

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 61

READT 023/13

UNDER

Sections 92 and 115 of the Real Estate Agents Act 2008

BETWEEN

**THE REAL ESTATE AGENTS
AUTHORITY (CAC 2007)**

Prosecutor/Applicant

AND

BRENDAN MARSHALL

Defendant/Respondent

MEMBERS OF TRIBUNAL

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

HEARD ON THE PAPERS

DATE OF THIS DECISION 16 July 2012

COUNSEL

Ms S G J Locke for prosecutor
The defendant on his own behalf

**DECISION AS TO INTERIM SUSPENSION PURSUANT TO S.115
REAL ESTATE AGENTS ACT 2008**

The Application Before Us

[1] On 13 May 2013 we received not only a formal charge from the Authority alleging misconduct by the defendant based on various alleged frauds, but also an application (with supporting affidavit) from the prosecution for suspension of the defendant's Real Estate Agents Licence pending the outcome of a hearing for the substantive charge.

[2] The appropriate procedure regarding suspension of licence pending outcome of hearing is covered in some detail in s.115 of the Act which we set out and refer further below.

[3] The application is made on the grounds that it is necessary or desirable to suspend the defendant's licence No. 10013750 as a licensed salesperson having regard to the interests of the public including:

1. Protection of the public in light of the serious nature of the charges, namely:
 - (a) the creation and use of fraudulent invoices to obtain money from the company accounts of his employer, Hastings McLeod Ltd; and
 - (b) the application of those funds to his personal use.
2. The public interest in ensuring that real estate agents maintain high standards of honesty and integrity.

[4] The application is made in reliance on ss.91, 92, and 115 of the Act and the affidavit of Gerald Gallacher filed in support of the application of the prosecution. Mr Gallacher is a senior investigator with the Real Estate Agents Authority and he sets out in his affidavit serious allegations against Mr Marshall which relate to the details of the charge.

The Specific Charge

[5] The charge against Mr Marshall reads as follows:

“Charge

Complaints Assessment Committee 20007 charges Brendan Marshall (defendant) with misconduct, in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars:

The defendant created false invoices and charged these to his employer Hastings McLeod Ltd (the agency). The defendant used the invoices to cash cheques or withdraw funds from two company accounts, an Imprest account and a BNZ credit card account. Those funds were then applied to his own personal use.”

Section 115 of the Act

[6] Section 115 is the provision of the Act dealing with the Tribunal's power to order the interim suspension of a license pending the outcome of a hearing. Section 115 provides:

“115 Suspension of licence pending outcome of hearing,

- (1) *The Tribunal may suspend the licence of a licensee where*
 - (a) *a licensee has been charged under section 91; and*
 - (b) *the Tribunal considers that it is necessary or desirable to suspend the licence having regard to the interests of the public.*
- (2) *The process for suspending a licence under this section is as follows:*
 - (a) *the Tribunal must give a licensee written notice of its intention to suspend the licence; and*
 - (b) *the notice must -*
 - (i) *contain the Tribunal's reasons for the intended suspension; and*
 - (ii) *state that the licensee has 10 working days within which to make written representations to the Tribunal as to why the licence should not be suspended; and*

- (iii) *state the proposed period, or otherwise describe the proposed duration, of the suspension; and*
 - (c) *if any written representations are made by the licensee within the period referred to in paragraph (b)(ii), the Tribunal must take those representations into account in deciding whether to suspend the licence and the period or duration of any suspension; and*
 - (d) *the Tribunal must then decide whether to suspend the licence, and notify the licensee accordingly, as soon as practicable.*
- (3) *If the Tribunal decides to suspend the licence, the Tribunal must give the licensee and the Registrar written notice of its decision and*
- (a) *include in the notice the grounds for the decision, the date on which the suspension takes effect, and the period or duration of the suspension; and*
 - (b) *specify in the notice the right of the licensee to appeal to the High Court under section 116.”*

Discussion

[7] The pre-requisite to ordering interim suspension is that the licensee has been charged under s.91 (refer s.115(1)(a)). The ground for interim suspension is set out in s.115(1)(b) as follows: *“(b) The Tribunal considers that it is necessary or desirable to suspend the license having regard to the interests of the public.”*

[8] The procedure for suspending a license is set out in s.115(2). We must give a licensee written notice of our intention to suspend the license (s.115(2)(a)). The notice must contain, among other things, our reasons for the intended suspension and the proposed period of the suspension (s.115(2)(b)(i) and (iii)). The notice must also state that the licensee then has ten working days to make written submissions to us as to why his license should not be suspended (s.115(2)(b)(ii)).

[9] We must then make a final decision and provide notice accordingly to the licensee (s.115(2)(d) and (3)).

[10] The purpose of the s.115(2) procedure for suspending a licence is to ensure that a licensee is given the opportunity to be heard and to respond to any application made to suspend his licence pending the outcome of a hearing.

[11] The procedure set out in s.115 needs to be followed precisely. The s.115 process is that, once we consider it is desirable to consider suspension under s.115, we are to give the licensee notice of our intention to suspend his licence. This notice must contain our reasons for the intended suspension, and must state that the licensee has ten working days in which to make written representations to us as to why the licence should not be suspended, and state the proposed period or otherwise of the proposed duration of the suspension.

[12] The grounds upon which we can consider the prosecution’s said application for interim suspension are if the licensee has been charged under s.91, and we consider it necessary or desirable to suspend his licence having regard to the interests of the public. We do consider that the evidence before us, prima facie, discloses serious wrongdoing such that there is a serious risk to the public if Mr Marshall remains able to continue to practice as a real estate agent pending the outcome of the charge.

[13] Emails from Mr Marshall to our Registrar seem to state that his concern is an alleged failure of the Authority to fully investigate the complaint against him; a lack of proof of his alleged offending; that he has not admitted guilt as has been claimed; that he has not received justice; and that, in any case, the invoices in question are in most cases for legitimate expenditure and in the remaining instances the situation is unclear. He also asserts that he has a good and proud record as a real estate salesperson and expects to “kick” an addiction to gambling. As a parent, he is very concerned at the loss of income which would result from losing his licence as a real estate salesperson.

Notice

[14] This decision, therefore, operates as notice under s.115(2) of the Act. We hereby give to Brendan Marshall written notice of our intention to suspend his licence. The reasons for the intended suspension are set out in this ruling and, in particular, at paragraph [12] above.

[15] Mr Marshall has ten working days from the service of this order upon him within which to make written representations to us as to why his licence should not be suspended. We shall then make a decision whether to suspend Mr Marshall's licence and notify him as soon as practicable. If we decide to suspend his licence we shall also comply with s.115(3) as set out above.

[16] The proposed period of the suspension is for a period of nine months or until the hearing of the charge under s.91, whichever date is the earlier.

[17] 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