

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2013] NZREADT 52

READT 077/11

**IN THE MATTER OF** charges laid under s.91 of the Real Estate Agents Act 2008

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

Prosecutor

**AND** **RAJNEEL RAJ**

Defendant

**MEMBERS OF TRIBUNAL**

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

**SUBSTANTIVE DECISION ISSUED 3 JULY 2012 ([2012] NZREADT 37)**

**HEARING ON PENALTY** at Auckland on 9 April 2013

**DATE OF THIS DECISION ON PENALTY** 4 July 2013

**COUNSEL**

Mr L J Clancy, for the prosecution/Authority  
Mr K Barron-Afeaki S.C., counsel for defendant

**DECISION OF THE TRIBUNAL ON PENALTY**

***Background***

[1] Our decision of 3 July 2012 convicted the defendant of a number of detailed charges of misconduct set out therein. We also detailed our reasoning for that decision on guilt, even though it was a matter of formal proof, due to the non participation of the defendant at that stage.

[2] On 21 September 2012, we issued a memorandum regarding the defendant's non appearance at sentencing. That has led to Mr Barron-Afeaki being instructed by the defendant and appearing before us on 9 April 2013. Apparently the defendant was not well enough to attend with his counsel over penalty.

[3] As Mr Barron-Afeaki put it, sufficient facts are set out for present purposes in paras [14] to [16] of our 3 July 2012 decision which read as follows:

*"[14] In outline, it is alleged that Mr Raj was involved in a fraudulent scheme for the financial benefit of himself and others. The scheme involved Mr Raj using a*

*person connected to him to purchase a property from a genuine vendor and then immediately on-sell the property at a higher price to a genuine purchaser. On settlement, the difference between the original purchase price and the on-sale price would be kept by Mr Raj or his associates.*

*[15] The ultimate purchasers involved had no deposit to purchase a property. Key to the scheme was that the purchasers were assisted in obtaining mortgages to fund their purchases by Mr Raj (a BNZ bank loans officer was also involved in the scheme). In order to deceive the mortgagee into lending sufficient funds to complete the purchase, Mr Raj created sale and purchase agreements showing falsely inflated purchase and deposit amounts, which were provided in support of loan applications.*

*[16] The scheme necessitated non-disclosure to both the genuine vendors and ultimate purchasers of the financial benefit that Mr Raj, or parties related to him, would receive when the transactions settled.”*

[4] Until the early stages of resumption on 9 April 2013 the defendant sought to have the penalty hearing adjourned and Mr Barron-Afeaki made submissions to that effect.

[5] The defendant, as a former licensed salesperson, was found guilty by us on 3 July 2012 of six charges of misconduct. He has not attended any of the hearings before us and that appears to be because he is suffering severely from mental depression. Mr Barron-Afeaki noted that illness has certainly existed since April 2012 and, in particular, comprises an anxiety complex which is well known to be most difficult to bear. It was also put that, until recently, the defendant could not afford professional advice regarding these offences and that no defence was put forward on his behalf in terms of our 3 July 2012 decision. It is put that he has only recently been able to instruct Mr Barron-Afeaki with the financial assistance of friends and family.

### ***The Present Stance of the Defendant***

[6] It is put that the defendant has had the problem of inadequate preparation, lack of professional advice until recently, and continued suffering from chronic depression with anxiety disorder so that available reasonable views and explanations have not been provided on his behalf. We are also advised that the defendant's mental health illness has had a devastating effect on his domestic life and he has been incapable of working since April 2012 and subsists on a Sickness Benefit and the support of family and friends. He is required to take regular medication for his chronic depression (with anxiety disorder) and receives regular counselling for that.

[7] Mr Barron-Afeaki emphasised that in the initial stages of the defendant's prosecution and particularly on 14 July 2011, he (the defendant) participated in an extensive interview with the Authority's investigator, Mr Ross Gourverneur. In the course of the 9 April 2013 hearing, it was emphasised that there had been a further such meeting with the investigator in early April 2013 about a week before the penalty hearing.

[8] In his typed submissions to us, which he developed at the oral hearing before us on 9 April 2013, Mr Barron-Afeaki submitted that the defendant had played a relatively minor role in the offending which led to our findings of misconduct and that *“almost all monies transacted were never paid to him but to three other principal parties”*. It was put that the defendant *“only ever received a commission and never received any of the large monies transacted by the principal offenders”*.

[9] It was also put by Mr Barron-Afeaki that the defendant *“was never fully aware of the scamming activities being undertaken by these other parties (principals) he was conducting business with”*. It is also put that the defendant was *“hoodwinked”* and never really understood the full extent of the activities of the three principal offending parties he had worked with. These parties were named to us as all being members of a local Indian community; one being a former bank officer, and another a former real estate salesperson and business partner of the defendant, and the other seemed to be an investor. It is strongly submitted that the defendant has greatly cooperated with the Authority to enable it investigate those three other parties whom the defendant describes as the principal offenders. It is put that the defendant benefitted in a relatively small way in comparison to those other three persons and that the defendant has no *“substantial assets nor any large amounts of money in his control”*.

[10] Mr Barron-Afeaki then submitted as follows:

**“Compensation**

4.27 *Under section 110(2)(g) of the Act, states any person that has suffered loss by reason of a licensee’s misconduct, the Tribunal may order that the defendant pay to that person a sum by way of compensation, not exceeding \$100,000.*

4.28 *Evidence from parties who suffered from transactions involving the defendant was submitted on their behalf, by the Committee by way of a memorandum dated 1 August 2012.*

4.29 *In summary, three parties sought compensation being:*

- a. *Mark Dalangin - \$73,000 compensation sought*
- b. *Marevil Porlares – unspecified amount of compensation sought – overdraft \$12,379.04*
- c. *Kilisimasi Segal - \$50,750 compensation settlement ‘on a confidential basis’ – compensation for legal fees incurred \$11,995.42.*

**Mark Dalangin**

4.30 *In relation to Mark Dalangin, it is not accepted that Dalangin paid \$3,000 to the defendant. No money was ever given to the defendant. It was given to Prabhkar Kudumula and his associates.*

4.31 *The defendant accepts no responsibility for any local application, and states there was an introduction only and the remaining dealings were with other identified principal parties.*

4.32 *In relation to the remaining \$70,000 compensation sought by Dalangin – the defendant states this has no basis as Dalangin purchased the property based on current market valuations by the own independent valuers, which was then accepted by the banks.*

4.33 *Any figure ordered against the defendant must reflect a fair apportionment of responsibility and level of offending actually perpetrated by the defendant and not by other parties.*

**Marevil Porlares**

4.34 *Porlares claims an unspecified amount of compensation for financial loss.*

4.35 *This claim is vague and unspecific in its nature and cannot be relied upon by the Tribunal to assess compensation.*

4.36 *Mention of a \$12,379.04 overdraft with insufficient provision of evidence establishing a causal nexus to the offending at hand by the defendant, cannot be seriously taken into account by the Tribunal in relation to considering compensation.*

**Kilisimasi Segal**

4.37 *It is noted that a \$50,750 compensation settlement ‘on a confidential basis’ was reached between Segal and an unidentified party.*

4.38 *The defendant can only speculate that this unspecified party is most likely to be Mr Vinod Rathore (a former bank officer), Mr Jumshied Kashkari (a real estate franchise licensee and former business partner of the defendant) and/or Mr Prabhkar Kudumula, as discussed above.*

4.39 *Compensation however is sought for legal fees incurred of \$11,995.42.*

4.40 *Any figure ordered by the Tribunal against the defendant must again reflect a fair apportionment of responsibility and level of offending actually perpetrated by the defendant and not by other parties.*

4.41 *In this light, it is unclear to the defendant whether any of the abovenamed parties have been prosecuted and if so, what the outcomes of any prosecution is.*

4.42 *To this end, the defendant seeks the Tribunal properly take into account information it has in its possession to apportion compensation accordingly.”*

[11] Mr Barron-Afeaki accepted that the defendant’s real estate agent’s licence was previously suspended for two years from 20 November 2007 for conduct which also involved non-disclosure of sales to related parties and on-sales.

[12] There seemed to be no dispute that the defendant ceased working as a real estate agent in July 2011 when he surrendered his real estate licence. It is put for him that he has therefore already self-imposed a punishment of significant proportion; that he is a traumatised person from these proceedings; that he never

intends to practice in the real estate sector again; and that we must take these factors into account when assessing penalty.

[13] Mr Barron-Afeaki then put it that appropriate penalty would be an order of censure; a suspension of the defendant's real estate salesperson's licence; a fine; but only compensation which reflected the defendant's actual role by comparison with the other Indian persons allegedly involved in the misconduct of the defendant. It is put that, in any case, the defendant's financial position is such that "*there clearly lies a serious cloud of doubt*" over his ability to pay compensation or a fine.

### ***The Stance of the Authority***

[14] Mr Clancy also supplied us with very helpful typed submissions, which we cover below under our heading of "*Discussion*", and he made oral submissions to us at the penalty hearing of 9 April 2013. He then noted the submission for the defendant that the defendant was a mere pawn and his three other Indian acquaintances were the main offenders and that the defendant is assisting the Authority pursue them.

[15] Mr Clancy put it that, in reality, the defendant has provided very little information about the co-offenders and his so-called cooperation has been rather vague. Mr Clancy submitted that, in any event, the fact that there could have been co-offenders does not exonerate the defendant from the six offences of misconduct.

[16] Mr Clancy also puts it that, whereas the defendant says he only benefitted from the misconduct by way of obtaining commissions on the sale of real estate, he in fact also pocketed profits of a further \$189,000 and, in so far as he says that his Indian acquaintances received that, there is no evidence to that effect and the defendant has never presented himself to us.

[17] In his 9 April 2013 oral submissions, Mr Barron-Afeaki again referred to the concepts contained in his said written submissions and covered above, but understood that the defendant would be providing names of co-offenders and a list of their residential addresses.

[18] As indicated above, it was put that the defendant says he has been hoodwinked by those colleagues, who have now disappeared having used his status at material times of being a licensed real estate salesperson. It is put that these somewhat shadowy colleagues had much finance available for property purchases, that the defendant's role was merely to find appropriate residential properties for their activities, and that his mistake was to have "*gone along with it all*" attracted by the sales commissions available to him "*without much work*".

[19] Mr Barron-Afeaki insists that the defendant has been cooperative as recently as early April 2013; and that the only vagueness is that the defendant did not have "*paperwork*" to support his information, but that he will very soon be giving many names and addresses to the investigator of the Authority.

[20] It is strongly submitted by Mr Barron-Afeaki that the defendant should obtain credit for providing such information which, he submits, has not been useless as put by the prosecution.

[21] Mr Barron-Afeaki emphasised that the defendant is an ill man; although we are not at all clear whether he was ill at material times i.e. at the time of the offending on

which the six findings of misconduct are based. We note that, broadly, that offending took place in late 2010 whereas the defendant seems to have been diagnosed with mental health problems in April 2012.

[22] Mr Clancy particularly submitted with regard to penalty that, in terms of s.110(2)(e) of the Act, we order that the defendant never again be employed as a real estate agent nor ever be able to practice again in the real estate industry.

[23] With regard to compensation orders and ability to pay fines and costs orders, Mr Clancy submitted that it has not been proved that the defendant has no financial means. He also put it, in terms of the orders we might make, that compensation to those members of the public affected by the defendant's misconduct receive priority. He advised that the Authority does not seek an order for costs but accepts that there should be a costs order against the defendant in favour of our disciplinary Tribunal.

## **Discussion**

### *Purposes and Principles of Disciplinary Orders*

[24] McGrath J, for the majority of the Supreme Court, in *Z v CAC* [2009] 1 NZLR 1 (Blanchard, Tipping and McGrath JJ), has stated:

*"... the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure appropriate standards of conduct are maintained in the occupation concerned."* (at [97]):

[25] The Tribunal summarised the position with regard to the particular statutory scheme set out in the Real Estate Agents Act 2008 (Act) in *CAC v Walker* [2011] NZREADT 4:

*"[17] Section 3(1) of the Act sets out the purpose of legislation. The principal purpose of the Act is "to promote and protect the interests of consumers in respect of transactions that relate to real estate agency work". One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (s.3(2)).*

*[18] This function has been recognised in professional disciplinary proceedings involving other professions for example, in medical disciplinary proceedings: Taylor v The General Medical Council [1990] 2 ALL ER 263 and in disciplinary proceedings involving valuers: Dentice v The Valuers Registration Board [1992] 1 NZLR 720. This is reinforced by the reference in the purpose provision to the Act (s.3) to raising industry standards and the promotion of public confidence in the performance of real estate agency work.*

*[19] In Patel v Dentists Disciplinary Tribunal High Court, Auckland, CIV 2007-404-1818, 13 August 2007, Lang J held that disciplinary proceedings inevitably involve issues of deterrence and penalties and are designed in part to deter both the offender and others in the profession from offending in a like manner in the future."*

**Orders Available**

[26] Charges of misconduct under s.73 of the Act having been proved, we may make any of the orders provided in s.110(2) of the Act. Among other orders, it would be open for us to:

- [a] Cancel the defendant's licence;
- [b] Suspend the defendant's licence for a period not exceeding 24 months;
- [c] Fine the defendant up to \$15,000;
- [d] Order that the defendant pay to any person a sum by way of compensation, not exceeding \$100,000 (where it appears that person has suffered loss by reason of the defendant's misconduct).

[27] In addition to the orders available under s.110, we may also make any of the orders that can be made by a Complaints Assessment Committee under s.93 on a finding of unsatisfactory conduct.

[28] The defendant's misconduct is of the most serious type. It involves among other things, dishonesty, forgery, and non-disclosure of the financial benefits amounting to more than \$189,000.

[29] The defendant's certificate of approval under the Real Estate Agents Act 1976 was previously suspended for two years from 20 November 2007 following an application to the Real Estate Agents Licensing Board by the Real Estate Institute of New Zealand. The conduct at issue for that suspension also involved non-disclosure of sales to related parties and on-sales.

[30] In all the circumstances of the offending now before us, we consider that no order less than cancellation of the defendant's licence would adequately reflect the purpose of the Act, namely, to 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.

[31] We must also impose a significant fine to denounce and deter this type of conduct by others in the industry.

**Compensation**

[32] As set out above, under s.110(2)(g), where it appears that any person has suffered loss by reason of a licensee's misconduct, we may order that the defendant pay to that person a sum by way of compensation, not exceeding \$100,000.

[33] At paragraph [121] of our decision on liability, we expressly afforded the parties to transactions linked to the charges an opportunity to submit evidence of any loss caused by the defendant's misconduct. Information was provided by three parties, Mark Dalangin (party to transactions relevant to charge 3), Marevil Porlares (charge 4) and Kilisimasi Sega (charge 2).

*Kilisimasi Sega (charge 2)*

[34] Mr Sega paid approximately \$530,000 for 14 Andover Way in November 2010, the transaction having been arranged by the defendant. In fact, the genuine vendor of the property had accepted an offer of \$478,000 in the name of Adlin Singh, a “middle-man” arranged by the defendant. Mr Sega advises that, had he been aware that his purchase was not from the genuine vendor of the property but rather from a friend of the defendant (who stood to make approximately \$49,000 profit in a contemporaneous on-sale), he would not have agreed to pay \$530,000.

[35] Mr Sega obtained a retrospective valuation for 14 Andover Way as at 20 November 2010. The valuation was for \$480,000 which is very close to the price the genuine vendor agreed to accept from Adlin Singh.

[36] Mr Sega therefore asserts that, due to the defendant’s misconduct, he suffered a loss of approximately \$50,000, being the difference between the market value of the property at the time he bought it and the price he paid as arranged by the defendant.

[37] Mr Sega does not claim that loss in full in these proceedings because he has reached a confidential settlement with a third party. He seeks reimbursement of loss, including legal costs incurred pursuing the settlement, in the amount of \$11,995.42. Mr Sega’s lawyer has confirmed that the current loss outstanding is the figure claimed.

*Marevil Porlares (charge 4)*

[38] Ms Porlares seems to have also suffered a loss, on her purchase of 32 Mataroa Road, in a manner similar to that described in respect of Mr Sega.

[39] It is an available inference that the price accepted by the genuine vendor of 32 Mataroa Road (\$235,000) from the middle-man arranged by the defendant (Urmila Devi) represented close to market value as at the date of the transaction in May 2010. The price paid by the ultimate vendor Ms Porlares (approximately \$275,000) represented an inflated figure incorporating the profit sought by the defendant or his associates (as was clearly the case with the transaction involving Mr Sega).

[40] The following factors are relevant:

- [a] The genuine vendor, Chun Xia Ge, could have declined the offer made in the name of Urmila Devi. If that offer (\$235,000) had been below market value, it is likely the offer would have been rejected.
- [b] Ms Porlares was not a sophisticated buyer. She placed almost total reliance on the defendant and his associate in purchasing the property. The purchase price (in reality approximately \$275,000) was advised by the defendant without negotiation. It was not an offer made at arms-length on the open market by Ms Porlares.
- [c] The same-day on-sale transaction resulted in a profit of \$32,215, paid by bank cheque to Urmila Devi.



- [d] While Ms Porlares has provided a registered valuer's report for the property that assesses the value as \$280,000, this is the value as at July 2012, not May 2010 when the transaction occurred.
- [e] We understand that Ms Porlares sold 32 Mataroa Road in August 2011 leaving a residual debt to the BNZ of \$12,579.04 as at 12 February 2012. BNZ had advanced 100 per cent of the purchase price of \$275,000 in 2010 based on the defendant's misrepresentations.

*Mark Dalangin (charge 3)*

[41] The situation in respect of Mr Dalangin's claim for compensation is slightly different because Mr Dalangin was a party to two different transactions to which we now refer.

[42] In respect of 12 Ballance Avenue, there was no on-sale as the defendant had arranged a direct purchase on behalf of Mr Dalangin and his partner from the vendor Vimlesh Ram at a price of approximately \$375,000.

[43] There is no charge relating to misrepresentations as to the purchase price of 12 Ballance Avenue, although we did find that the sale and purchase agreement was submitted to Mr Dalangin for signature without all material particulars having been inserted (charge 3.3) and that particulars were later inserted without the knowledge or consent of Mr Dalangin or his partner (charge 3.4).

[44] Mr Dalangin has provided information as to the current Council capital valuation of 12 Ballance Avenue (\$315,000) which is considerably lower than the price arranged by the defendant in January 2010 (\$375,000).

[45] In respect of 60 Hain Avenue, the defendant arranged the purchase without Mr Dalangin and his partner's knowledge using a blank signed sale and purchase agreement (charge 3.4). The defendant also failed to disclose that the transaction was an on-sale and that the genuine vendor had sold to Urmila Devi for \$322,000 (charge 3.2).

[46] Mr Dalangin has provided information as to the current Council capital valuation of 60 Hain Avenue (\$365,000). The CV is lower than the price arranged by Mr Raj in February 2010 (\$375,500), albeit the CV is higher than the amount accepted by the genuine vendor at that time (\$322,000).

[47] It is nevertheless an available inference, on the information before us that Mr Dalangin and his partner paid over market value for 60 Hain Avenue in 2010 as a result of the defendant's misconduct. Similar considerations to those listed above in respect of the Mataroa Road transaction apply.

[48] Mr Dalangin also claims \$2,000 for lost rental income in respect of 60 Hain Avenue because the defendant resided at 60 Hain Avenue without the knowledge or consent of Mr Dalangin or his partner (charge 3.5).

**General**

[49] The information provided by Mr Dalangin, Ms Porlares and Mr Sega, when viewed in the context of the wider evidence filed in these proceedings, is sufficient to

found an inference that all three of those parties paid above market value for properties as a result of the defendant's misconduct and that each has suffered loss as a result of that misconduct.

[50] Accordingly, it is open to us to order the defendant to make payments by way of compensation to Mr Dalangin, Ms Porlares and/or Mr Sega under s.110(2)(g).

[51] As we have already indicated, given the seriousness of the defendant's misconduct, no order short of cancellation of the defendant's licence would adequately meet the purposes of the Act. Also, we must impose a significant fine to denounce the defendant's conduct and deter similar behaviour. Further, it is open to us to make orders for compensation against the defendant in favour of Mr Dalangin, Ms Porlares and/or Mr Sega, on the basis that those persons have suffered loss by reason of the defendant's misconduct.

### ***Our Orders***

[52] The compensation issue is straightforward with regard to Mr Sega and Ms Porlares. With regard to Mr Dalangin we see it as follows. The defendant caused him to overpay for his purchase of 12 Ballance Avenue by \$60,000 and for 60 Hain Avenue by \$48,500 – making a total of \$108,500; but the base figures are current Council capital valuations although that base for 60 Hain Avenue has increased to \$365,000 (compared with its sale by the genuine vendor at \$322,000). There is also the \$2,000 loss of rent due to the defendant occupying 60 Hain Avenue. Being a little arbitrary and conservative in favour of the defendant, on the balance of probabilities we fix Mr Dalangin's fair compensation at \$50,000 for an overpayment for 12 Ballance Street, plus \$10,500 for an overpayment for 60 Hain Avenue; plus the \$2,000 rent loss; to total a compensation sum of \$65,000 for him.

[53] We have taken into account that, belatedly, the defendant does seem to have endeavoured to cooperate with the prosecution to some extent. We are concerned that the defendant's activities were appallingly fraudulent and deceptive, are an unacceptable blot on the real estate profession as a whole, and cannot be tolerated. Accordingly, we make the following orders:

- [a] The licensee's real estate agents salesperson's licence is hereby cancelled.
- [b] Any current employment or engagement of the defendant by a licensee is terminated and no agent may employ or engage the defendant in connection with real estate agency work.
- [c] The defendant is fined \$10,000 to be paid to the Registrar of the Authority within 20 working days from the date of this decision.
- [d] The defendant is to pay \$2,000 towards the costs of this Disciplinary Tribunal to the Tribunals Unit of the Ministry of Justice, 86 Customhouse Quay, Wellington, within the said 20 working day period.
- [e] We make compensation orders in accordance with our references and coverage of those above, namely, \$11,995.42 to Mr Sega, \$12,579.04 to Ms Porlares, and \$65,000 to Mr Dalangin, all to be paid to those persons

respectively by the defendant within two months of the date of this decision.

[54] 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.

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Judge P F Barber  
Chairperson

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Mr G Denley  
Member

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Mr J Gaukrodger  
Member