

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2013] NZREADT 89

READT 008/10

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

**BETWEEN** **THE REAL ESTATE AGENTS  
AUTHORITY (per COMPLAINTS  
ASSESSMENT COMMITTEE  
10020)**

Prosecutor

**AND** **JULIE ANNE McDONALD** of  
Ashburton, former real estate  
agent

Defendant

**MEMBERS OF TRIBUNAL**

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

**HEARD** at ASHBURTON on 3 October 2013

**DATE OF DECISION** 17 October 2013

**APPEARANCES**

Mr L J Clancy, counsel for prosecution  
No appearance by or on behalf of the defendant

**DECISION OF THE TRIBUNAL**

***The Charges against the Defendant***

[1] The defendant faces four charges of misconduct brought by Complaints Assessment Committee 10020 under s.73(a) of the Real Estate Agents Act 2008. The defendant elected not to appear before us so that the prosecution proceeded by way of formal proof.

[2] In outline, the Committee alleges that Ms McDonald, a licensed real estate agent:

- [a] Forged the signature of Rata Jared Kamau on a listing agreement for a property at 2/14 Ascot Place, Ashburton;

- [b] Relied on the forged document to claim a commission on the sale of the property;
- [c] Relied on the false document to lodge a caveat on the property;
- [d] Misrepresented that she had lodged a bond, paid by tenants of the property, to the Department of Building and Housing within 23 working days of its receipt by her, namely by 15 May 2009, when the bond was not lodged until 9 June 2009.

[3] In full, the charges read:

*"1. Following a complaint made by Waddoup David Kamau ("the complainant"), through his solicitor, the Complaints Assessment Committee (CAC 10020) charges Julie Anne McDonald, agent, 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:** *The forgery of the signature of Rata Jared Kamau, then the holder of Waddoup David Kamau's power of attorney, on a document headed "Ashburton Real Estate Ltd (MREINZ) Listing Authority for Sale", by or with the knowledge of Julie Anne McDonald.*

*2. The Complaints Assessment Committee (CAC 10020) further charges Julie Anne McDonald 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:** *Julie Anne McDonald's reliance on the document headed "Ashburton Real Estate Ltd (MREINZ) Listing Authority for Sale", knowing and/or on notice that it was not a genuine document, to claim commission on the sale of Waddoup David Kamau's property at 2/14 Ascot Place, Ashburton.*

*3. The Complaints Assessment Committee (CAC10020) further charges Julie Anne McDonald 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:** *Julie Anne McDonald's reliance on the document headed "Ashburton Real Estate Ltd (MREINZ) Listing Authority for Sale", knowing and/or on notice that it was not a genuine document, to lodge a caveat on the title of the property of Waddoup David Kamau at 2/14 Ascot Place, Ashburton.*

*4. The Complaints Assessment Committee (CAC10020) further charges Julie Anne McDonald 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:** *Julie Anne McDonald's statements that she had paid the bond paid by the tenants of Waddoup David Kamau's property at 2/14 Ascot Place, Ashburton, to the Department of Building and Housing within 23 working days of its receipt by her, namely by paying the bond to the Department of Building and*

*Housing on 15 May 2009, when payment of the bond was not made to the Department of Building and Housing until 9 June 2009.*

5. *The Complaints Assessment Committee (CAC10020) further charges Julie Anne McDonald with misconduct under s.73(c)(ii) of the Real Estate Agents Act 2008 in that her conduct consisted of a wilful or reckless contravention of s.30(2) of the Real Estate Agents Act 1976.*

**Particulars:** *Appointment of Peter Loftus as a director of Ashburton Real Estate Limited on 27 October 2009 without the prior approval of the Real Estate Agents Licensing Board.”*

[4] At the commencement of the hearing, charge 5 above was withdrawn by the prosecution.

### **The Basic Facts**

[5] In February 2009, the complainant, Mr W D Kamau, became ill and was admitted to hospital. His son, Mr R J Kamau, was granted power of attorney. The family decided that Mr W D Kamau would move into a residential care home and that his property at 2/14 Ascot Place, Ashburton, should be rented out and, possibly, sold at a later date.

[6] The defendant, a licensed real estate agent and director of Ashburton Real Estate Ltd, was engaged by the Kamau family to find a tenant for the property.

[7] On 20 February 2009, the defendant sent R J Kamau a number of documents for signature, including an agency agreement for the sale of the property; but the Kamau family decided to proceed only with the rental of the property and not a sale at that stage. On 21 February 2009 R J Kamau telephoned the defendant to confirm this .

[8] R J Kamau then printed off the various documents which the defendant had sent him, signed them with the exception of the agency agreement, and emailed them back to the defendant on 21 February 2009.

[9] Between 22 and 24 February 2009, the defendant contacted R J Kamau and queried why he had not signed the agency agreement for sale of the property. The defendant claims that R J Kamau then agreed to sign an agency agreement with a reduced commission rate, and that an amended copy was emailed by her to him on 22 February 2009. R J Kamau states that he did receive an email from the defendant on 22 February 2009, but the attachment to that email was a “*residential sales browser*” document, not an agency agreement with an amended commission rate.

[10] On 25 February 2009, the defendant emailed R J Kamau again, asking if he could “*see [his] way clear*” to let her “*manage the tenancy and the selling of the property in total*” and offering a flat commission of \$8,500. The prosecution alleges that the defendant’s email of 25 February 2009 is inconsistent with her claim to have emailed R Kamau an agency agreement with an amended commission rate on 22 February 2009. We agree there is that inconsistency.

[11] The defendant claims that, some time after 25 February 2009, she received an email from R J Kamau with a signed agency agreement attached. R J Kamau denies sending such an email and denies signing the agency agreement. The defendant has not been able to produce a copy of an email attaching the signed agency agreement. Nor has the prosecution's computer forensic examiner, Mr J M Jorgensen, been able to find any trace of it.

[12] In March 2009, a new power of attorney from W D Kamau was granted to Tony Vainerere, a counsellor at Ashburton Presbyterian Support Services, because R J Kamau was then residing in Wellington. Then, R J Kamau provided Mr Vainerere with a folder of the original documents he had signed in respect of the property. The folder was passed on to W D Kamau's solicitor in Ashburton, Mr G Martin, who noted that the documents did not include a signed agency agreement for sale of the property.

[13] In early May 2009, Mr Martin referred Mr Vainerere to a Mr Sands of Phillip Kenny Real Estate Ltd (Harcourts) as a salesperson able to assist with marketing and selling the property. That was discussed with the defendant who claimed to have a signed sole agency to sell the property. On 7 May 2009, the defendant emailed Mr Vainerere attaching what purported to be a copy of an agency agreement for the property signed by R J Kamau. However, he advised that the signature on that document was not his. Accordingly, on 19 May 2009 Mr Martin wrote to the defendant formally instructing her to cease acting in relation to the property.

[14] Correspondence between Mr Martin and the defendant's solicitor followed. On 27 May 2009, the defendant's solicitor advised Mr Martin that the defendant had a claim to \$9,000 commission on the sale of the property under the said form of agency agreement and would lodge a caveat on the property on that basis.

[15] In June 2009, the property was sold to the tenant of the property who had been obtained by the defendant as a letting agent for the attorney of Mr W D Kamau.

[16] Also in June 2009, Mr Martin raised concerns that the defendant had not lodged the tenant's bond with the Department of Building and Housing in a timely fashion, despite her advice to the contrary.

### ***A Summary of Further Relevant Evidence For the Prosecution***

[17] The above outline of basic facts is an amalgam of the evidence we heard from Mr R J Kamau the son of Mr W D Kamau, Mr A A Vainerere a counsellor for the Presbyterian Support Services at Ashburton, Mr J M Jorgensen an independent computer forensic examiner, Mr J O'Brien a computer expert, and Mr G E Martin a prominent Ashburton solicitor who represented Mr W D Kamau at material times. Mr D L Boot, a senior document examiner for the New Zealand Police, gave evidence to us that, due to the poor quality of the signature on the form of agency agreement supplied by the defendant, he could not be sure whether it was the genuine signature of Mr R J Kamau but, overall, he opined it was not genuine.

### ***Evidence for the Defence***

[18] Although this matter proceeded by formal proof as noted above, we received a signed statement of evidence from the defendant dated 16 December 2010 together

with a signed statement of evidence in support of the defendant respectively from Mr G K Riach and Mr P Loftus and we refer to that evidence below. Because we have wide powers to admit evidence we now refer to salient parts of those briefs but, of course, the weight to be attached to evidence is determined by our views on credibility.

[19] We note that the reason there has been such a delay between the filing of the defence briefs of evidence and the hearing in Ashburton on 2 October 2013 is that the original hearing of this prosecution was interrupted by the second substantial Canterbury earthquake. Also, for various reasons, it has proved difficult since then to arrange a rehearing of this prosecution.

### ***Evidence from the Defendant***

[20] The defendant's signed statement of evidence dated 16 December 2010 is quite detailed and covers the events described above. She obtained a branch manager's certificate in October 2004 and a full licence in February 2005. She opened an office under the L J Hooker franchise on 25 January 2005 and had become a director of Ashburton Real Estate Ltd when it was formed in June 2004. It seems that Mr P Loftus is her partner.

[21] She states that from the 20 February 2009 outset of her dealings with Mr K Kamau, the brother of Mr R J Kamau, he made it clear to her that the property was to be sold and the sooner the better as the owner's financial position was not good. She covered those events in some detail. She said that the property was a flat in very poor condition. She understood that Mr K Kamau wanted the property sold quickly but the market was slow in February 2009 and she indicated to Mr Kamau that perhaps an investor would buy the place for rental purposes. She says she remembers asking Mr Kamau whether, if she found a buyer, the vendor would sell and she says that Mr K Kamau responded "*definitely*" to that question.

[22] The defendant says she did some research and concluded that the sale price range was \$180,000 to \$200,000, she advised Mr K Kamau accordingly, and he responded that the family needed \$200,000 to pay all fees and clear debt. She indicated to him that she had a person who might rent the property immediately at \$240 a week and so alleviate the family's short term financial crisis. She said that Mr K Kamau thought that a good idea. She states that on 20 February 2009, through Mr K Kamau, Mr R J Kamau, as attorney for their father, authorised her to rent and sell the property and she was to send "*the papers*" to Mr R J Kamau by email. She described doing that on 20 February 2009 at 19.25 hours. She says that Mr R J Kamau telephoned her the next day to talk about tidying up the property and he advised he was signing the papers she had sent to him to authorise her to rent and sell the property and there was some discussion over commission. She said that Mr K Kamau discouraged her from visiting the property owner Mr W D Kamau as he was unwell.

[23] The defendant says that Mr R J Kamau returned six of the pages she had sent him but she resent him the commission page on Sunday 22 February 2009 along with two other pages of rental management charge out rates. She stated "*from that point Rata had two copies of the listing authority page. One with my signature and one without*". She said that not all pages were returned by Mr R J Kamau so she sent him an email of 25 February 2009 and, a little later, he sent her the missing

pages duly signed and these are relevant documents and copies in the agreed bundle of documents. She has not been able, subsequently, to find the email attached to those documents and in May 2009 called in a computer expert "*who explained that a virus was likely responsible for randomly deleting files on my computer*".

[24] The defendant arranged for a tenant to move into the property on 29 February 2009 but soon gave that tenant notice for not paying rent. She marketed the property seemingly for both sale or renting.

[25] The defendant then outlined her dealings with Mr Tony Vainerere who took over as attorney for Mr W D Kamau when Mr R J Kamau settled in Wellington. She says that he confirmed to her that the property was to be sold. Inter alia she states:

*"37. I asked him if he was happy for me to carry on trying to sell the property and he confirmed that he was and that he didn't have the time or industry knowledge to deal with it himself. He did not ask to see a listing authority. I assumed Rata and Mr Kamau senior had told him I had been appointed as agent to sell."*

[26] The defendant said it was agreed that she would continue to collect the rental income from the property. She felt the asking price for sale of the property was too high. She said she discussed with Mr Vainerere the change in tenants and best marketing process for sale at a reduced price. She says that on 21 April 2009 Mr Vainerere authorised her to spend money on advertising and take it from the rental income so she advertised some proposed open homes.

[27] The defendant said she carried out much work "*getting the property up to scratch to be rented and sold*". When the first tenant left she cleared with Mr Vainerere that it be relet and she found a new tenant Ms K Highsted who took possession on 24 April 2009 on a short term basis. She says she discussed with the tenant whether the bond be held by her or paid to the Bond Centre and it was agreed that it would be held by her short term "*to see how things progressed*" and she proceed with an open home for 2 May 2009. She felt that the tenant was a potential buyer and had discussions with the tenant about price.

[28] The defendant reported progress to Mr Vainerere but, on 7 May 2009, he asked if she would let another agent sell the property. She responded that could happen once her sole agency had expired. She says it was then that Mr Vainerere asked her to email him a copy of her listing authority and suggested that she did not have one.

[29] On 11 May 2009 she sent an offer from a Mr Barker to Mr Vainerere but it was not acceptable. Mr Barker increased the offer to \$155,000 but Mr Vainerere wanted \$185,000 and had discussions with the defendant to obtain her advice. In accordance with that advice Mr Vainerere counter-offered at \$180,000 but Mr Barker was prepared to go to \$160,000 and no more. Mr Vainerere would not accept that and seemed angry with the defendant.

[30] The defendant says that on 15 May 2009 she forwarded the bond to the Bond Centre. She said it had been paid on 24 April 2009 so that the 23 day working period expired on 27 May 2009. She does not know why but the cheque was not cleared until 9 June 2009.

[31] It seems that on behalf of the owner Mr W D Kamau, Mr Vainerere then treated with the tenant Ms Highsted regarding her purchasing the property. On 19 May 2009 Mr G Martin, as lawyer for Mr W D Kamau, emailed the defendant requiring her to immediately cease acting for the vendor and indicated that the vendor did not want the sale of the property to be through Ashburton Real Estate Ltd or the defendant. However, the defendant continued to market the property including advising the tenant. She feels she was squeezed out of the sale to the tenant by Mr Martin. Apparently, the tenant purchased the property through Mr Martin.

[32] The defendant says she was advised to lodge a caveat and to enforce her sole agency agreement. She then resigned as the property manager for Mr W D Kamau *“and handed matters over to my lawyers”*.

[33] The defendant says that she pursued commission against the tenant purchaser through the District Court because the tenant was introduced to the property by her and she regarded herself as entitled to \$9,000 commission including GST. Her claim was heard in the local Disputes Tribunal and she was unsuccessful in her claim. She says that she caveated the property *“acting on legal advice”*.

[34] Inter alia, she asserts that she always believed she had both verbal and written authority to act as the owner’s agent to both rent and sell the property and that she would never have done so otherwise. She remarks that there was no secret whatsoever that she was taking strenuous steps to sell the property. She maintains that the signatures on the authority documents which she has produced are those of Mr R J Kamau. Towards the end of her witness brief she states: *“I absolutely and categorically deny that I signed Mr Kamau’s name on any of those documents. I did not. I am sure that he sent me those documents by email. I don’t know what computer he used to send them from.”* She then added:

*“75. I had no idea what was going on behind the scenes but there was clearly some sort of family rift which must have left Mr Kamau in a position where he wanted to withdraw and have nothing more to do with acting as power of attorney.”*

### **The Evidence of Mr G K Riach**

[35] Mr Riach is a Christchurch lawyer. His witness statement of 15 December 2010 is directed to the issue of the appointment of an unlicensed person to be a director of the defendant’s real estate company. Although he deals with some of the background covered above, it is not necessary for us to deal further with his witness brief although it does provide interesting background regarding the aspects of the caveat and its eventual release and the District Court proceedings.

### **The Evidence of Mr P Loftus**

[36] The evidence of Mr Loftus particularly focused on why he had been appointed a director of Ashburton Real Estate Ltd on 27 October 2009. However, charge 5 above against the defendant has been dropped by the prosecution so we need not deal with Mr Loftus’s evidence on that aspect.

[37] Mr Loftus is a former Police Officer who felt that the defendant was intimidated and threatened by the complainant’s solicitor. It seems that Mr Loftus became a

director of Ashburton Real Estate Ltd to be able to support the defendant in related litigation. He said he was aware that the defendant had spent a lot of time marketing and endeavouring to sell the property and that she always understood that she had been authorised to both rent and sell that property as the sole agent. Mr Loftus also opined that the defendant's computer "*had some sort of virus that had randomly deleted emails*" at material times.

[38] Mr Loftus also stated that he was present throughout an entire Disputes Tribunal hearing which seemed to be about the defendant claiming commission from Mr W D Kamau on the said sale of his property. He said that he heard Mr R J Kamau give evidence by telephone acknowledging that he may have signed all the pages of a sole agency listing authority. Mr Loftus opined that he had always thought that to be a very significant concession made by Mr R J Kamau.

[39] Such evidence from Mr Loftus is hearsay and conflicts with Mr R J Kamau's evidence to us.

## **RELEVANT LAW**

### **Misconduct**

[40] The concept of disgraceful conduct under s.73(a) was discussed by us in *CAC v Downtown Apartments Limited and Anor* [2010] NZREADT 6 at [49] to [59]. Our analysis of s.73(a) in *Downtown Apartments* has been subsequently applied in numerous cases (e.g. *CAC v Lum-On* [2010] NZREADT 30.)

[41] We have held that s.73 will require a marked or serious departure from acceptable standards. The word disgraceful is not a term of art and is to be given its normal meaning. Whether conduct is "*disgraceful*" will be an objective question for us to assess and in doing so we can take into account any special knowledge, skill, or training that an agent of good standing is expected to possess.

### **Conduct Prior to the Act Coming into Force**

[42] The conduct alleged in this case took place prior to the Act coming into force on 17 November 2009. Section 172 of the Act therefore applies.

[43] As we have held on a number of occasions, in cases in which a defendant was licensed or approved under the Real Estate Agents Act 1976 at the time of the conduct alleged, and where the defendant has not been dealt with under the 1976 Act in respect of that conduct, s.172 creates a three step process (see *CAC v Dodd* [2011] NZREADT 01 at [65] to [67]):

- [a] Step 1: Could the defendant have been complained about or charged under the 1976 Act in respect of the conduct?
- [b] Step 2: If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?
- [c] Step 3: If so, only orders which could have been made against the defendant under the 1976 Act in respect of the conduct may be made.



[44] At the time of the conduct alleged, the defendant was a licensed agent under the 1976 Act. She has not been dealt with under the 1976 Act in respect of the conduct in issue and could clearly have been complained about or charged under the 1976 Act. Accordingly, we may consider the charges against her under s.73(a) of the Act, notwithstanding that the conduct alleged occurred before November 2009.

### ***Our Findings***

[45] We have heard the witnesses for the prosecution and found them to be truthful and credible in our assessment and experience, whereas we have not heard from the defendant or her witnesses on oath.

[46] Having heard the evidence, we advised at the hearing that we found the four remaining charges (the first four charges), as set out above, proved against the defendant by the prosecution on the balance of probabilities. We found the first three charges/offences to amount to misconduct and the fourth charge/offence to be merely unsatisfactory conduct. In all the circumstances, we have decided to put that fourth offence to one side and take no further action with regard to it because of the seriousness of the first three charges.

[47] Simply put, we have found the factual allegations of the prosecution in the present case to be proved on the balance of probabilities so that it follows that the defendant's conduct was disgraceful. What is alleged against the defendant is deliberate dishonesty, forgery, and use of a forged document to assert an entitlement to commission. Prima facie, that conduct is at the more serious end of the range likely to come before us.

[48] Because we have found misconduct under s.73(a) proved, the issue of penalty arises. As set out above, only orders which could have been made against the defendant under the 1976 Act are available. Having announced our finding, we then invited the prosecution to make submissions on penalty. Accordingly Mr Clancy made full submissions on penalty from the Authority's perspective. Subsequent to the hearing, Mr Clancy set out his submissions on penalty in writing and these have been forwarded to the defendant.

[49] The offending conduct took place between February and June 2009 so that it is governed by the Real Estate Agents Act 1976 and not by the Real Estate Agents Act 2008 which did not deal with conduct occurring before 17 November 2009.

[50] We have referred above to the aspect of the relevant conduct being prior to the 2008 Act coming in to force. By virtue of s.172 of the Real Estate Agents Act 2008, we have jurisdiction to consider the charges against the defendant under s.73(a) of the 2008 Act notwithstanding that the relevant conduct of the defendant occurred before 17 November 2009.

[51] At material times, the defendant was a licensed agent under the 1976 Act so that its ss.94 to 96 inclusive apply. For present purposes, s.94 of the 1976 Act enables us to cancel a real estate agent's licence on certain grounds which include that a licensee has been convicted of a crime involving dishonesty; that a licensee has been guilty of misconduct in the course of his or her company's business as a real estate agent, and that by reason of that misconduct it is in the interests of the public that the licence be cancelled; that the licensee has been shown to be of such a

character that it is in the interests of the public that the licence be cancelled. Under s.95 we have power, as an alternative to cancellation, to suspend a defendant for up to three years if we are satisfied that a ground exists for ordering the cancellation of that real estate agent's licence. Under s.96 of the 1976 Act we may in the alternative or in addition to cancelling or suspending such a licence, impose a penalty upon the agent not exceeding \$5,000.

[52] Inter alia, Mr Clancy emphasised the extent of s.94(1) and particularly referred to s.94(1)(b) that where we have found misconduct by the agent in the course of her or her company's business as a real estate agent and that by reason of that misconduct it is in the interests of the public that the licence be cancelled, we may cancel the licence. Mr Clancy also dealt with the character test ground as covered in s.94(1)(c) and relevant case law interpreting that but, in this case, s.94(1)(b) of the 1976 Act would seem more appropriate.

### ***Post-hearing Developments***

[53] On the second working day after the hearing the defendant contacted our registry about various concerns which she recorded by email of 9 October 2013. These were along the lines that she maintains she did not know of the hearing and would have attended; that for many months communication with or by her has been difficult for various reasons; that she did not know that her barrister had withdrawn even though this registry was notified of that many months ago; that she has recently returned from visiting family in the United Kingdom, apparently since about April 2012, and various other such reasons; and would *"very much appreciate the opportunity to put my side of the story to you in person if that is at all possible"*.

[54] The defendant seemed to understand that our decision had been reserved. In fact, towards the end of the hearing we found the charges, proved against the defendant but we did not pronounce penalty. This means she is guilty of misconduct in terms of the particulars set out in the charges except that the fifth charge was withdrawn, as explained above, and on the fourth charge we merely found the offence of unsatisfactory conduct, as also explained above.

[55] It would seem, as endorsed by counsel for the Authority in submissions subsequent to the hearing and related to the defendant's said email of 9 October 2013, that the defendant's only course, if she does not accept our findings, is to appeal our decision on guilt. However, we have not yet finally fixed penalty and, of course, we welcome submissions from the defendant on that aspect.

[56] Accordingly, we direct the registrar to arrange a telephone conference between the Chairman and counsel for the Authority/prosecution and the defendant to either set a timetable towards a hearing on penalty or to deal with the penalty aspect *"on the papers"*.

### ***Outcome***

[57] Simply put, the first three charges of misconduct have been proved, we found unsatisfactory conduct on the fourth charge, and the fifth charge has been withdrawn. It now remains for us to deal with penalty in the usual way as the outcome from our findings.

[58] 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