

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2013] NZREADT 70

READT 045/12

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

**BETWEEN** **REAL ESTATE AGENTS**  
**AUTHORITY (CAC 20002)**

Prosecutor

**AND** **JODIE LOUISE KITTO**

Defendant

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Ms N Dangen - Member  
Mr J Gaukrodger - Member

**HEARD** at AUCKLAND on 9 August 2013

**DATE OF DECISION** 21 August 2013

**APPEARANCES**

Ms J M Pridgeon, counsel for the prosecution/Authority  
No appearance by defendant

**DECISION OF THE TRIBUNAL**

***Introduction***

[1] Jodie Louise Kitto (the defendant) faces one charge of misconduct laid pursuant to s.73(a) of the Real Estate Agents Act 2008 (the Act). The Authority, through Complaints Assessment Committee 20002 (the Committee), alleges that the defendant's conduct in her dealings with the complainant, Colin Frankham, would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[2] The Committee alleges that the defendant purported to enter into two sale and purchase agreements with the complainant without his full understanding of the transactions, or his consent; and that she then purported to enforce the two agreements by leaving a settlement notice, a trespass notice, a set of keys, and a letter, on the complainant's doorstep on two separate occasions.

### **Procedure**

[3] The prosecution proceeded by way of formal proof because, although on 17 December 2012 the defendant appeared to deny the charge and appeal the decision of the Committee to prosecute, the defendant has since declined to participate further in this prosecution despite having been served with all papers as appropriate.

[4] Much care has been taken to effect such service on her because she has been in custody since about 14 May 2013 when she was convicted of four separate frauds and sentenced to imprisonment for two years and three months. As those convictions involved dishonesty, she is prohibited from being licensed under the Act for 10 years from 14 May 2013 by virtue of s.37(1)(a) of the Act. We understand that she let her licence lapse on 8 August 2011.

[5] In so far as the defendant has filed an appeal against the Committee's decision to lay a charge against her, that appeal need not be decided as we have heard the case and find the charge proved.

### **The Charge**

[6] The charge laid by the Authority against the defendant on 10 July 2012 reads:

*"1. Following a complaint by Colin Frankham (complainant) Complaints Assessment Committee 20002 charges Jodie Louise Kitto, former licensed salesperson, with misconduct under s.73(a) of the Real Estate Agents Act 2008 in that her conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.*

#### **Particulars:**

- (a) *Purporting to enter into two agreements for sale and purchase with the complainant without the complainant's full understanding of the transactions or consent, namely:*
  - (i) *A Contract for Sale and Purchase of Land and Buildings dated 7 September 2010 between Colin James Frankham (vendor) and Jodie Louise Kitto (purchaser); and*
  - (ii) *A Contract for Sale and Purchase of Land and Buildings dated 7 September 2010 between Jodie Louise Kitto (vendor) and Colin James Frankham (purchaser).*
- (b) *Purporting to enforce the above agreements by means including:*
  - (i) *Leaving a Settlement Notice dated 13 January 2011 on the complainant's doorstep on 13 January 2011;*
  - (ii) *Leaving an undated Trespass Notice on the complainant's doorstep on 19 July 2011 purporting to trespass the complainant from his own property at 26 Rambler Crescent;*

- (iii) *Leaving keys for the property at 15 Hotspur Place on the complainant's doorstep on 19 July 2011;*
- (iv) *Leaving a letter on the complainant's doorstep on 19 July 2011 explaining that he needed to vacate his property and move into the property at 15 Hotspur Place no later than 4pm on 23 July 2011."*

### **The Facts**

[7] The complainant, a 77 year old man, has lived in his property at 26 Rambler Crescent, Beach Haven, Auckland (the Rambler Crescent property) for over 50 years. After his wife passed away, he decided to sell his home in April 2010. He listed it with Ray White, but did not ultimately receive an offer he wished to accept.

[8] In September 2010, the defendant knocked on his door, introduced herself, and said she as a real estate agent. She told the complainant that she wanted to list his home for sale. He told her that he required an offer of at least \$850,000. He said that she came across as very insistent on selling his property, was talking at speed, and told him to "get rid of" his current listing agreement with Ray White.

[9] The defendant returned to the complainant's home several days later, saying that she had obtained a valuation for his property of \$750,000. She did not show this to him. Again, she was talking very fast and was very insistent.

[10] At this meeting, the defendant presented the complainant with what she said was an agent's authority for sale. The document did not appear to be filled out and the defendant insisted the complainant sign it blank. She told him she would complete it and insert his required selling price of \$850,000. Unthinkingly, the complainant signed the document without reading it properly. He believed he was signing a document which gave the defendant permission to market his property for him.

[11] The defendant continued to contact the complainant from time to time by telephone. She assured him that she had a prospective purchaser interested in buying the Rambler Crescent property. This purchaser was apparently securing finance in order to submit an offer of \$750,000. The defendant never presented this offer to the complainant.

[12] However, the defendant did at some stage in September 2010 take the complainant to 15 Hotspur Place, Bayview, Auckland (the Hotspur Place property). The defendant was the registered proprietor of this property from 15 May 2010 to 12 August 2011. She told the complainant that the property was hers and was valued at \$340,000. She tried to persuade the complainant to swap his Rambler Crescent property with her Hotspur Place property. She told the complainant that she would pay him the price difference between the properties. She told him she would pay him \$370,000.

[13] The complainant made it clear to the defendant that the Hotspur Place property was completely unsuited to him for a number of reasons. Firstly, he was looking for a property smaller than his own because he could not keep up with the maintenance on his Rambler Crescent property. Secondly, the Hotspur Place property was a two-

storey house as the complainant was getting older, he wanted a single-storey house. Thirdly, the Hotspur Place property needed a lot of interior and exterior maintenance.

[14] After the visit to the Hotspur Place property, the defendant visited the complainant at his home again. She had changed her mind on the value of the Hotspur Place property, saying that it was now valued at \$500,000 (rather than \$340,000), and offered the complainant a lower cash payment than previously offered. The complainant reiterated his disinterest in the property.

[15] Some days after that, the defendant went to the complainant's house again. She gave him \$1,000 which she said was to pay for the Ray White signage and advertising costs. As he had already paid these, this confused the complainant. The defendant then demanded the \$1,000 back.

[16] During this same visit, the defendant told the complainant he had signed an agreement to exchange his Rambler Crescent property with her 15 Hotspur Place property. The complainant had never seen nor signed such an agreement as it was something he never considered.

[17] The defendant insisted that the complainant move out of his Rambler Crescent property, which he did not.

[18] Over the coming months, the defendant left a number of documents on the complainant's doorstep.

- [a] The first was a contract for sale and purchase of land and buildings dated 7 September 2010. This purported to be an agreement between the complainant and the defendant that the complainant sell the Rambler Crescent property to the defendant for \$433,000. The complainant had not agreed to the contents of the contract and had not filled it in. Indeed, he had not seen the contents of it prior to it being left on his doorstep.
- [b] The second was a contract for sale and purchase of land and buildings also dated 7 September 2010. This purported to be an agreement between the complainant and the defendant that the defendant sell the Hotspur Place property to the complainant for \$433,000. The complainant does not recall seeing this document before finding it on his doorstep.
- [c] A green document entitled "*CCH's Contract for sale of land and buildings explanatory notes to form*".
- [d] A settlement notice dated 13 January 2011. This said that the final date for settlement of the sale and purchase of the Hotspur Place property was 31 January 2011.
- [e] An undated hand-written letter addressed to the complainant at the Hotspur Place property, saying that the defendant was moving into the Rambler Crescent property on 23 July 2011. The letter attached two keys, which it said were for the Hotspur Place property. The letter referred to the previously mentioned sale and purchase agreements and said that they were for a straight swap of the Rambler Crescent and Hotspur Place property.

- [f] A trespass notice addressed to the complainant at the Hotspur Place property, warning him to stay off the Rambler Crescent property.
- [g] After taking advice, the complainant ignored the above correspondence. The defendant has not contacted the complainant since the documents and keys were left on his property on 19 July 2011.

### **Relevant Law**

[19] Section 73(a) of the Act provides:

**“73 Misconduct**

*For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—*

*(a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*

*...”*

[20] The Tribunal considered the ambit of the term “disgraceful” in *CAC v Downtown Apartments Ltd* [2010] NZREAD 06 where it held:

*“[55] The word disgraceful is in no sense a term of art. In accordance with the usual rules it is given its natural and popular meaning in the ordinary sense of the word. But s.73(a) qualifies the ordinary meaning by reference to the reasonable regard of “agents of good standing, or reasonable members of the public.”*

*[56] The use of those words of qualification to the ordinary meaning of the word “disgraceful” make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess. See Blake v The PCC 1997 1 NZLR 71.*

*[57] The ‘reasonable person’ is a legal fiction of common law representing an objective standard which individual conduct can be measured but, under s.73(a,) that reasonable person is qualified to be an agent of good standing or a member of the public.*

*[58] So while the reasonable person is a mythical ideal person, the Tribunal can consider, inter alia, the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the ... defendant.*

*[59] So, in summary, the Tribunal must find on balance of probabilities that the conduct of the ... defendant represented a marked or serious departure from the standards of an agent of good standing or of a reasonable member of the public”.*

[21] Accordingly, s.73(a) allows us to make disciplinary findings in respect of conduct which would be considered as a marked or serious departure from the standards of an agent of good standing or of a reasonable member of the public.

## **Discussion**

[22] As well as denying the charge in her *“Notice of Appeal”* and response to the charge, the defendant argues that her dealings with the complainant were in a private capacity, and not conducted as a real estate agent. *“Real estate agency work”* is defined in s.4 of the Act where its para (a) reads *“means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction”*. We find that, at all material times, the defendant was endeavouring to sell the complainant’s property even though she was most duplicitous in terms of his wishes and instructions to her.

[23] We consider that the defendant’s actions did amount to *“real estate agency work”* as defined in s.4 of the Act.

[24] In any event, it is settled law that misconduct under s.73(a) need not involve *“real estate agency work”*. For a finding of misconduct under s.73(a) to be appropriate, there simply needs to be a sufficient nexus between the conduct alleged and the licensee’s fitness to perform real estate agency work; - *CAC 10026 v Dodd* [2011] NZREADT 01 at [77] – [83]; *S v CAC and B* [2010] NZREADT 13 at [19].

[25] Mr C Delany (an investigator for the Authority) outlines in his evidence that the defendant was first issued with a licence on 26 July 2010. Her licence continued until it lapsed on 8 August 2011. In terms of the charge before us, all dealings with the defendant took place in the months between. Those dealings were initiated by the defendant who, in her capacity as a real estate agent, approached the complainant and conducted herself in such a manner. She offered to sell his property for him ostensibly in terms of his instructions to her. The defendant was clearly engaged in *“real estate agency work”*.

[26] Simply put, whether the conduct in question amounts to *“real estate agency work”* is not an issue we needed to make a finding on. This is because it is within the scope of s.73(a) of the Act, because there is a clear nexus between the conduct alleged and the defendant’s fitness to perform real estate agency work.

[27] From the evidence adduced to us, we find the charge proven against the defendant.

## **Penalty**

[28] Decisions of industry disciplinary Tribunals emphasis the maintenance of high standards and the protection of consumers above any punitive element, although orders made in disciplinary proceedings may have a punitive effect, refer *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 (SC). Penalties in this context are designed to deter the offender and others in the profession from offending in a like manner in the future, refer *Patel v Complaints Assessment Committee HC Auckland CIV-2007-404-1818, 13 August*.

[29] The defendant embarked on a course of fraudulent conduct against the complainant and harassed him and failed to promote and protect his interests. She sought to obtain his property through illegal means, without his consent or understanding as to what was happening. She demonstrated a complete lack of concern for the Act or for the Real Estate Agents Act (Professional Conduct and

Client Care Rules) 2009, and breached a number of their provisions. The defendant's actions can be summarised as that she was indifferent to and seemingly unaware of her obligations as a real estate agent; and, more concerningly, disturbingly fraudulent.

[30] It was put that such conduct would usually result in, at least, a lengthy period of suspension; but that the licensee currently does not hold a licence and is unable to for 10 years pursuant to s.37 of the Act. The Committee was also minded, initially, to seek that a compensation order be made in favour of the complainant. However, further enquiries have revealed that the complainant suffered no quantifiable loss. As such, a compensation order is not sought by the prosecution.

[31] It was also put to us that although the defendant is, in effect, banned from the real estate industry for 10 years from 14 May 2013, these proceedings are of particular importance for two reasons. First, the complainant is entitled to see that the defendant has been properly dealt with under the Act; and, second, we need to signal our views for consideration by the Registrar should the defendant ever seek to become a real estate agent upon the expiry of her period of mandatory ineligibility for such a licence. We agree.

[32] We observe that, in terms of s.71 of the Act, a former licensee is a "*licensee*" under the Act. This means that we have our full powers under s.110 of the Act to make Orders against the defendant in terms of her misconduct, even though the defendant has let her licence expire and is no longer eligible to hold such a licence for 10 years from 14 May 2013. In other words although at this point of time she no longer holds her licence, s.71 of the Act makes it clear that we are able to sentence her as if she still were such a licensee.

[33] We have been informed that some licensees have been surrendering their licences, or not renewing them, with a view to avoiding orders being made against them under this Act, or so they think. As we have indicated above, surrendering or not renewing a licence cannot avoid the effect of s.71 of the Act which enables us to deem a former licensee to be a present licensee for the purposes of our sentencing for proof of misconduct.

[34] We consider that the conduct of the defendant, which we have detailed above, constitutes appalling misconduct as the word "*misconduct*" is defined in s.73 of the Act. Indeed her conduct has been so uncommercial and irrational as to suggest a mental health problem; but we are required to deal with that conduct as being very corrupt indeed. In our considered and unanimous view, the defendant must never again be permitted to re-enter the real estate industry in any capacity. She should never be permitted to hold any position of trust.

[35] In the usual way, we take account of such sentencing factors as deterrence, denunciation, and accountability. Some of the features we have covered above are aggravating. The non-participation of the defendant rather obviates a consideration of mitigating factors should any exist.

[36] Accordingly, we Order as follows:

[a] Pursuant to s.110(2)(b) of the Act, the defendant's licence is cancelled.

- [b] Pursuant to s.110(2)(d), the licensee must never perform any supervisory functions (nor administrative or assisting functions) in the real estate industry; and,
- [c] Pursuant to s.110(2)(e) the defendant must never been employed or engaged again in connection with real estate agency work.

[37] 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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Ms N Dangen  
Member

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Mr J Gaukrodger  
Member