

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 97

READT 037/12

IN THE MATTER OF

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

BETWEEN

**REAL ESTATE AGENTS
AUTHORITY (per CAC 20006)**

Prosecutor

AND

MS ZOHREH HOMEI AZIMI

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms C Sandelin - Member

HEARD at AUCKLAND on 27 and 28 May 2014

DATE OF OUR SUBSTANTIVE DECISION 16 September 2014 [2014]
NZREADT 69

DATE OF THIS DECISION ON PENALTY 28 November 2014

COUNSEL

Mr R M A McCoubrey and Ms J M Pridgeon for the prosecution
Mr M P Hislop for the defendant licensee

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] In a decision dated 16 September 2014, we found Ms Azimi guilty of two charges of misconduct under s.73(a) of the Real Estate Agents Act 2008 ("the Act").

The Charges

[2] The charges were as follows:

- [a] **Charge 1:** She allowed a fraudulent loan application to be made in her name for the purchase of 1/3185 Great North Road, Auckland; and
- [b] **Charge 2:** She listed and sold 23 Glenmore road, Sunnyhills, 3/78 Paihia Road, One Tree Hill, and 10B Heretaunga Avenue, Onehunga, on more than one occasion each, knowing that she was doing so to facilitate the commission of a fraudulent mortgage scheme.

[3] Our conclusions in our said decision are set out as follows:

"[131] Our unanimous assessment of the defendant as a witness is that she is not a credible witness and we consider that there is not much truth in her evidence in relation to the issues before us.

[132] We consider that there has been "misconduct", in terms of the definition in s.73 of the Act, by her in signing a blank form for a mortgage broker to use to arrange a mortgage for her to buy real estate, and then taking no interest in the information about her inserted into the blank form, or attached to it, much of which proved to be false. She simply was not "an accountant" who worked for the Small Business Association for \$85,635 p.a. at 40 hours per week on contract nor did she receive income from two fictional boarders. Also she knew, or should have known, that those in control of the blank mortgage application form were part of a mortgage ramping operation.

[133] We also consider that the defendant's conduct in allowing the use of her name, and that of Barfoots, on sale and purchase transactions involved in a mortgage ramping scheme conducted within the wide Iranian family referred to above was misconduct; because she either knew that their real estate activities were fraudulent or she must have inferred that."

[4] Accordingly, we found the charges proved. The Committee's position is that the Tribunal should cancel Ms Azimi's licence and fine her.

The Purposes and Principles of Disciplinary Orders

[5] McGrath J, for a majority of the Supreme Court (Blanchard, Tipping and McGrath JJ) in *Z v CAC* [2009] 1 NZLR 1 (at [97]), has stated:

"... the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure appropriate standards of conduct are maintained in the occupation concerned."

[6] We summarised the position with regard to the particular statutory scheme set out in the Real Estate Agents Act 2008 (Act) in *CAC v Walker* [2011] NZREADT 4:

"[17] Section 3(1) of the Act sets out the purpose of legislation. The principal purpose of the Act is "to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work." One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (s.3(2)).

*[18] This function has been recognised in professional disciplinary proceedings involving other professions for example, in medical disciplinary proceedings: *Taylor v The General Medical Council* [1990] 2 ALL ER 263 and in disciplinary proceedings involving valuers: *Dentice v The Valuers Registration Board* [1992] 1 NZLR 720. This is reinforced by the reference in the purpose provision to the Act (s.3) to raising industry standards and the promotion of public confidence in the performance of real estate agency work.*

[19] *In Patel v Dentists Disciplinary Tribunal High Court, (Auckland, CIV-2007-404-1818, 13 August 2007) Lang J held that disciplinary proceedings inevitably involve issues of deterrence and penalties and are designed in part to deter both the offender and other in the profession from offending in a like manner in the future.*"

Orders Available

[7] Mr McCoubrey noted that, charges of misconduct under s.73 of the Act having been proved, we may make any of the orders providing for at s.110(2) of the Act. Among other orders, it would be open to us to cancel the defendant's licence; suspend the defendant's licence for a period not exceeding 24 months; and fine the defendant up to \$15,000. In addition to the orders available under s.110, we may also make any of the orders that can be made by a Complaints Assessment Committee under s.93 on a finding of unsatisfactory conduct, refer s.110(2)(a).

Discussion

[8] We found that Ms Azimi aided one specific act of dishonesty (a mortgage application); and a dishonest scheme (the mortgage ramping fraud). Mr McCoubrey submits for the prosecution that those two activities are so fundamental to the business of real estate transactions that the licensee must have her licence cancelled.

[9] He adds that, at the very least, she ought to have known that those in control of the mortgage application were part of a mortgage ramping operation, and she must have inferred that the activities of those for whom she acted in the sale and purchase transactions were fraudulent; see paragraphs 132 and 133 of our said decision set out above.

[10] Mr McCoubrey also puts it that the real estate profession, which is often associated with the raising of finance from banks, rightly demands that practitioners within the industry approach these aspects of their profession with scrupulous care and honesty; and, in this, Ms Azimi has been found seriously wanting. He therefore submits that the protection of the public and the maintenance of standards requires no less firm a response than cancellation.

[11] In addition to cancellation, the prosecution submits that it would be appropriate to fine Ms Azimi.

[12] Mr Hislop (as counsel for the defendant) also referred to the above case authorities and then added:

"4. In summary a penalty must fulfil the following functions:

- a) Section 3(1) of the Act sets out the purpose of the Act and provides that the principle purpose of the Act is to promote and protect the public. One of the ways in which this is achieved is by providing accountability through an effective disciplinary process pursuant to section 3(2) of the Act.*
- b) The purpose provision of the Act under section 3 is to raise industry standards and to promote public confidence in the performance of*

real estate work. There is an emphasis to maintain professional standards as recognised in Taylor v The General Medical Council and Dentice v The Valuers Registration Board.

- c) *A majority of decisions stress that a penalty in a professional disciplinary case is about the maintenance of standards and protection of the public; however, there is also an element of punishment. This is in the form of a fine or censure. These are designed to deter both the offender and others in the profession from committing the same or similar offences.*
- d) *Rehabilitation: where necessary, the rehabilitation of the agent must also be considered.”*

[13] Mr Hislop also submitted that an order for compensation pursuant to s.110(2)(g) of the Act is not applicable to this particular offending *“taking into consideration that the Act requires there to be a loss due to the defendant’s misconduct”*, as he put it. He submits that there was no loss in this particular offending.

[14] Mr Hislop then, helpfully, notes that we must impose the least punitive/restrictive penalty on the defendant and that this must be balanced with the dual obligations to protect the public and the maintenance of standards; and the penalty must also be proportionate to the charge.

[15] Mr Hislop submits that taking into consideration the circumstances of the offending in this case, an order for the cancellation of the defendant’s licence is not warranted nor proportionate to the offending before us. He also submits that suspension is unwarranted taking into consideration that the defendant has already had her licence suspended since July 2012 and, he puts it, that term of suspension is sufficient in itself as a means of penalising the defendant.

[16] Mr Hislop notes that the defendant is currently unemployed and is the sole caregiver of her elderly mother which has caused her a significant amount of financial strain as have these proceedings on the defendant’s day-to-day life. Indeed, Mr Hislop puts it: *“She has reached a stage where she just wants this ordeal to be over and hopes to one day be in a position where she is accepted back into this industry”*.

[17] With regard to publication, Mr Hislop set out the following in his submissions:

“13. When the defendant was originally suspended, the details of the charges and suspension were reported by the media with a significant amount of publicity surrounding this offending. This has already caused the defendant a substantial amount of shame and embarrassment in her community. The Iranian community is a small community and she has already been subject to ridicule causing her a lot of anxiety.”

[18] In terms of aggravating and mitigating factors, Mr Hislop submits that there are no aggravating factors apart from the inherent elements of the offending in each charge. He submits that there was no loss suffered to any of the parties involved and that the defendant withdrew the loan application before it proceeded any further. Mr Hislop submits that there are no personal aggravating factors in relation to the defendant.

[19] He puts it that the mitigating factors in relation to the defendant are:

- [a] There have been no other complaints made by any other vendors or purchasers before or after the said offending;
- [b] The defendant has an otherwise unblemished record with the Authority and the Institute; and
- [c] The defendant's licence to practice as a real estate agent was suspended on 30 July 2012 and therefore she has not been in a position to derive any income as a real estate agent since then.

[20] Mr Hislop then summarised the defendant's stance as follows:

“Conclusion

- 17. *Taking into consideration the circumstances of the offending and the requirement for the Tribunal to impose the least punitive/restrictive penalty it is submitted that no further penalties should be ordered.*
- 18. *In normal circumstances a suspension would be appropriate however taking into consideration the fact that the defendant has been suspended since July 2012 prior to being found guilty in September 2014 no further suspension is warranted.*
- 19. *Furthermore the defendant has already suffered significantly financially. With the added shame and embarrassment suffered by the defendant in her community it is submitted that the principles of deterrence highlighted under the Act have already been addressed.*
- 20. *Taking into consideration the level of misconduct the defendant was found guilty, of, an order for the cancellation of the defendant's licence, is not a proportionate penalty to the offending.*
- 21. *It is submitted that due to her personal circumstances no further penalty should be imposed.”*

Outcome

[21] As we covered in our detailed decision of 16 September 2014, the misconduct of the defendant is concerning and at a serious level. We consider that the type of dishonesty displayed by the defendant must bar her from any future role as a real estate salesperson. We agree with the views expressed by Mr McCoubrey for the Authority. The public must be protected from the activities with which the defendant became involved.

[22] We accept that we must impose the least punitive/restrictive penalty on Ms Azimi in terms of protecting the public and maintaining proper industry standards, and that any penalty we impose must be proportionate to the charges and to the offending; and be fair and just overall.

[23] We are conscious that the defendant has been unable to work as a real estate salesperson since 30 July 2012; and has experienced much stress and humiliation from these charges and resulting publicity.

[24] We take into account the above factors outlined by Mr Hislop on behalf of the defendant.

[25] However, when we stand back and absorb the said various factors, we order that Ms Azimi's licence be cancelled and that she be fined \$5,000 to be regarded as a contribution to, or some compensation for, the costs of the Authority as prosecutor. That \$5,000 is to be paid to the Registrar of the Authority at Wellington within two calendar months of the date of this decision.

[26] 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 C Sandelin
Member