

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 22

READT 29/13

IN THE MATTER OF

charges laid under s.91 of the
Real Estate Agents Act 2008

BETWEEN

**THE REAL ESTATE AGENTS
AUTHORITY (per Complaints
Assessment Committee 20003)**

Prosecutor

AND

VIRENDRA JHAGROO

Defendant

MEMBERS OF TRIBUNAL

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

SUBSTANTIVE DECISION ISSUED 4 February 2014 under [2014] NZREADT 8

DATE OF THIS DECISION ON PENALTY – 21 March 2014

BY CONSENT HEARD ON THE PAPERS

COUNSEL

Mr L J Clancy for the prosecution
Mr T Rea for defendant

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] In our 4 February 2014 decision herein ([2014] NZREADT 8) we dismissed charges of misconduct brought against the defendant by a Complaints Assessment Committee of the Authority; but we found the defendant guilty of unsatisfactory conduct under s.72 of the Real Estate Agents Act 2008 (“the Act”).

[2] We are aware that the prosecution has appealed that decision of ours to the High Court at Auckland Registry. The prosecution seeks that the High Court make a finding of misconduct against the defendant under s.73 of the Act on both or either of the two charges dealt with before us, together with an order for costs.

[3] The defendant’s conduct in question occurred in 2007 when he held a certificate of approval as a salesperson under the Real Estate Agents Act 1976.

[4] We had concluded our said substantive decision herein with the following paragraphs:

[90] Simply put then, with some reluctance we dismiss charge 1 but, in terms of charge 2, we exercise our discretion (in terms of s 110(4) of the Act) to find the defendant guilty of unsatisfactory conduct at a concerning high level.

[91] Accordingly, we invite the Registrar to arrange a directions hearing by telephone between our Chairperson, and Mr Clancy and the defendant, as to a timetable for submissions towards a penalty fixture."

Jurisdiction

[5] For the purposes of our dealing with the issue of penalty the defendant has re-engaged Mr Rea as his counsel.

[6] As it happens this is a case where Mr Rea for the defendant is able to endorse the written submissions on penalty put to us by Mr Clancy for the Authority as prosecutor. Mr Clancy's submissions are reflected in our reasoning below. Presumably because the defendant has limited resources and needs to retain Mr Rea for the High Court appeal against our dismissal of the misconduct charges, Mr Rea has simply provided succinct but helpful submissions by email. The substance of that reads:

*"On the issue of penalty, it seems clear given the findings by the Tribunal that the Tribunal lacks jurisdiction to impose a penalty on Mr Jhagroo for this pre-2008 Act conduct as the conduct (on the basis of the Tribunal's findings) would not have satisfied the test for bringing the matter before the Real Estate Agents Licensing Board under s.99 of the Real Estate Agents Act 1976. Refer in particular to *Sime v REINZ*, and the passages in the judgment at page 14 to 16. For example, at page 15: "So it is clearly intended that the type of character required to be established under s.99(1)(b) is something of a **more serious kind than professional misconduct ...**" (emphasis added). Again at page 16: "Traits such as dishonesty or gross incompetence **may** be within this category. Less culpable characteristics may well not."*

*There has been no finding of misconduct or dishonesty by Mr Jhagroo. It is clear that any finding of unsatisfactory conduct (even one expressed by the Tribunal as being at the high end of the range) would be insufficient to satisfy the *Sime* test."*

[7] As the conduct in issue took place prior to the 2008 Act coming into force on 17 November 2009, section 172 of Act applies. Under s.172, the only penalty orders open to us are orders which could have been made against the defendant pursuant to the 1976 Act.

[8] We have previously held that findings of unsatisfactory conduct, as distinct from findings of misconduct, are analogous to findings made by Regional Disciplinary Sub-Committees under the old statutory framework; refer *CAC 10024 v Downtown Apartments Limited* [2010] READT 06 at [39] to [44].

[9] The orders which could be made by Regional Disciplinary Sub-Committees (for breaches of the REINZ Rules) were a maximum fine of \$750 and censure; however, these were orders against the approved salesperson or branch manager's employing agent rather than the salesperson or branch manager personally.

[10] Accordingly, we have previously held that penalty orders, including fines, cannot be imposed for unsatisfactory conduct by salespersons where the unsatisfactory conduct occurred prior to the 2008 Act coming into force; see, for example, *Handisides v CAC 10030 & Cruden* [2011] READT 36 at [43] and [46].

Outcome

[11] In the present case we accept that no orders by way of penalty are therefore available for us to impose on the defendant for his unsatisfactory conduct outlined in our substantive decision herein of 4 February 2014. Accordingly, no penalty orders are imposed.

[12] 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 J Gaukrodger
Member

Ms N Dangen
Member