

Decision No: [2013] NZREADT 41

Reference No: READT 041/12

IN THE MATTER OF of a charge made under s.91 of the Real Estate Agents Act 2008

BETWEEN **REAL ESTATE AGENTS AUTHORITY
(CAC 10063)**

AND **JOANNE PICKNELL**
Defendant

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

Ms K Davenport - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

APPEARANCES

Mr McCoubrey and Ms Pidgeon for the Real Estate Agents Authority
Mr DG Collecutt for the Defendant

HELD on the papers

PENALTY DECISION

[1] In a decision dated the 20th day of March 2013 Ms Picknell was found guilty on two charges.

[2] The first charge was that she provided blank Agreements for Sale and Purchase of Real Estate to a Ms Letele. The second charge related to the fact that from February 2011 Ms Picknell failed to report to the Real Estate Agents Authority the fact that Ms Letele was undertaking Real Estate Agency work without a licence.

[3] Ms Picknell was found guilty of both of these charges and is now to be sentenced.

[4] In imposing a penalty the Tribunal has the powers which are available under s.110(2) of the Real Estate Agents Act. These can include an order cancelling the licence of Ms Picknell, an order suspending her licence, a fine not exceeding \$15,000 and compensation.

Submissions of REAA

[5] The Real Estate Agents Authority ("REAA") submitted that Ms Picknell failed to achieve the fundamental purpose of the Act which is to promote and protect the interests of consumers in Real Estate Agents transactions in leaving the forms with an unlicensed person to do as she wished with them.

[6] The REAA submits that this is serious misconduct and that the appropriate penalty is lengthy suspension of her licence and a moderate fine commensurate with the seriousness of her misconduct (and her means).

Submissions of Defendant

[7] Counsel for Ms Picknell on the other hand submits that a lengthy suspension is not necessary and that Ms Picknell's error is out of step with her general good character.

[8] Ms Picknell's counsel identified the four issues which are important in a sentence (see *Real Estate Agents Authority v Lum-on* [2012] NZREADT 47). These issues are:

- [a] Protection of the public;
- [b] Maintenance of standards;
- [c] Punishment; and
- [d] Rehabilitation of the agent.

[9] Mr Collecutt submits on behalf of Ms Picknell that there is no need for protection of the public as there is no risk of a repeat offence. He submitted that at the time she supplied the blank agreements there were no regulations or rules which expressly prohibited the supply of blank stamped agreements to clients or others. He submits that Ms Picknell had received no training to assist her to realise that it was inappropriate to supply blank stamped agreements to her clients.

[10] He submitted that while it was a significant error of judgment for Ms Picknell to leave the agreements with Ms Letele, it was not done to facilitate Ms Letele holding herself out as an agent.

[11] He submitted that it was a lack of oversight by Ms Picknell as opposed to any awareness of risk of more serious potential misconduct.

[12] He therefore submitted that there was no material risk of similar misconduct with third parties. He submitted that Ms Picknell's failings were simply an error of judgment.

Maintenance of Standards

[13] Mr Collecutt acknowledged that Ms Picknell had breached professional standards. He also submitted that with her previous good character, remorse and low risk of reoffending, Ms Picknell would ensure that her professional standards would not be compromised in the future. He referred to the fact that the Real Estate Agents Act (Professional Conduct and Client Care Rules) which came into force on 8th April 2013 now specifically provide that no agency agreement may be left with any person without all material particulars inserted into or attached to the document.

Punishment

[14] Mr Collecutt submitted that there was little need for punishment of Ms Picknell because this was a case of offending at the lowest end of the spectrum. He further submitted that Ms Picknell needed to be able to earn a living and that she would be considerably prejudiced in her ability to earn a living if her licence was suspended given her existing financial difficulties.

[15] He further submitted that the financial circumstances of the defendant made the imposition of only a minor fine appropriate. Finally he submitted that the most appropriate penalty was the imposition of a non supervisory period of time under s.110(2)(d) of the Act. He submitted that this order would also be the most appropriate order to assist Ms Picknell's rehabilitation.

Principles of Sentencing

[16] There are four matters to consider when considering imposition of a penalty as set out in *Real Estate Agents Authority v Lum-on* [2012] NZREADT 47.

[17] A penalty must fulfil the following functions. They are:

[a] *Protecting the public*

Section 3 of the Real Estate Agents Act provides that this is one of the purposes of the Act.

[b] *Maintenance of professional standards*

This was emphasised in *Taylor v The General Medical Council*¹ and *Dentice v The Valuers Registration Board*².

[c] *Punishment*

While most cases stress that a penalty in a professional discipline case is about the maintenance of standards and protection of the public there is also an element of punishment – such as in the imposition of a fine or censure. See for example the discussion by Dowsett J in *Clyne v NSW Bar Association*³ and Lang J in *Patel v Complaints Assessment Committee*⁴).

[d] *Rehabilitation of the Agent*

Where appropriate, rehabilitation of the agent must be considered – see *B v B*⁵.

Discussion

[18] In this case the Tribunal found Ms Picknell's actions were serious. It is particularly concerned about Charge 2 (the failure to notify the REAA of Ms Letele's actions). As the Tribunal noted in the judgment, what Ms Picknell chose to do when she realised that agreements provided by her had been used by Ms Letele, was to send an invoice for the use of those agreements to Ms Letele. She did nothing to alert anyone of any concerns. The Tribunal considers this is serious offending.

[19] The Tribunal recognises however that there is a need to rehabilitate Ms Picknell and also to impose the least restrictive penalty upon Ms Picknell which is appropriate in all the circumstances to recognise the four principles of sentencing.

[20] However, the Tribunal does not consider that this is a matter which can be dealt with by imposition of a non supervisory order under s.110(2)(d). In fact the Tribunal have difficulty in understanding how an order under s.110(2)(d) would be of any use at all as Ms Picknell employs no-one.

¹ [1990] 2 All ER 263

² [1992] 1 NZLR 720

³ (1960) 104 CLR 186 at 201-202

⁴ HC Auckland CIV 2007-404-1818; Lang J; 13/8/07

⁵ HC Auckland, HC 4/92 6/4/93; [1993] BCL 1093

[21] The Tribunal consider that in cases where there has been dishonesty or someone complicit in dishonesty that the most appropriate sentence is either cancellation or suspension of the licence of the licensee. In this case, it seems clear that as Ms Picknell herself was more of a party to the dishonesty rather than the principle player, that suspension is more appropriate than cancellation. We do not accept her counsel's submissions that suspension is not appropriate. She erred significantly and was complicit in the dishonesty of Ms Letele. We also refer to the comments made on the charges in the judgment. Ms Picknell should also pay a modest fine commensurate with her means. However given the need to rehabilitate Ms Picknell and her need to earn a living, we will not make this order of suspension lengthy.

[22] The Tribunal comment that Ms Picknell will need to ensure that she can continue to operate safely as a real estate agent in the future and should continue to attend Continuing Education classes to upskill herself as an agent. The Tribunal also considered she was lacking in a clear understanding of the responsibility of her role as an agent.

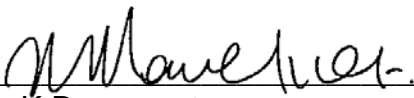
Tribunal's Decision

[23] Accordingly the Tribunal make the following orders:


- [a] An order suspending the licence of Ms Picknell for a period of nine months under s.110(2)(c);
- [b] An order that Ms Picknell pay a fine of \$1,000.

[24] 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 16th day of May 2013



 Ms K Davenport
 Chairperson



 Mr G Denley
 Member



 Mr J Gaukrodger
 Member