

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 41

READT 036/14

IN THE MATTER OF an interim suspension application
under ss.92 and 115 of the of the
Real Estate Agents Act 2008

BETWEEN **REAL ESTATE AGENTS
AUTHORITY (CAC20005)**

Applicant/Prosecutor

AND **AARON DREVER**

Respondent/Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

HEARD ON THE PAPERS

DATE OF THIS THRESHOLD DECISION 30 May 2014

COUNSEL

Ms J MacGibbon, counsel for prosecuting Authority
Mr G J Foley, barrister, for the licensee

**DECISION AS TO PROSECUTION APPLICATION FOR INTERIM SUSPENSION
OF LICENCE AS REAL ESTATE AGENT
PURSUANT TO SECTION 115 OF THE REAL ESTATE AGENTS ACT 2008**

Introduction

[1] The prosecution have charged the defendant licensee with misconduct under s.73(a) of the Act alleging that his conduct covered below would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful. The particulars of the charge dated 28 March 2014 are that, allegedly, the defendant obtained payments from vendor clients of his employer real estate agency, Hedgman Real Estate Ltd, for his personal benefit knowing that those payments were payable to the agency. There is reference to four properties where that is alleged to have happened.

[2] The defendant denies the charge and a fixture has yet to be made for it to be heard by us.

[3] By application of 28 March 2014 the prosecution apply to us for an order under s.115 of the Act to suspend the defendant's licence pending the outcome of the

hearing of the said charge on the grounds that is necessary or desirable having regard to the interests of the public including:

1. Protection of the public in light of the serious nature of the charge, namely:
 - (a) Obtaining payment of vendor client funds into his personal bank account when he knew this money was rightly the property of Hedgman Real Estate Ltd (the agency); and
2. The public interest in ensuring that real estate agents maintain high standards of honesty and integrity, particularly when dealing with vendor client money.

[4] On 15 April 2014 our Chairman issued a timetable for the filing and serving of submissions on this threshold issue on the basis that the parties accept that we then consider the said application on the papers and issue a decision. Those submissions have been filed by both parties with extensive and helpful supporting affidavits.

A Summary of the Stance for the Applicant

[5] Ms MacGibbon submits for the Authority, as prosecutor, that Ms Hedgman, the principal and agent at the agency, has made it clear in her affidavit of 21 March 2014 that:

- [a] It was never the agency procedure for a licensee to personally invoice vendor clients;
- [b] The licensee knew the procedure was that the agency invoiced the vendors, paid the marketing money, and recouped the money owed from the vendors;
- [c] She only became aware that the licensee was personally invoicing clients when anomalies as to payment, or complaints, arose.

[6] In response to statements made by Ms Hedgman, the licensee has stated:

- [a] that he considered it reasonable to bank these funds into a separate account pending a proper accounting exercise to ascertain the correct financial position between himself and the agency;
- [b] that he understood advertising costs were then credited back to his account if and when paid by vendor clients, often in later monthly periods.

[7] Ms MacGibbon puts it that the licensee has not addressed the specific issues raised by Ms Hedgman and that he knew what the office procedure was as to payment of vendor marketing funds, particularly, that it was the agency which invoiced the clients, not licensees personally. The evidence of Ms Hedgman makes it clear that at no time was it acceptable practice to directly obtain and bank vendor marketing funds into a personal account. Furthermore, it is submitted by Ms MacGibbon that it is simply common-sense that a licensee should not personally obtain funds, rather than the agency, given that the listing agreement is between the vendor and the agency.

[8] It is put that what has happened in this case is that the licensee has sought to remedy an in-house employment dispute over payments through the direct and improper invoicing of clients which, Ms MacGibbon submits, is disgraceful conduct.

[9] Ms MacGibbon also asserts that the alleged conduct of the defendant raises real issues of risk. She puts it that the defendant licensee was prepared to obtain client funds personally to remedy his dispute with the agency, thereby involving clients in that dispute. By doing this, the licensee placed his own interests above those of the vendor clients and his employer. Ms MacGibbon submits that, at best, this shows an appalling lack of judgment and indifference to the licensee's obligations; at worst, dishonesty.

[10] Ms Hedgman had engaged the defendant as a licensed agent on 19 July 2010 on the basis that he was an independent contractor with her company Hedgman Real Estate Ltd which is a branch of Remax trading in West Auckland. Her affidavit is detailed as to her concerns about the conduct of the defendant. There is a supporting affidavit from a Mr T Hamer as to how, on 27 May 2013, he paid marketing money into the defendant's bank account which was to be reimbursement of the agency for expenditure on advertising an auction of the Te Atatu South property of Mr Hamer and his wife.

The Stance of the Defendant

[11] Counsel for the defendant/respondent licensee has filed full submissions in opposition to the application for interim suspension. The defendant denies the charge. Five affidavits have been filed in support of his case and a number of character references and letters of support have also been filed for the defendant.

[12] He opposes the interim suspension application on the following grounds:

- [a] The subject matter of the charge arose in the context of, and comprises part of, an ongoing commercial dispute between the defendant and his former employer/agency;
- [b] He denies that he acted dishonestly;
- [c] The vendor clients suffered no loss, nor was there risk of loss;
- [d] Interim suspension would result in extreme hardship to the defendant and a dependent family member;
- [e] The defendant's current employment environment includes systems and supervision such that interim suspension is neither necessary nor desirable in the interests of the public.

[13] As Mr Foley has noted on behalf of the defendant:

- "6. (a) *Section 115 of the Real Estate Agents Act 2008 provides that the Tribunal may suspend the licence of a licensee where a licensee has been charged under s.91; and the Tribunal considers that it is necessary or desirable to suspend the licence having regard to the interests of the public.*
- (b) *The Real Estate Agents Handbook 2013, Legislation, Commentary and Guidance (Sawyers and Jennings, Brookers Ltd 2013) notes at*

RA115.1(2) that the key consideration for the Tribunal is whether the suspension is “necessary or desirable having regard to the public interest”, and the Tribunal has highlighted that protection of the public and the need to ensure that real estate agents maintain standards of honesty and integrity are key considerations when considering this test: REAA v Azimi [2012] NZREADT 50.”

[14] Mr Foley then addressed a number of case authorities and put it that:

“18 The general principles which can be extracted from these cases are:

- Protection of the public is of primary concern;*
- Of significance is the fact that for interim orders charge(s) are unproven and evidence untested;*
- An application must demonstrate at least a prima facie case and that there is risk to safety of the public such that interim suspension is necessary;*
- Should a respondent’s livelihood be at issue the threshold is a very high one;*
- A Tribunal must balance the needs of the respondent with the public interest;*
- No order will be made unless an immediate need to protect the public is shown (which cannot be addressed by conditions or restrictions on practice) as such an order tends to pre-empt the substantive hearing and may have unnecessary adverse effect on the practitioners and his practice.”*

[15] As Mr Foley puts it, the prosecution alleges that the defendant wrongly obtained and paid vendor client funds into his bank account knowing the money was rightly the property of the agency; and that, to ensure that real estate agents maintain high standards of honesty and integrity, there should be interim suspension of the defendant’s licence due to these allegations of repeated dishonest actions by him. Mr Foley then states:

“20. The respondent does not dispute that he banked advertising monies relating to the four properties into his own bank account. His position, in summary, is that this was not done with any dishonest intention, but rather was done with a view to holding the funds pending a full and proper reconciliation of the financial position between himself and the agency, Hedgman Real Estate.

21 The respondent’s affidavit sets out that there was a commercial dispute between himself and Hedgman Real Estate as to the correct financial position between them, with Ms Hedgman alleging that the respondent owed Hedgman Real Estate a significant amount of money.

22. The respondent disputed this alleged debt, and his concern about this (and about the lack of proper financial documentation being provided to him, despite his repeated requests) was such that the respondent’s

accountant was engaged to investigate the matter by conducting an audit. An audit was carried out, but essentially failed to determine the correct position between the parties due Ms Hedgman's refusal to provide documentation necessary for a full audit and reconciliation."

[16] Mr Foley then refers to the affidavit evidence deposing that the agency's accounting and administrative systems were such that they cannot be relied upon and there needs to be a full audit of the entire period of the defendant's term at the agency, particularly, with regard to the treatment and substantiation of advertising expenses. The defendant is concerned that he has been wrongly charged by the agency for advertising and other costs; and that often advertising costs were to be paid in full by the vendor but have been charged to him.

[17] Mr Foley then puts it that, at the time the defendant took the monies into his bank account, he understood that advertising for these properties had already been expensed by Ms Hedgman to his account with her agency and his intention was to retain these amounts in his bank account pending a full accounting reconciliation; if that is so, the vendors had received the benefit of the marketing which they had paid for and have suffered no loss.

[18] There is evidence that the defendant has worked for another reputable agency since September 2013 without there being a single complaint about his conduct despite him being involved with a significant number of listings and sales. There is also evidence from the defendant's current manager that his current employer provides a high level of support and supervision for his agents, including very good and clear systems around vendor monies to ensure consistent care and handling of those monies. Indeed, the current manager of the defendant confirms that, as a matter of usual office management, he meets daily with the defendant to discuss general business matters and resolve any difficulties.

[19] Accordingly, Mr Foley submits that current management and supervision of the defendant by a senior member of the industry, coupled with clear and consistent office systems and procedures in relation to vendor client funds, ensures that there is no material risk to the public from allowing the respondent to continue to practice as a real estate agent pending determination of the charge.

[20] Also, the defendant alleges animosity towards him from the complainant due to his leaving her agency and competing against her.

Our Views

[21] Obviously, there are issues of credibility to be determined at the substantive hearing of the charge.

[22] Simply put, we consider that the evidence currently before us on behalf of the defendant shows that there is no material risk to the public from allowing the defendant to continue to practice as a real estate agent pending determination of the charge. He is well supervised and supported as a busy real estate salesperson by an experienced and reputable manager and employer.

[23] There would be financial hardship to the defendant and his father as covered above.

[24] Also, the underlying current of this charge seems to be a civil dispute over money arrangements between the complainant and the defendant, although that would not excuse any conduct breach by the defendant in terms of the Act and its Rules, if that has happened.

[25] We are conscious that the issue of the alleged offending by the defendant has led to a charge being laid against him in the District Court under s.220 of the Crimes Act 1961 and he has pleaded not guilty to that. He is currently on remand at large and intends to strenuously defend that charge. It may be that the defendant and his legal advisers prefer that criminal charge to be disposed of before we hear the charge laid in our forum. However, we are willing to offer a very speedy timetable to a fixture before us.

[26] In all the circumstances, we decline the application to suspend the defendant's real estate salesperson's licence. We direct our Registrar to arrange a Directions Hearing by telephone with our Chairman as to an appropriate timetable procedure towards a fixture before us.

[27] 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

Ms N Dangen
Member

Ms C Sandelin
Member