

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2013] NZREADT 95

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 CAC 10020)**

Prosecutor

**AND**

**JULIE ANNE McDONALD** of  
Ashburton, 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 ([2013] NZREADT 89)

**APPEARANCES**

Mr L J Clancy, counsel for prosecution  
Messrs R Kay and D Webb for defendant

**MEMORANDUM TO THE PARTIES**

[1] In our decision of 17 October 2013 we found three charges of misconduct to have been proved against the defendant together with a finding of unsatisfactory conduct on a fourth charge. We directed the registrar to arrange a telephone conference of the parties with the Chairperson to deal with penalty.

[2] There have been two such telephone conferences and the counsel for the defendant advise they shall forthwith be filing an appeal against our misconduct decision . In that case they submit that it is appropriate for the consideration of penalty to be deferred pending the decision on appeal by the High Court. Their reasons for that submission are that the defendant does not accept our finding and is exercising her right of appeal; and (it is put) the processes for our consideration of penalty and appeal to the High Court are inconsistent with one another because the defendant is unable to prepare submissions to fully traverse her position on penalty when she does not accept our findings of guilt; and the High Court has all our powers.

[3] The prosecution does not accept that our consideration of penalty should be so postponed. Mr Clancy submits that the appeal process under s.116 of the Act does not act as a stay on extant Tribunal proceedings and, if it did, there would be an incentive for any licensee found guilty by us to appeal in order to delay the imposition of an appropriate penalty. Mr Clancy also refers to Rule 20.10(1) of the High Court Rules providing as a general position that an appeal does not operate as a stay of proceedings.

[4] It is put that this issue was addressed in *CAC v Kumandan* [2012] NZREADT 26 where Mr Kumandan, having been found guilty of misconduct, appealed to the High Court and sought a stay of penalty proceedings in this Tribunal; but we declined that. In that case there was an intertwined issue about the prosecution's penalty submissions having been filed out of time but, in terms of the issue now before us, the Tribunal stated:

*"[3] It is the Tribunal's understanding that notwithstanding Mr Kumandan's appeal, a penalty must still be imposed by this Tribunal and that in fact time for filing Notices of Appeal does not begin to run until the penalty decision has been issued."*

### **Our view**

[5] Insofar as it is put for the defendant that *"if the High Court does not find in Ms McDonald's favour, it has the same powers to deal with the matter as does the Tribunal, and the decision of the High Court would be final in the matter (subject to s.120 of the Act)"*, we do not think it helpful to the High Court for us to not deal with all issues before us. In any case we do not consider it appropriate to, in effect, allow an appeal process to operate as a stay to our completion of this prosecution. There is nothing to prevent the defendant participating in penalty proceedings in the usual way. It may be appropriate for her to give evidence in relation to the penalty issue. Even though she disputes guilt, submissions may be made on her behalf as to what penalty Orders might be appropriate.

[6] The charges we have dealt with relate to events in 2009 and have been before us since 2010 but were delayed due to consequences from Canterbury earthquakes. There is now a clear public interest in avoiding further delay in this matter.

[7] As Mr Clancy has pointed out, should we make a penalty Order affecting the defendant's ability to practice, she would be able to apply to the High Court for an interim Order allowing her to carry out real estate agency work until any appeal is determined (refer s.117 of the Act).

[8] Accordingly, we decline to adjourn this matter further and we fix 3 March 2014 in Ashburton as the date for a fixture on penalty. We understand that counsel will now agree upon a timetable for submissions towards that fixture.

[9] 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