

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2015] NZREADT11

READT 065/14

**IN THE MATTER OF**

penalty under s.110 of the Real Estate Agents Act 2008

**BETWEEN**

**REAL ESTATE AGENTS  
AUTHORITY (per CAC 20003)**

Prosecutor

**AND**

**CHAIRAT (HENRY) SANTIPONGCHAI**  
of East Tamaki, Auckland, former  
real estate agent

Defendant

**MEMBERS OF TRIBUNAL**

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

**BY CONSENT HEARD ON THE PAPERS**

**DATE OF THIS DECISION** 28 January 2015

**REPRESENTATION**

Mr M J Hodge and Ms J MacGibbon, counsel for the prosecution  
The defendant on his own behalf

**DECISION OF THE TRIBUNAL (ON PENALTY)**

***The Admitted Charges***

[1] Complaints Assessment Committee 20003 has charged Mr Santipongchai with four charges of disgraceful conduct under s.73(a) of the Real Estate Agents Act 2008. Broadly, his conduct involved misleading clients into paying him money which he misapplied for his own benefit i.e. he committed three frauds.

[2] Section 73 reads in full as follows:

**“73 Misconduct**

*For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—*

*(a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*

- (b) *constitutes seriously incompetent or seriously negligent real estate agency work; or*
- (c) *consists of a wilful or reckless contravention of—*
  - (i) *this Act; or*
  - (ii) *other Acts that apply to the conduct of licensees; or*
  - (iii) *regulations or rules made under this Act; or*
- (d) *constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.”*

[3] The charges read in full as follows:

**“1. *Disgraceful conduct – Sukothai Restaurant***

*Complaints Assessment Committee 20003 (Committee) charges Chairat (Henry) Santipongchai (defendant) with misconduct under s.73(a) of the Real Estate Agents Act 2008 (Act) in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.*

***Particulars:***

*The defendant personally obtained \$5,000 from his client, the owner of the Sukhothai Restaurant:*

- (a) *by misleading his client about the reason those funds were required;*
- (b) *for the purpose of using the funds for his own benefit; and*
- (c) *misled his employer about the reason why he personally obtained those funds.*

**2. *Disgraceful conduct – 63 Chesterfield Mews***

*The Committee charges the defendant with misconduct under s.73(a) of the Act in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.*

***Particulars:***

*The defendant personally obtained \$20,000 from the purchasers of 63 Chesterfield Mews, Russley, Christchurch under an agreement for sale and purchase dated 23 September 2012:*

- (a) *by misleading the purchasers about how those funds would be held;*
- (b) *used the funds for his own benefits;*
- (c) *misled the purchasers about how those funds had been held.*

**3. *Disgraceful conduct – Rosewood Court Motel***

*The Committee charges the defendant with misconduct under s.73(a) of the Act in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.*

**Particulars:**

*The defendant personally obtained \$499 from his client, the owner of the Rosewood Court Motel, 85 Sherbourne Street, St Albans Street, Christchurch:*

- (a) by misleading his client about how those funds would be applied; and*
- (b) used the funds for his own benefit.*

**4. Disgraceful conduct – agency work on own account without agent’s licence**

*The Committee charges the defendant with misconduct under s.73(a) of the Act in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.*

**Particulars:**

*The defendant carried out real estate agency work in relation to the Sukhothai Restaurant, 63 Chesterfield Mews, and the Rosewood Court Motel on his own account without holding an agent’s licence under the Act.”*

[4] Mr Santipongchai has admitted charges 1 to 3, but has not commented on charge four. We consider that the defendant’s acceptance of charge 4 must follow, given his acknowledgement of the other charges, because charge 4 flows from the matters covered by the first three charges.

**Factual Background**

**Sukhothai Restaurant**

[5] Mr Santipongchai misled his vendor clients by stating that they needed to pay \$5,000 for his agency’s marketing/advertising costs. In fact, there was no such requirement and his agency knew nothing about the payment Mr Santipongchai required from his clients. When subsequently questioned by his agency about this, Mr Santipongchai stated that the \$5,000 was repayment of a personal debt owed to him, which was untrue. In an interview with the Committee’s investigator, Mr Santipongchai admitted his conduct was wrong. Mr Santipongchai has repaid the \$5,000 to his vendor clients.

**63 Chesterfield Mews**

[6] Mr Santipongchai obtained \$20,000 from purchasers of the above property under an Agreement for Sale and Purchase dated 24 September 2012 on the basis that those funds were to be held in a neutral account until title had transferred. In fact, Mr Santipongchai immediately spent the funds for his own benefit. Those funds have not been paid.

### **Rosewood Court Motel**

[7] Mr Santipongchai obtained \$499 from the client vendor of this Motel on the basis it would be spent on TradeMe advertising. In fact, Mr Santipongchai did not spend the funds on TradeMe advertising, he instead applied them for his own personal benefit.

### **Charge Four**

[8] There is no record of any listings with the defendant's employer agency for 63 Chesterfield Mews and Rosewood Court Motel or the Sukothai Restaurant. Although the licensee has not stated whether he admits this element of charge 4, we accept that, given his acknowledgement of real estate agency work in respect of the three properties referred to above, and the absence of a listing with his agency, charge 4 is proved. In any event, given the gravity of charges 1 to 3, the penalty in this case must be the same even if charge 4 is not taken into account.

### **The Response of the Defendant**

[9] In a typewritten response of 13 August 2014, Mr Santipongchai has advised that he is very regretful about the events set out in the charges. He accepts responsibility without excuse but adds *"even though I may have foolishly thought I was doing the right thing at that time"*.

[10] He covered his experience as a real estate agent over about 10 years during which he achieved very high sales. He has spoken at annual conferences of his then employer and has conducted training seminars, mainly, for salespeople in Christchurch. He feels he has let down Harcourts, his God, and himself.

[11] He said that he was bankrupted by the IRD on 15 August 2013 having fallen behind in his debt to the IRD due to the Christchurch earthquakes affecting his business. He says that when he heard of the complaints against him, he voluntarily suspended his salesperson's licence and all these experiences have made him reflect on what steps he needs to take *"to straighten myself out"*.

[12] The defendant emphasises that he totally regrets these and other matters, will not reoffend again, and is turning to religion probably in a missionary manner in Thailand. He seems unsure whether he should seek to work again as a real estate salesperson to earn some money and be less of a burden to his family financially; also, by such work he could accumulate financial resources for religious missionary work; or whether he should simply leave the real estate industry and move into some other area of employment.

[13] In any case, the defendant appeals to this Tribunal for mercy and adds *"I know what I did was wrong, I will do my best to make up for it by repaying at the earliest time I can, I will never go and do the wrong again ..."*.

[14] The defendant also seems to be adding that he would like name suppression i.e. he puts it *"I would really appreciate it if these charges could be off the records. I am not be selling houses anymore and will devote the majority of my time to training and teaching people to do the right thing, to helping build churches in New Zealand such as the Thai-Laos Christian Fellowship and move on to Thailand, Laos and Myanmar when the time comes."*

[15] Since then (i.e. on 20 November 2014) Mr Santipongchai advises that he has nothing further to add on his behalf and states *“I have voluntarily surrendered my licence, I am bankrupt, I am trying to pick up the pieces put them together into a better me and a better life ...”*

### **Discussion**

[16] Mr Santipongchai’s remorse is acknowledged. However, the gravity of his misconduct is such, it is submitted by the prosecuting Authority, that an order for cancellation of his salesperson’s licence must be made. It is also put by counsel for the prosecution that compensation orders in favour of Mr Santipongchai’s victim would have been sought, but for his bankruptcy.

[17] We have summarised the purposes and principles 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 that 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. 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 agency work.*

*[19] In Patel v Dentists Disciplinary 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 others in the profession from offending in a like manner in the future.”*

[18] It is submitted by Mr Hodge for the prosecution that the appropriate order against Mr Santipongchai is one of licence cancellation. It is put that Mr Santipongchai has engaged in conduct which is flagrantly dishonest. Funds were taken from vendor clients on three occasions and have only been repaid in one case. The largest amount, \$20,000, has not been repaid. It is also put that, in circumstances where licensees deal with trust funds, proper processes must be followed. It is submitted that there would be a significant public risk in allowing Mr Santipongchai to be in a position to reinstate his licence.

[19] It is put for the prosecution that we have taken a consistent and strong stance against dishonest behaviour affecting consumers. In *REAA v Brendan Marshall* [2013] NZREADT 101 the licensee had been charged with instances of fraud against his employing agency and dishonesty against a client; and we found that:

*“[50] The evidence is compelling that a substantial number of concerning frauds have been committed by the defendant. We agree with the submission of Mr Clancy that even one of the instances of said frauds amounts to disgraceful conduct; so that there is misconduct on the part of the defendant. However, we find that the evidence proves, on the balance of probabilities, that there has been much more than simply a one off instance of fraud but, rather, a pattern of conduct seemingly triggered by what the defendant has referred to as his gambling addiction.”*

[20] We went on to say:

*“[51] Our finding of misconduct means that we need to deal with the issue of penalty. There can be no doubt that the misconduct committed by the defendant and outlined above is of such a serious nature that there must be cancellation of his real estate agent’s licence.”*

[21] In *REAA v Stevenson* [2013] NZREADT 74 we considered penalty in light of dishonesty under the Real Estate Agents Act 2008. Mr Stevenson was found guilty of dishonesty involving forging the signature and initials of the complainants on the commission rate and disclosure form. He was also found guilty of seriously incompetent or negligent real estate agency work. We determined that it was appropriate to cancel Mr Stevenson’s licence.

[22] We accept that this case is one where cancellation of Mr Santipongchai’s licence is the appropriate outcome. He went outside the procedure of his employer agency and conducted a series of real estate work without any agency knowledge, that enabled him to dishonestly take funds from his clients. We agree with Mr Hodge, as counsel for the prosecution, that a penalty order of cancellation of licence is needed to mark the seriousness of the conduct should Mr Santipongchai apply for a licence in the future. Mr Santipongchai’s voluntary surrender of his licence is not a cancellation under the Act. The approach sought by Mr Hodge has been adopted in cases such as *REAA v Kitto* [2013] NZREADT 70 where we said at [33] *“we have been informed that some licensees have been surrendering their licences, or not renewing, with a view to avoiding orders being made against them under this Act, or so they think. As we have indicated above, surrendering or not renewing a licence cannot avoid the effect of s.71 of the Act which enables us to deem a former licensee to be a present licensee for the purposes of our sentencing for proof of misconduct”*.

## **Outcome**

[23] We agree with Mr Hodge’s said submissions on behalf of the prosecution. We take into account the defendant’s remorse and early plea of guilty and his apparent good intentions of rehabilitation. However, he must be firmly penalised, although a fine and costs orders seem futile due to the defendant being bankrupt.

[24] In all the circumstances, we order cancellation of the defendant’s salesperson’s licence under the Act, which we understand to be License No. 10014049 in the name of Henry Santipongchai.

[25] We understand that a total of \$20,499 is still owed to two clients, but Mr Santipongchai has been adjudicated bankrupt. The prosecution observe that, unfortunately, therefore, no compensation order may be made. We can appreciate

that it seems that the defendant's financial situation makes any compensation orders futile; although we do not have details of his financial situation and prospects other than that he seems to have been bankrupted at the behest of the IRD. We note that in his submission to us, the defendant suggests that he intends to repay his debts. We do not have precise details of his liability to complainants and, presumably, those complainants have filed as creditors in the bankruptcy. To cover any eventuality, we reserve leave to apply on the issue of compensation.

[26] At this point, we know of no compelling reason to grant name suppression as the defendant seems to be seeking. He is entitled to apply for restriction on publication in terms of s.108 of the Act and, no doubt, the prosecution would respond. We think it unlikely, in the relevant circumstances as we now understand them, that any non-publication order can be granted.

[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.

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Judge P F Barber  
Chairperson

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Mr J Gaukrodger  
Member

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Mr G Denley  
Member