

[2013] NZREADT 28

READT 037/11 & 044/11

IN THE MATTER OF

charges under s.91 of the Real Estate Agents Act 2008

AND

**REAL ESTATE AGENTS
AUTHORITY (CAC 10003)**

Prosecutor

AND

D H KUMANDAN

Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport – Chairperson
Ms J Robson – Member
Mr G Denley – Member

HELD on the papers

PENALTY DECISION

[1] This penalty decision is back before the Tribunal as a result of an appeal by Mr Kumandan of the Tribunal's decision of April 2012 and its penalty decision dated 12 June 2012 cancelling Mr Kumandan's licence.

[2] The Tribunal has seen the decision of Justice Katz dated 19 December 2012 which sets out her decision on Mr Kumandan's appeal. At paragraph 74 she found that the Tribunal misdirected itself as to the correct interpretation of s 172.

Her Honour said:

“Determination of appropriate penalty

[74] I have found that the Tribunal misdirected itself as to the correct interpretation of s 172. As a result it erred by, in effect, imposing a penalty on Mr Kumandan that

was appropriate under the more stringent provisions of the 2008 Act, but which may or may not have been appropriate if the character test in s 99(1)(b) of the 1976 Act had been taken into account.

[75] If the Tribunal had applied the interpretation of s 172 that I have outlined above it may have reached a different view as to the appropriate penalty in this case. It is therefore appropriate to allow Mr Kumandan's appeal in relation to penalty. However in my view the issue of an appropriate penalty on the facts of this case, taking into account the requirements of s 99(1)(b) of the 1976 Act (as interpreted in *Sime* is best reconsidered by the Tribunal, given its expertise and specialist nature).

[76] I accordingly remit the matter back to the Tribunal to reconsider the issue of penalty afresh, in light of the matters set out in this judgment, including in particular the correct interpretation of s 172 of the 2008 Act.

[3] The High Court disallowed Mr Kumandan's appeal on his conviction and remitted the penalty decision back to the Tribunal for a new penalty decision in accordance with her decision.

[4] Her Honour also set out for the Tribunal the correct interpretation of s 172:

[65] Section 172 requires the following approach in relation to conduct by a licensee which occurred prior to the enactment of the 2008 Act:

- (a) Could the conduct have been complained about or a charge laid under the 1976 Act?
- (b) Has the licensee been guilty of misconduct or unsatisfactory conduct under the 2008 Act?
- (c) If the answers to both (a) and (b) are "yes" then a penalty may be imposed under the 2008 Act. However it may only be a penalty which could have been imposed in relation to that particular conduct under the 1976 Act. This requires the Tribunal to consider s 99 of the 1976 Act in this case, before a penalty of cancellation or suspension of Mr Kumandan's licence can be imposed.

[5] The penalty to be imposed requires the Tribunal to take into account s 99(1)(b) of the Real Estate Agents Act 1976 which involves an analysis of Mr Kumandan's character.

[6] As a result of this decision the Tribunal now reconsiders its decision on penalty. The Real Estate Agents Authority has submitted that applying the character test under s 99(1)(b) of the Real Estate Agents Act 1976 as was discussed in *Sime v Real Estate Institute of New Zealand & anor*¹ would still lead to the conclusion that Mr Kumandan's licence should be cancelled. They submitted:

5.2 This character test was discussed in the case of *Sime v Real Estate Institute of New Zealand & Anor*⁹ It was found that there were two stages which had to be satisfied for this to be met.¹⁰

¹ [M73/86] HC Auckland, 30 July 1986

- (a) *First, to enquire into whether the person's character, in the sense of his personal qualities, reputation and behaviour reflect on his honesty and integrity; and*
- (b) *Secondly that it is in the public interest that the certificate be cancelled or the person suspended. Traits such as dishonesty or gross incompetence may be within this category.*

5.3 This was further addressed in Niall v The Real Estate Institute of New Zealand Incorporated.¹¹ This adopted the approach in Sime and in discussion of the character test his Honour found that the conduct of Mr Niall did not warrant cancellation.

[36] *The Board does not appear to have considered Mr Niall's character as such. Rather, it seems to have decided to make an example of him. In so doing it has fettered its future discretion by determining that cancellation will follow in any case where there has been falsification of documents used in the transfer of land and in the borrowing of money on the security of land. The Board's intention appears to have been to prescribe cancellation in any such instance, regardless of the role played by an individual participant, or the previous character of the person concerned. That approach places an unnecessary fetter on the Board's role in exercising its functions under s 99. Although I accept that cancellation may well be appropriate in many – indeed most – cases where falsification has occurred, the Board is obliged to have regard to all relevant factors, including character, before concluding that cancellation is appropriate to an individual case.*

[emphasis added].

[7] The Real Estate Agents Authority submitted that Mr Kumandan's conduct in forging a solicitor's signature on a document is significant dishonesty which "goes to the heart of the trust and confidence which the public is entitled to place in real estate agents". It submits at paragraph 6.3 that dishonest behaviour demonstrates that the defendant poses a high degree of risk to members of the public and that after applying the facts of this case to the Sime case the conclusion is still that Mr Kumandan's licence ought to be cancelled.

[8] Mr Kumandan submitted that the Real Estate Agents Authority's submissions were incorrect. He submitted that there was no "*legitimacy to third parties ... This is clutching at straws. The document was never intended for any parties to see. It was clearly an administrative internal memo, only for the benefit the very employer (complainant) (sic)*".

[9] He denied that he had ever been a threat to the public. He pointed to the fact that after leaving the complainant's firm he worked successfully as an office manager for two years without incident. He submitted that the complainant's complaint was vexatious. He also submitted that the individuals at the Real Estate Agents Authority "*have a hidden agenda*".

[10] He denies any analogy between his conduct and that of the agents in the Niall and Simes cases. He submitted that the Complaints Assessment Committee had not established the (bad) character test and that it had no bearing on his current licence.

[11] He submitted that the Tribunal could impose a fine of up to \$750 but urged the Tribunal to consider a lesser amount or a caution.

[12] He also referred to the fact that his licence had been cancelled for nine months and he had not received it back from the Real Estate Agents Authority. He submitted that he had already suffered significant punishment and he needed to get back to work.

[13] He made a number of other submissions relating to the High Court judgment and the Real Estate Agents Authority which the Tribunal cannot consider. The Tribunal's jurisdiction exists now only to consider penalty.

Discussion

[14] The Tribunal must consider the 2 step test set out in the Simes case.

Step 1

Does Mr Kumanandan's character (personal qualities, reputation and behaviour) reflect on his honesty and integrity?

Step 2

Is it in the public interest that the certificate be cancelled or the person suspended?

[15] This charge was a charge that Mr Kumandan forged a signature. He did not receive any financial advantage for this. However even without this factor forgery is a serious matter. 'Character' in this context requires an examination of Mr Kumandan's personal qualities in conjunction with the charge. The Tribunal note that as set out in the judgment the transactions at the centre of this charge were unusual. Mr Kumandan made two commissions on related sales which did not proceed. He also tried to blame the administrative assistant for the forgery.

[16] The case law against a conclusion that dishonesty necessarily means an agent's character is impugned. We have therefore carefully examined his reputation, behaviour and other qualities. We know that Mr Kumandan was a solicitor/lawyer in his native South Africa; he told the Tribunal during the hearing that it had been hard to get work as an agent and so began to work within the Indian community. In his role as a lawyer and then as an agent it would have been clear to him that forgery is behaviour outside the behaviour expected of a professional. The fact that Mr Kumandan forged a document, purportedly from a solicitor, for whatever purpose in the course of a transaction does reflect on his reputation, his character and his honesty as an agent. He was the only person involved in this forgery. We have no other information about Mr Kumandan's character.

[17] In Fitzmaurice v NZ Police [2013] NZHC 494 the Court considered that evidence of past good character could be used as mitigation on a sentence. In that case a disgraced priest had used parish monies to feed a gambling addiction. However we do not have any such information to assist us save for Mr Kumandan pointing to his two year employment record after the event.

[18] We therefore need to consider on the information we have whether Mr Kumandan's character (as an agent who has been found guilty of forgery) reflects on his honesty and integrity.

[19] In the Sime case Tompkins J referred to a definition of character as involving both disposition and reputation. We consider both have been impeached by his dishonesty. In the absence of evidence it is difficult to argue that the stain of dishonesty has reflected on Mr Kumandan's character as set out above.

[20] We therefore conclude that s 99(1)(b) has been established.

[21] The Tribunal consider that taking into account the facts of this case and the charge that Mr Kumandan was found guilty of that Mr Kumandan's character is such that it is in the public interest that his Certificate of Approval (now his licence) be cancelled or suspended.

[22] Public interest in professional disciplinary proceedings is generally recognised to be in ensuring that standards are maintained and for the public to be protected from agents operating outside the Rules and that their behaviour reflects what society as a whole would recognise as a reasonable standard of behaviour (see for example s 3 of the Real Estate Agents Act 2008) and Roberts v PCC [2012] NZHC 3354.

[23] We now consider whether Mr Kumandan should have his licence suspended or cancelled. As set out in our earlier decision a penalty in a professional discipline case should also recognise the need to rehabilitate an agent and be the lowest possible penalty for the circumstances. We have no direct evidence of any specific rehabilitation (as Mr Kumandan still denies the forgery) but consider that further training in ethics in real estate would be helpful to Mr Kumandan. However, we have no power to order any training.

[24] Mr Kumandan has had his licence cancelled for nine months. He needs to earn an income to support his family. We consider therefore that a period of suspension for a further 12 months from the date of this order would be a proportional penalty which would penalise Mr Kumandan and recognise that he needs to be rehabilitated. A 12 month suspension would enable Mr Kumandan to see that in a finite time he will be able to work again as an agent. This 12 month period is $\frac{1}{3}$ of the maximum suspension which also recognises that while this forgery was unacceptable there was no personal gain, it was a single occasion and so it is less serious than cases where there is a benefit to the agent or was part of an ongoing scheme to defraud.

[25] Accordingly the Tribunal suspends Mr Kumandan's licence for a period of 12 months from the date of this order.

[26] The Tribunal draw the parties' attention the right of appeal to the High Court contained in s.116 Real Estate Agents Act.

DATED at AUCKLAND this 17th day of April 2013

Ms K Davenport
Chairperson

Ms J Robson
Member

Mr G Denley
Member

⁹ *Sime v Real Estate Institute of New Zealand & Anor* M73/86 HC Auckland, 30 July 1986 at [Tab 3]

¹⁰ *Ibid* at 16

¹¹ *Niall v The Real Estate Institute of New Zealand Incorporated* HC Auckland CIV 2009-404-135, 9 July 2009 at [Tab 4]