

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 30

READT 023/12

IN THE MATTER OF

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

BETWEEN

**REAL ESTATE AGENTS AUTHORITY
(CAC 10056)**

Prosecutor

AND

MARK CHARLES FERGUSON

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr J Gaukrodger - Member

SUBSTANTIVE DECISION ON GUILT ISSUED 22 January 2013 as [2013] NZREADT 5

DATE OF THIS DECISION ON PENALTY

24 April 2013

REPRESENTATION

Mr M J Hodge, counsel for the prosecution
The defendant on his own behalf

DECISION OF THE TRIBUNAL

Background

[1] In our decision of 22 January 2013 we found the defendant guilty of misconduct on six charges which we covered in some detail.

[2] At para [46] of that decision we stated that each of the charges raised issues of dishonesty by the defendant and that some of the offending is very serious. We also dealt with the present financial position of the defendant and noted that, because he was declared bankrupt on 31 October 2012, proceedings for monetary orders against him cannot continue without the leave of the High Court (s.75, Insolvency Act 2006). We noted that, accordingly, neither a fine nor compensation may be ordered against the defendant, and set out some views about compensation aspects.

[3] We then set out our general views on the issue of the penalty to be imposed on the defendant and continued:

"[53] We have been firmly advised that the Defendant will not take any further part in these prosecutions.

[54] *It must follow from the overall offending that his licence be cancelled. If we cannot formally cancel a licence which, apparently, has been surrendered and, apparently, then cancelled, we record that it would be most disturbing if the Defendant were to be considered as suitable as a licensee at any time in the future should he so apply. It seems that his licence now stands cancelled indefinitely at law.*

[55] *We reiterate that the best view which could possibly be taken of the Defendant's conduct, in the various circumstances covered above, is that he showed a reckless disregard for his duties as a licensee. However, we consider that we must assess his conduct as amounting to a pattern of disturbing dishonesty.*

[56] *Our member Mr Gaukrodger raised the point that there must be some responsibility on the Ray White franchise for failure to supervise the activities of this particular Defendant, possibly even extending to penalty and liability for compensation should such a failure be proved in all the circumstances. We understand that, in due course, Mr Hodge will let us have the view of the Authority on this concept of our concern about possible responsibility of the Ray White franchise in terms of the Defendant's activities referred to above.*

[57] *Having said all that, we consider that (despite the negative attitude of the Defendant to these prosecutions so far) in the interests of natural justice we shall, of course, have him served with this decision and allow him one calendar month to make submissions on the aspect of penalty. Should he make such submissions, we direct the Registrar to arrange a short fixture for him to address us personally on that aspect should he wish to do so. In any case, we invite submissions on penalty from the Prosecution in the usual way. If the Defendant declines to make submissions on penalty or rests on written submissions we shall deal with that issue when and as we think appropriate."*

Further Developments

[4] By 28 March 2013 the defendant did decide to take part in these prosecutions by providing quite detailed email submissions of that date purporting to be in relation to penalty. However, the defendant's submissions focused on denying liability for guilt on the charges rather than penalty.

[5] Accordingly, Mr Hodge simply responds for the prosecution that he perceives (as do we) that the defendant's submissions are really directed at liability issues which we have already decided, and that the prosecution feels no need to refer further to penalty because the defendant has surrendered his licence. The prosecution simply seeks a finding that cancellation of that licence would have been ordered had the defendant still held such a licence. We infer that Mr Hodge, on behalf of the Authority, is content with the views we have expressed in para [54] (set out above) of our decision of 22 January 2013.

[6] The defendant seemed to be emphasising to us the hardship which has resulted to him from these charges in that, as he put it:

"I have removed myself from the industry out of respect of the office I was working in. I didn't want them being affected by the charges laid.

I have been in the real estate industry since 1994, with not one complaint directed to me until we opened our office in Inglewood.

I have been a salesperson, auctioneer and trainer, business development manager for the Ray White and Harcourts group, and business owner. I am AREINZ and completed a Diploma of Business Studies (Real Estate) at Massey University with the help of being granted REINZ scholarships two years in a row in the 1990s. I have had a distinguished real estate career ...”

[7] We do understand the hardship for the defendant to which he referred. The defendant then stressed that he took these charges seriously but seemed to be saying that he has been denied the truth of matters. He states that the process of this case has taken a massive toll on him and his family. He puts it that *“we simply do not have the funds to fight the process or take action against those that have provided false statements to take personal grievance”*. He added that the evidence against him was based on *“disgruntled clients and real estate salespeople statements”*.

Our Conclusion

[8] It seems to us that the outcome is as we put it in our decision of 22 January 2013. This is that we cannot impose a fine nor compensation on the defendant because of his insolvency. In that decision we covered what we would have done in terms of compensation but for the defendant’s bankruptcy limiting our jurisdiction. We have expressed our views that the defendant never be considered as suitable for a real estate salesperson’s licence at any time in the future should he so apply, and that his licence now stands cancelled indefinitely at law.

[9] Accordingly, we feel unable to take the concept of penalty against the defendant any further, but reserve leave to apply.

[10] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

Judge P F Barber
Chairperson

Ms J Robson
Member

Mr J Gaukrodger
Member