BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 47

READT 003/13

IN THE MATTER OF	an application to review under s.112 of the Real Estate Agents Act 2008
BETWEEN	**MS L**
	Applicant
AND	**REGISTRAR, REAL ESTATE AGENTS AUTHORITY**
	Respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

HEARD at AUCKLAND on 14 May 2013

DATE OF THIS DECISION 14 June 2013

COUNSEL

Mr P Dacre QC, for applicant
Mr R M A McCoubrey and Ms J MacGibbon, counsel for respondent

DECISION OF THE TRIBUNAL

The Application Before Us

[1] In late 2012 Ms L ("the applicant") applied to the Registrar for the annual renewal of her salesperson license under s.43(3) of the Real Estate Agents 2008 ("the Act") but, on 18 December 2012, the Registrar declined to do so. The Registrar was not satisfied that the applicant is a fit and proper person to hold a salesperson's licence because on 2 August 2012, after trial by jury, she was convicted of permitting premises to be used for the manufacture of methamphetamine under s.12(1) and (2)(a) of the Misuse of Drugs Act 1975.

[2] The applicant applies for a review of the Registrar's decision and for a name suppression order. Both applications are opposed by the respondent.

The Registrar's Decision

[3] The Registrar found that the applicant was not a fit and proper person pursuant to s.43(3) of the Act and put it *"Given that consumers provide real estate agents with access to their homes, it is important that those holding licences have the highest levels of honesty and integrity and that consumers are able to trust them".* We endorse those views.

[4] The Registrar also stated: *You have been convicted of a serious offence and the nature of that offending, as described in the Summary of Facts and your barrister's accompanying letter, does not reflect well on you and raises questions relating to your integrity"*.

The Stance of the Applicant

[5] In her typed evidence-in-chief (being also an affidavit sworn on 19 April 2013) the applicant deposed that she is a X year old single mother with one dependent X year old child. She confirmed that she was convicted in the District Court as stated above and sentenced to six months community detention, plus 200 hours community service, plus supervision for nine months, and with reparation of $1,384.

[6] She puts it that the offending incident was isolated, does not reflect her true nature, and the circumstances of that offending developed over a period of less than 24 hours. She deposes that she is a person of honesty and integrity who has never previously been in trouble with the Police and has no other criminal convictions.

[7] The applicant recorded that an unfounded complaint was made against her as a real estate agent in 2008 and was heard by the then REINZ Tribunal. It found that she had no case to answer. The complaint was by purchasers of a property who, after signing an unconditional contract, sought to avoid it.

[8] The applicant attained the National Certificate in Real Estate on 25 October 2006 and has worked as a licensed real estate agent since then for X X Real Estate at X. She has worked hard at her career and in 2008/9 was the second highest achiever in her firm's rural lifestyle team. She has produced references about her abilities and to the effect that she is an honest and conscientious person and of good character and compassion.

[9] Since the hearing before us, she has filed a letter from the owner/manager of X Real Estate at X (X X Ltd) supporting her application and confirming that real estate agency has offered her a position as a real estate salesperson just as soon as her licence can be reissued (if it is). That letter also records that the prospective employer takes into account the said conviction against the applicant.

[10] The applicant emphasises that she is the primary earner for her family and needs a real estate licence to continue to support her family.

[11] She takes responsibility for allowing two males onto her property on 28 July 2009 who manufactured methamphetamine there. She explains that she had no knowledge of or involvement in that manufacturing process.

[12] It is put that, on the evening before the day of the offence, a friend of hers, named Ms S, telephoned her and asked if she (Ms S) could stay the night because the next day was the birthday of Ms S's mother, and a number of relatives were staying at her mother's house so there was no room for Ms S and her partner. The applicant had known Ms S for approximately one year from a chance meeting. She agreed to let Ms S and her partner stay in her then house (which was on a farm owned by her and her estranged husband) but, a little later, Ms S contacted her and said that two of her friends also needed a place to stay for the night having travelled from out of Auckland. The applicant agreed that those two persons stay the night in a bar area above the cowshed on the property on the understanding that they would leave the next morning. Accordingly those persons arrived. The applicant took the two males over to the cowshed and showed them the loft with its sleeping facilities.

[13] The following morning the applicant arose and went to work in the usual way at about 9.30 am and was very busy at real estate work throughout the day. She did not see two males before she left for work and expected they would leave that morning.

[14] At about mid afternoon when she was in the course of meeting clients, the applicant was telephoned by Ms S. She was told there had been a small fire in the cowshed and the Police were on their way to the house to investigate there being a P lab there.

[15] The applicant drove home rapidly and was greeted by Police who told her that a P lab had been found in the milking shed and that they wished to speak to her as a potential witness. She was most anxious to get back into her house and speak with her son whom she expected to be scared by the Police presence as he was only X years old at the time. She says she felt pressurised by the Police to make some sort of a statement as a witness but they interpreted her as saying that she had realised at material times that the two men may have been setting up a P lab. She asserts that is not true and not what she told any Police officer; and she meant the Police to understand that, with hindsight, she ought to have suspected that the two men might have been up to something.

[16] Inter alia, the applicant emphasised that she tried to correct the statement of her evidence prepared by the Police but they would not allow that; so she signed it in order to be allowed out of the Police car and get back to her son.

[17] The applicant stated to us, inter alia:

> *"36. I would like to reiterate that I did not knowingly help or allow anyone to commit a crime on my property. I did not even know that the two males were still at the property because I had been at work all day and had assumed that they left in the morning as had been agreed.*
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> *37. If I had believed that they were at the property to manufacture P I would have asked them to leave immediately. If they did not do so, I would have contacted the Police."*

[18] We observe that the defendant's explanation could be quite credible but, for some reason or other, the jury did not accept it.

[19] At material times the applicant seemed to be enmeshed in stressful divorce, matrimonial property, and custody proceedings but was making a good living as a real estate agent. She put it that she would not have taken any steps to jeopardise that career.

[20] She added that the property was part of a working farm where the milking shed must be kept sterile and hygienic and any strange odours or chemical smells would have been immediately investigated by farm workers. Also, the living area over the cowshed was frequented by her former husband and his brothers and others so that strange smells or stains would have been immediately noted.

[21] The applicant has continued to work as a real estate agent up until December 2012 when her licence was not renewed. She asserts that she is a fit and proper person to hold a real estate licence and finds her current predicament devastating and is shocked that her honesty and integrity is called into question.

[22] She also requests that we restrict publication of her name or any information regarding these proceedings as such publication would cause her career irreparable damage and would cause her now X year old son undue stress at his school. As it

happens, the applicant's conviction has not been publicised nor were her involvement in proceedings at trial.

[23] Very simply put, the stance of the applicant is that she was totally unaware that two men were likely to manufacture methamphetamine on her premises. We are conscious that, as set out below, she was sentenced on the basis of having turned a blind eye to the likely criminal offending of the said two males.

[24] Of course, the applicant was carefully and thoroughly cross-examined by Mr McCoubrey and, inter alia, she insisted that she was not trying to minimise the material events or her involvement (if any) in them.

[25] Also, Mr McCoubrey took the applicant through her testimonials with a view to showing that their authors were not particularly independent nor familiar with the details of her conviction in some cases.

The Applicant's Criminal Trial

[26] The applicant was found guilty after trial by jury. She was sentenced on the basis that she had not been involved in the manufacture of methamphetamine nor initiated what took place on the premises, but that she had been suspicious and failed to take steps to prevent it. Certainly, the sentencing notes of His Honour Judge G A Judge Fraser show that His Honour did not seem to regard the applicant's offending as limited. Parts of His Honour's sentencing notes read:

> *"[3] In terms of the facts, the reality is that you were found to have had de facto control of the loft area of the milking shed of the property that you were occupying. You permitted two acquaintances to stay in the loft area and set up a clan lab. The realisation as to what was happening was at the point where there was an unloading of equipment from the car into the loft area. At that point, you did not attempt to stop them from doing that and adopted the approach of simply hoping that it would all go away. The premises, in fact, were used for the purposes of manufacturing methamphetamine. I accept that the Crown has accurately portrayed the facts as set out in the submissions to the Court.*
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> *[4] You appear with no previous conviction against your record and that is to your credit, in terms of the sentence outcome.*
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> *[5] The relevant factors set out in the probation report are, the risk of re-offending is seen as low. It is critically important, in my view, that a sentence is one which will enable you, if possible, to continue to work which will then enable you to appropriately look after your eight year old son and your partner, who also has needs that require your support. ...*
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> *[11] Mr Dacre has also filed extensive submissions and included are various points he has set out, which I think are important, i.e. that there was no evidence that you had not known these two males that unloaded this equipment beforehand. That all the dealings were made between the other woman and the two males involved. It is accepted that there was some suspicion on your part as to what was happening. There is no evidence of any financial payment or receipt of drugs in return that for what had been facilitated, but what is critical and Mr Dacre has clearly accepted, is that you failed to take any steps to prevent this from happening.*

[12] It is accepted that there is no evidence of any other assistance being provided to these people. The bind that you felt that you were in at the time, is set out by Mr Dacre and I accept that that was probably the case. The issue is one simply, of you turning a blind eye to what was happening and, as Mr Dacre says in his submission, hoping that it would all just go away.

[13] There is no evidence that there is likely to be any ongoing offending on your part and there is no evidence in regards to amounts of manufacture that occurred. I accept the reality is in terms of what was found, that any manufacture would have been small. There is no premeditation and the offending was of limited duration. Finally, Mr Dacre submits that there was no suggestion that you were involved in the manufacturing process, or that you gained any benefit and I accept that is the case. Mr Dacre addresses the issue of a community-based sentence and I will address that in a moment.

[14] He had referred to the fact that you are a good and responsible mother, of previous good character and holding a responsible job in the community and, finally, submitted that the offending is at the lower end of the scale for this type of offending, no premeditation, short duration no active steps to assist, no evidence of reward and a combination of failure to take any active steps and turning a blind eye. He exhorts the Court to deal with you by way of a community-based sentence and the one as recommended by the Probation Service. ...

[18] The issue of remorse is possibly debatable, given that you do not accept that you were involved in the offending at all. ...

[21] ... What is important, in terms of the public interest, is that will enable you to look after your partner and your child and enable you to contribute back to society in a productive manner ..."

Our Enquiry on Review

[27] As we covered in *Revill v Registrar of the Real Estate Agents Au* [2011] NZREADT 41 at [11], the issue is whether the applicant satisfies us that she is a fit and proper person to hold a licence. Each case is fact specific and we must determine whether the applicant has satisfied the onus of showing she is a fit and proper person to hold a salesperson's licence with reference to any additional material.

[28] It is clear from the language of s.36(2) that the onus is on the applicant to satisfy us that she is a fit and proper person to hold a licence; and that subsection reads:

*"**36 Entitlement to licence***

...

(2) An individual may be licensed as a salesperson if the individual satisfied the Registrar that he or she –

(a) has attained the age of 18 years; and

(b) is not prohibited from holding a licence under section 37; and

(c) is a fit and proper person to hold a licence; and

(d) has the prescribed qualifications."

[29] The standard of proof is the ordinary civil standard of the balance of probabilities. However, to meet this standard, sufficient and adequate information must be provided. The Supreme Court made this point in *Westfield (New Zealand) Limited & Anor v North Shore City Council & Anor* [2005] 2 NZLR 597. In *Westfield* the Court considered s.93 of the Resource Management Act 1991, which required the Council to be satisfied it had received adequate information to make a decision about notification of applications for resource consent. Section 94(2) of the Resource Management Act 1991 provided that the Council was not required to notify an application if, among other things, it was *"satisfied that the adverse effect on the environment of the activity for which consent is sought will be minor"*. Elias CJ held:

> *"[23] The requirement that the consent authority must be "satisfied" that adverse effects on the environment are minor before it decides not to notify a resource consent application for a discretionary activity is a significant obligation. By contrast, when a substantive decision is made on the application for a resource consent for a discretionary activity is a significant obligation. By contrast, when a substantive decision is made on the application for a resource consent for a discretionary activity under s.105, the consent authority is simply empowered to decide whether or not to grant the consent and on what conditions, after taking into account the considerations identified by the Act and in the context of the plan. Such decisions may be finely judged. That is not the approach required of the decision maker by s.94(2). That is not the approach required of the decision maker by s.94(2). The requirement that the consent authority be "satisfied" that adverse effects on the environment are minor is a pointer to additional conviction and the need for some caution. "*

[30] Keith J held:

> *"[52] Significant in the basic requirements stated in ss.93(1) and 94(2) are the double emphasis on "satisfied", the strongest decisional verb used in the Act, the etymology of "satisfy" (to do enough), and a standard meaning relevant in this context – to furnish with sufficient proof or information; to assure or set free from doubt or uncertainty; and to convince; or to solve a doubt, difficulty."*

[31] Blanchard J, with whom Richardson J concurred in a short judgment, held:

> *"[108] The information which the consent authority must have, in order that it can be properly be "satisfied", must be adequate for it to make two determinations under s.94(2)."*

The "Fit and Proper" Person Requirement under s.36 of the Act

[32] Section 36(2) is set out above.

[33] In *Marie-Ann Nixon v Real Estate Licensing Board of New Zealand* HC AK 222/93 23 August 1994 at 21, the High Court held that the starting point in any determination is that good character is presumed unless a real question mark is raised by the evidence. If a question mark has been raised then, as was held in *L v Canterbury District Law Society* [1999] 1 NZLR 467 at 474:

> *"... the [applicant] must establish affirmatively that he is a person of unquestionable integrity, probity and trustworthiness and that since the [offending] he has "so far amended his ways and character that he is now a fit and proper person to practise on his own account."*

[34] In *Re Gazley* (HC Wellington, CIV-2011-485-1776-26 October 2011), the High Court remarked:

> *[9] ... the focus of the Court's inquiry is necessarily forward looking and the function of the Court is not to punish the applicant for past conduct. Due recognition should be given to the circumstances of youth where the conduct in question occurred when the candidate was immature and the entire circumstances and wider facts concerning the application must be considered, not just the previous misconduct. The onus is on the candidate to show that he or she is a fit and proper person."*

[35] The decision of *Interim Advance Corporation Pty Ltd v Commissioner for Consumer Protection* [2008] WASAT 81 provides useful guidance on the *"fit and proper person"* test in the context of a refusal to grant a credit provider's licence. The State Administrative Tribunal considered a review of a decision not to grant a credit provider's licence. The general principles as apply to the *"fit and proper person"* test in Australian law are set out at [29] to [32]. In particular:

> *"(a) "Fit", with respect to a particular office, is said to involve three things: Honesty, knowledge and ability. That is "honesty to execute it truly, without malice affectation or partiality; knowledge to know what the ought duly to do; and ability as well in estate as in body, that he may intend and execute his office, when need is, diligently, and not for impotency or poverty neglect it": quoting Hughes & Vale Pty Ltd v State of New South Wales (No 2) (1955) 93 CLR 127 at 156;*
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> *(b) Immediately recent and more distant behaviour is relevant to the assessment, though it is not possible to say how far back a Tribunal is able to look: quoting Re Davis (1947) 75 CLR 409 at 416;*
>
> *(c) "Fit and proper" is to be determined in light of the subject matter of the Act in which the expression appears: quoting Maxwell v Dixon [1965] WAR 167 at 169;*
>
> *(d) It is necessary to assess whether the characteristics of honesty, knowledge, and ability are present in the context of the vocation for which the licence is sought. The State Administrative Tribunal referred to Sobey v Commercial and Private Agents Board (1979) 22 SASR 20 at 76, which considered the granting of a licence on an application by an agent. That Court stated:*
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> > *... an applicant must show not only that he is possessed of a requisite knowledge of the duties and responsibilities devolving upon him as the holder of a particular licence under the Act, but also that he is possessed of sufficient moral integrity and rectitude of character as to permit him to be safely accredited to the public, without further inquiry, as a person to be entrusted with the sort of work which the licence entails."*

[36] Although *Interim Advance Corp* was dealing with the review of a decision not to grant a credit licence, the respondent submits that useful guidance can be taken from its principles. In particular, the respondent submits that we may take into account the following factors in exercising its discretionary power:

> [a] whether the applicant will honestly engage in the duties related to being a salesperson;

[b] whether the applicant has the necessary knowledge of her legal obligations and a willingness to abide by them;

[c] whether the applicant possesses *"sufficient moral integrity and rectitude of character"* to be accredited to the public via a salesperson's licence and to undertake the type of work that licence contemplates without further inquiry;

[d] the purposes of the Act which, at its core, is concerned with consumer protection; and

[e] the applicant's past conduct.

[37] The authorities affirm that it is a significant step to deprive a person of a licence or status; see, for example, *Dempster v The Registrar General of Land & Anors* HC AK CIV 2005-404-003178 2 December 2005 at [56] and *Harder v Auckland District Law Society* [1983] NZLR 15 at 17. However, the primary consideration is as emphasised in *Re Owen*: the Court must be satisfied objectively that the candidate is a fit and proper person. The judgment of the Court is made in the interests of the community, having regard for the profession; *Re Owen* [2005] 2 NZLR 536 at [8]. In *Mason v REAA* [2013] NZREADT 7, we found that this principle is equally applicable to licensing decisions under the Act. We accept that this principle is equally applicable to licensing decisions under the Act. The purpose of the consumer-focussed Act is to (Section 3):

> *"promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work."*

[38] For consumers, real estate transactions are often the largest and most important they will enter into in their lives. It is essential that consumers are able to rely on the honesty and integrity of licensees who act in such transactions. It is for this reason that the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 impose minimum standards requiring licensees to comply with their fiduciary obligations to their clients, to act in good faith and deal fairly with all parties to a transaction, and to not engage in conduct likely to bring the industry into disrepute.

[39] In *Revill*, we noted the trust which consumers place in sales people:

> *"[22] ... Real estate salespersons typically operate in the privacy of their clients' homes. Indeed they are required to, for example in providing appraisals. This requires consumers to place a high degree of trust in licensees and could leave consumers in a vulnerable position ..."*

The Formal Submissions for the Applicant

[40] Mr Dacre, of course, made submissions directed (inter alia) at the content of s.36 of the Act and then referred to s.37(1)(a) which reads:

"Persons prohibited from being licensed

(1) The following persons are not eligible to hold a licence:
(a) a person who has been convicted, whether in New Zealand or another country, of a crime involving dishonesty (or of a crime that, if committed in New Zealand, would be a crime involving dishonesty) within the 10 years preceding the application for a licence ..."

[41] Mr Dacre then put it that the offending for which the applicant was convicted is not a dishonesty offence and therefore she is not prohibited from holding a licence pursuant to section 37 of the Act. He then covered relevant case law in a fairly similar manner to that we have set out above and he added:

"Fit and Proper"

In Re T [2005] NZLR 544 at 547 the High Court highlighted four features relevant to the required assessment of "fit and proper person" under the Law Practitioners Act 1982, namely:

(a) The focus is necessarily forward looking. The function of the Court is not to punish the applicant for past conduct. Rather, the issue is "worthiness and reliability for the future".

(b) The onus on a person who has erred in a professional sense following admission to the profession is heavier than that upon a candidate for admission.

(c) Due recognition must be given to the circumstances of youth where errors of conduct occurred when an applicant was immature.

(d) It is important to look at the facts of the case in the round, and not just have regard to the fact of a previous conviction or convictions.

...

In Robert William Revill v Registrar of the Real Estate Agents Authority 2011 NZREADT 41 the Tribunal accepted that the above principle is equally applicable to licensing decisions under the Act which is a piece of consumer legislation. ...

The Registrar was of the view that the applicant's criminal conviction calls into question her honesty and integrity. It is accepted that this conclusion was open to the Registrar to make and that the applicant may not have satisfied the Registrar that she is a fit and proper person to hold a licence. However, it is submitted that this Tribunal has a different body of information before it from the applicant than that which was presented to the Registrar.

The Registrar had limited information gleaned from the Police disclosure before her when making her decision about the renewal of the applicant's licence. The applicant did not present any information supporting her claim that she is a fit and proper person.

The trial Judge found that the applicant was not directly involved in the manufacture of methamphetamine and that she did not stand to benefit financially from it, but that

she was guilty of wilful blindness. The applicant was sentenced on this premise and received a very low sentence which was composite with the gravity of her offending.

The applicant maintains that she was not aware of the offending and that she did not "close her eyes to it". ...

It is respectfully submitted that in line with Re T the Tribunal's focus must be on looking forward and not on punishing the applicant for past conduct. It is submitted that the applicant's "worthiness and reliability for the future" has not been tarnished by her conviction for allowing premises.

The offending does not relate to her work as a real estate agent, nor does it involve any element of dishonesty.

The applicant's conduct and integrity has not been called into question prior to this incident, nor has it been called into question in the four years since, during which the applicant has maintained a professional approach to her job and her life."

Discussion

[42] The applicant bases her appeal on the fact that she is a fit and proper person, and that the conviction against her does not impede her ability to be a trusted salesperson.

[43] The applicant further argues that she was not inherently involved in the unlawful activity on her property and was unaware of what people were doing on the property. She asserts that she would not have permitted her property to be used if she had known that people were setting up a clan lab. We are conscious that Judge Fraser accepted that the applicant saw the two men unloading equipment but turned a blind eye as to their likely use of it. Yet, to us, that applicant maintains she had no knowledge that the two men were likely to manufacture methamphetamine on her premises.

[44] The wording of the offence in s.12(1) of the Misuse of Drugs Act 1975 is: *"every person commits an offence against this Act who knowingly permits any premises or [any vessel, aircraft, hovercraft, motor vehicle, or other mode of conveyance] to be used for the purpose of the commission of an offence against this Act."*

[45] The applicant was found guilty at trial. She was therefore found by a jury to have known that there was the attempted manufacture of methamphetamine and permitted her premises for this purpose beyond reasonable doubt. Her stance is contrary to the conviction she was found guilty of and, it is put for the respondent, is an attempt to minimise her offending. It was emphasised is that the trial Judge imposed a restrictive sentence of community detention on the applicant following the trial; although, in reality, community detention is not particularly restrictive.

[46] Unlike *Re Gazley*, where the conduct in question occurred when the candidate was immature, in this case recognition cannot be given to the circumstances of youth. The appellant's offending occurred when she was 37 years old and well able to understand the consequences of her actions.

[47] Given the conviction is for drug related offending, the respondent submits that this weighs negatively on whether the applicant is a fit and proper person; and that this is conduct that calls into question her honesty and integrity. Prima facie that is so.

[48] Of course, there must be scope for the applicant to rehabilitate herself and, by taking proper steps, to prove in due course that she is fit and proper. It is submitted for the respondent that there is no suggestion this has yet occurred and, overall, the Registrar's decision was correct.

[49] Mr McCoubrey puts it that the defendant is minimising her predicament and insisting that she has done nothing wrong and that events simply transpired against her. Mr McCoubrey also puts it that the various references which the applicant has adduced to us are given by people unaware of the criminal issue and its background and are primarily from satisfied customers.

[50] At that point, Mr McCoubrey was able to submit that the prospective new employer of the applicant would not know of the conviction in issue and we could not be sure whether there was any realistic employment offer. In the meantime, the applicant has adduced the letter from X Real Estate, which we referred to above, indicating that the prospective new employer is well aware of this situation and very willing to employ the applicant.

[51] Mr Dacre emphasises that the testimonials support the high calibre of the applicant as a real estate agent. He also points out that if a person considers themselves innocent, that person is entitled to maintain that view despite a jury not accepting it, and that we could hardly expect the applicant to accept guilt when she honestly feels innocent. We certainly understand that.

[52] We are conscious that a properly directed jury has disbelieved the applicant in terms of her explanations to us.

[53] It troubles us that if a jury in a higher Court has declined to accept the applicant's explanation for innocence, it seems rather presumptuous for us to take the opposite view without having heard evidence to the extent which the jury did. On the other hand, this is a different forum; and with a higher standard of proof for the defendant who only needed to create a reasonable doubt in the minds of a jury whereas the standard of proof before us is the balance of probabilities.

[54] We feel that Mr Dacre QC accurately put the situation as that the applicant must (and does) accept that the jury's verdict was proper. As he also said, she is entitled to focus on the Judge's sentencing comments which certainly suggest the likelihood of relatively minor offending, or possibly even innocence, on the part of the applicant in terms of her being a defendant at the jury trial.

[55] We also agree with Mr Dacre that when seeking references as to character in a small community where she lives and works, one can understand the applicant being rather loathe to disclose the outcome of the jury trial when, by chance, it does not seem to have received publicity.

[56] We note Mr Dacre's submission that although the charge of allowing premises to be used for the manufacture of methamphetamine is prima facie a charge of serious nature, there is a wide range of culpability within its parameters. He submits that the circumstances of this case clearly indicate that the gravity of the offence in this case was very much at the lower end of the spectrum and that this is supported by the low level of sentence ordered by the trial Judge.

[57] Mr Dacre, analysed the facts and the stance of the applicant, perhaps in greater detail than we have recorded above, with a view to showing that she was quite unaware

that there would be any suspicious behaviour by the two men on her property and would certainly never have allowed it.

[58] Mr Dacre QC filed comprehensive written submissions on behalf of the applicant and we have covered above the points emphasised by him.

Outcome

[59] We are extremely conscious of the need to confine the issue of real estate licences to persons who are clearly fit and proper, and it is appropriate that the Registrar of the Authority deals strictly with applications. However, having stood back and absorbed all the above we think that the stance of the applicant is credible and, in any event, that she deserves a second chance at her career. The case law covered above endorses, inter alia, a forward looking approach, rather than punishment for past conduct, and a consideration of the facts of the case in the round rather than a focus on Court convictions.

[60] Accordingly, we grant the application. We are comforted by the fact that, in the usual way, the applicant will need to apply for her annual renewal of licence so that any failures on her part (and we do not anticipate any) could be fatal to her career in the light of events to date.

The Application for Restriction on Publication

[61] Because we have granted this application for review, we need to deal with the issue of restriction on publication. The applicant seeks a restriction on the publication of this decision because publication would adversely affect her reputation and career and would be humiliating and stressful to her X year old son at school. Inter alia, Mr Dacre put it that the publication of the applicant's name, or any details of the hearing or documents associated with it, would cause her extreme hardship and irreparable damage to her career and reputation, affect her ability to earn income for her son and herself, and as already indicated, cause her son undue stress at his school in Auckland.

[62] Mr Dacre seeks an order prohibiting indefinitely the publication of any report or account of any part of these proceedings; and prohibiting the publication of the whole or any part of any books, papers, or documents produced; and prohibiting the publication of the name or any particulars of the affairs of the applicant or those charged with her.

[63] Publication of our decisions is subject only to the making of an order for non-publication by us under s.108 of the Act. In terms of the application for restriction on publication, we have the necessary powers.

General Principles

[64] The principles relating to applications of this type in the context of disciplinary proceedings under the Act are set out in *X v Complaints Assessment Committee (CAC 10028)* [2011] NZREADT 2 and *Graves v REAA (CAC 20003) & Langdon* [2012] NZREADT 4.

[65] In *X v Complaints Assessment Committee CAC 10028)* we considered an application for an interim order prohibiting publication of the determination of a Committee decision pending the outcome of the appeal. We held that it had the power to make non-publication orders on appeals and set out the principles to consider when determining whether to make such orders. We relied on *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) where Her Honour Elias CJ said at [41]:

> *"In R V Liddell ... this Court of Appeal declined to lay down any code to govern the exercise of a discretion conferred by Parliament in terms which are unfettered by legislative prescription. But it recognised that the starting point must always be the importance of freedom of speech recognised by s.14 of the New Zealand Bill of Rights Act 1990, the importance of open judicial proceedings, and the right of the media to report court proceedings: What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness."*
>
> [Citations omitted]

[66] We went on to consider whether those principles were applicable to proceedings of a disciplinary nature. In doing so, we referred to the purposes of the Act, which focus on consumer protection, as well as other decisions referring to principles applicable to disciplinary tribunals and non-publication orders: *Director of Proceedings v I* [2004] NZAR 635 (HC); *F v Medical Practitioners' Disciplinary Tribunal* HC Auckland AP21-SW01, 5 December 2001; *S v Wellington District Law Society* [2001] NZAR 465 (HC). In those decisions the courts accepted that the principles referred to in *Lewis* were applicable to disciplinary tribunals.

[67] At [38], we adopted the views accepted by a full bench of the High Court in *S v Wellington District Law Society* [2001] NZAR 465 (HC) that the public interest to be considered in non-publication applications in disciplinary hearings requires consideration of the extent to which publication of the proceedings would provide some degree of protection to the public, the profession, or the Court. It is this public interest that is to be weighed against the interests of other persons, including the licensee.

Convictions

[68] When a person is convicted of a criminal offence, that is information available to the public, and the media may report the details, unless the Court suppresses details of the conviction. The information is publicly available, and an order by us would not prevent the fact of criminal conviction being available to the public or the media. A member of the public or the media could also search the Register (of licensees under the Act) to find that the applicant is listed as a licensee and put the two pieces of information together.

[69] It is submitted for the Authority that any suppression order in this case would therefore reach its limits as only suppressing the process which we followed in reaching our decision. The criminal conviction information would remain publicly available. The respondent submits that the process followed by us in reaching our decision is information which the public should be entitled to, and is a matter of public interest.

[70] The respondent submits that a non-publication order should not be made; and that information about the proper process undertaken by us should be information available to the public.

[71] We are very conscious of the need for open justice and of the application of that concept in the real estate industry.

[72] However, taking into account that at this stage, on the particular facts of this case, there would be extreme hardship to the applicant in terms of her real estate agent business and career and to her son in terms of stress and humiliation, we order that her name be not published nor any obvious details which might lead to her identification. We are not prepared to extend restrictions on publication any further than that and not to the extent sought by Mr Dacre.

[73] 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

_____
Mr G Denley
Member

_____
Mr J Gaukrodger
Member