

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 24

READT 086/14

IN THE MATTER OF

an application for review under
s.112 of the Real Estate Agents
Act 2008

BETWEEN

CATHERINE FOOT of Wellington,
Former Real Estate Agent

Applicant

AND

**THE REGISTRAR OF THE REAL
ESTATE AGENTS AUTHORITY**

Respondent

MEMBERS OF TRIBUNAL

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

HEARD at WELLINGTON on 6 March 2015

DATE OF THIS DECISION 10 April 2015

COUNSEL

Mr K R Smith, for the applicant
Ms S M Earl, for the respondent Registrar

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Catherine Foot has applied to us for a review of a 3 September 2014 decision of the Registrar of the Real Estate Agents Authority declining her application to renew her salesperson's licence. The Registrar made the determination in light of Ms Foot's previous convictions for tax evasion offences.

The Offences

[2] In May 2011, Ms Foot was convicted (after pleading guilty) to various charges under the Tax Administration Act 1994 involving the evasion of \$222,171 in income tax and GST. The offences were:

- [a] Ten offences under s.148(1) of that Act (aiding or abetting a company to evade tax);
- [b] Two offences under s.143A(1)(c) of that Act (knowingly providing false, incomplete or misleading information to the Commissioner of Inland Revenue);
- [c] One offence under s.143A(1)(b) of that Act (knowingly failing to provide an income tax return).

[3] In sentencing Ms Foot to eight months home detention and 250 hours community work, Judge J Walker noted (in the Lower Hutt District Court):

- [a] The offending involved *“intricate transactions which resulted in companies controlled [by Ms Foot and her partner] obtaining GST refunds in respect of various purchases of property but not paying Goods and Services Tax and Income Tax when properties were sold”*;
- [b] That a good character discount was not appropriate given that the offending was repetitive over a period of years so as to cancel out any reduction due for good character.

The Registrar’s Decision

[4] After reviewing information about the convictions, the Registrar of the Authority determined as follows:

“Your application has been declined on the basis that I am not satisfied that you are, pursuant to section 36(2)(c) of the Act, a fit and proper person to be licensed as a salesperson.

In 2011 you were convicted of a number of offences relating to tax evasion. You were convicted of offences which required knowledge of wrong doing on your part. Licence holders under the Act have a number of obligations which require them to act with the highest level of honesty and integrity. While tax evasion is not a crime of dishonesty under s.2(1) of the Crimes Act 1961 these convictions mean that I am not satisfied that you have the requisite level of honesty and integrity for re-entry into the industry and, therefore, that you are not a fit and proper person to hold a licence. It is essential that consumers are able to rely on the honesty and integrity of real estate agents in respect of real estate transactions.”

[5] We regard those sentiments as very sensible and understandable in terms of the evidence then before the Registrar.

Relevant Principles

[6] Sections 36 and 37 of the Real Estate Agents Act 2008 (“the Act”) relevantly provide:

“36 Entitlement to licence

...

(2) *An individual may be licensed as a salesperson if the individual satisfies the Registrar that he or she—*

- (a) *has attained the age of 18 years; and*
- (b) *is not prohibited from holding a licence under section 37; and*
- (c) *is a fit and proper person to hold a licence; and*
- (d) *has the prescribed qualifications. [our emphasis]*

37 Persons prohibited from being licensed

(1) *The following persons are not eligible to hold a licence:*

- (a) *a person who has been convicted, whether in New Zealand or another country, of a crime involving dishonesty (or of a crime that, if committed in New Zealand, would be a crime involving dishonesty) within the 10 years preceding the application for a licence.*

...”

[7] A “*crime involving dishonesty*” is defined at s.4 of the Act as having “*the same meaning as in s.2(1) of the Crimes Act 1961*”. That definition does not include the offences for which the applicant was convicted.

[8] We noted in *Revill v Registrar of the Real Estate Agents Authority* [2011] NZREADT 41, that the “*fit and proper person*” test under s.36 is wider than the absolute prohibition following dishonesty convictions set out at s.37 and we put it:

[9] The “fit and proper person” criterion applies in addition to the prohibitions which apply under s.37. In other words, a person may not be prohibited from holding a licence under s.37 but may nevertheless not satisfy the Registrar that he or she is a fit and proper person.”

[9] In *Revill*, we summarised the general principles applicable to an application to review a decision of the Registrar not to grant a licence and set out that:

“[12] The onus is on the applicant for a licence to satisfy the Registrar that he or she is a fit and proper person to hold a licence ...

[13] The standard of proof is the ordinary civil standard of “on the balance of probabilities”. However, sufficient and adequate information must be provided in order to meet this standard. This point was made by the Supreme Court in

Westfield (New Zealand) Ltd & Anor v North Shore City Council & Anor [2005] 2 NZLR 597.

[14] *In Marie-Ann Nixon v Real Estate Licensing Board of NZ (HC Auckland, 22/93, 23 August 1994), the High Court held that the starting point in any determination is that good character is presumed unless a real question-mark is raised by the evidence. If a question mark has been raised then, as was held in L v Canterbury District Law Society [1999] 1 NZLR 467 at 474:*

“... the [applicant] must establish affirmatively that he is a person of unquestionable integrity, probity and trustworthiness and that since the [offending] he has ‘so far amended his ways and character that he is now a fit and proper person to practise on his own account’.”

“Fit and Proper”

[15] *In Re T [2005] NZLR 544, at 547, the High Court highlighted four features relevant to the required assessment under the Law Practitioners Act 1982, namely:*

- [a] *The focus is necessarily forward looking. The function of the Court is not to punish the applicant for past conduct. Rather, the issue is “worthiness and reliability for the future”.*
- [b] *The onus on a person who has erred in a professional sense following admission to the profession, is heavier than that upon a candidate for admission.*
- [c] *Due recognition must be given to the circumstances of youth where errors of conduct occurred when an applicant was immature.*
- [d] *It is important to look at the facts of the case in the round, and not just have regard to the fact of a previous conviction or convictions.*

[16] *The cases affirm it must be borne in mind that it is a significant step to deprive a person of a licence or status. However, the primary consideration is the principle that the Court must be satisfied objectively that the candidate is a fit and proper person. The judgment of the Court is to be made in the interests of the community having regard for the legal profession.*

[17] *We accept that this principle is equally applicable to licensing decisions under the Act which is a piece of consumer legislation and s.3 puts its purposes as: “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.”*

[10] As set out in *Revill*, the onus is on Ms Foot to satisfy us, on the balance of probabilities, that she is a fit and proper person to be granted a licence and she must provide sufficient and adequate information to so satisfy us.

[11] In the *Westfield* case referred to by us in *Revill*, the Court considered the ambit of the word “satisfy” in the context of decision making under the Resource Management Act 1991; and Elias CJ held:

“[23] The requirement that the consent authority must be “satisfied” that adverse effects on the environment are minor before it decides not to notify a resource consent application for a discretionary activity is a significant obligation. By contrast, when a substantive decision is made on the application for a resource consent for a discretionary activity under s.105, the consent authority is simply empowered to decide whether or not to grant the consent and on what conditions, after taking into account the considerations identified by the Act and in the context of the plan. Such decisions may be finely judged. That is not the approach required of the decision maker by s.94(2). The requirement that the consent authority be “satisfied” that adverse effects on the environment are minor is a pointer to additional conviction and the need for some caution.”

[12] In *Westfield*, Keith J held:

“[52] Significant in the basic requirements stated in ss.93(1) and 94(2) are the double emphasis on “satisfied”, the strongest decisional verb used in the Act, the etymology of “satisfy” (to do enough), and a standard meaning relevant in this context – to furnish with sufficient proof or information; to assure or set free from doubt or uncertainty; and to convince; or to solve a doubt, difficulty.”

[13] In *Westfield*, Blanchard J, with whom Richardson J concurred in a short judgment, held:

“[108] The information which the consent authority must have, in order that it can properly be “satisfied”, must be adequate for it to make [the relevant determinations]. ...”

[14] Examples of cases in which we have found that past conduct not involving convictions for dishonesty offending, nevertheless, renders an applicant not a fit and proper person to be granted a licence include:

- [a] *Zaheed v Registrar of the Real Estate Agents Authority* [2013] NZREADT 107. As in the present case, the applicant had convictions for tax evasion which had led to a sentence of home detention;
- [b] *Parlane v Registrar of the Real Estate Authority* [2013] NZREADT 94. The applicant had previous disciplinary findings against him made by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[15] In declining the application for review in *Parlane*, we commented that: *“It is fundamental that any real estate salesperson have sound ethics and there must be no doubts about that.”*

A Summary of Relevant Evidence

Evidence of The Applicant

[16] The applicant recorded that, just after she was made aware that she was to be prosecuted by the Inland Revenue Department in 2011, she voluntarily had the Authority place her real estate salesperson’s licence on hold and, from then, she ceased to operate as a real estate agent. She also made a full and frank disclosure to her then employer, Leaders Real Estate (1987) Ltd. She completely cooperated with officers of the IRD.

[17] The applicant stresses that she takes full responsibility for the conduct for which she was prosecuted by the IRD and is fully remorseful but believes there is some weight in the view that she was influenced by her domestic partner.

[18] There seems to be no dispute that the applicant is well educated with university qualifications and has been impressive in various senior work positions which require total honesty and integrity, including as a successful real estate salesperson. We accept that the probation office regarded her as being at a low risk of reoffending and with no previous criminal history.

[19] It does seem that, in terms of the business activities which led to the charges by the IRD, she was out of her depth and reliant on her domestic partner. Indeed, His Honour Judge J Walker regarded the latter co-offender as the architect of the offending and that the core tax evaded at his hands was considerably more than the core tax evaded by the companies in which the applicant was involved. However, the applicant accepts His Honour's view that he was satisfied the applicant knew what she was doing, at material times, to be wrong and illegal and that the offending took place over a nine year period. At sentencing, His Honour also accepted that the applicant was generally remorseful about her offending.

[20] The applicant emphasises that a number of persons have filed evidence briefs in her support regarding the present application to review the decision of the Registrar, and that she has been offered employment again with Leaders. Its managing director, Mr R G Garlick, has given evidence in her support which we refer to below. The applicant also particularly referred to the support she is receiving from Mr E Murrell, another senior real estate agent, whose evidence we also refer to below. She feels that, with such support, she can restore her good character and operate as a salesperson again with integrity and professionalism.

[21] Of course, the applicant was carefully cross-examined by Ms Earl on behalf of the Authority.

[22] It seems that the charges against the applicant arose out of her operating a property development company in a relatively small way. While the applicant fully acknowledges her said offending against our revenue laws, it is put that she was given bad advice from her domestic partner. That domestic relationship still continues. She was the sole director of the three companies involved in the offending and it seems that she knowingly assisted those companies avoid about \$222,000 in tax and GST.

[23] Also under cross-examination it emerged that the applicant did not use the avoided tax extravagantly and, indeed, some of it seems to have been spent on travelling to Australia to study for a real estate agents licence there. Curiously, there seems to have been no reparation to the IRD by the companies on the basis that, although the applicant was at material times a senior real estate agent in New Zealand, she had no savings and, of course, had handed in her real estate salespersons licence.

[24] The applicant accepts that the charges against her (brought by the IRD) involve the element of dishonesty. It seems that in a regular way the applicant sought a sentence indication from the District Court and then pleaded guilty on that basis.

[25] The applicant made it clear that she will fully accept whatever work supervision we impose on her should we grant her application, whether that be through Mr Garlick or anyone else. It seems that, even recently, the applicant had mentored other salespersons and assisted them understand relevant real estate law and practice.

[26] In re-examination, the applicant made it clear that she now has no business connections whatsoever with her domestic partner. She would accept a condition for restoration of her salesperson's licence that she not be involved in any property development work directly or indirectly. It seems that her three companies referred to above had handled property development work by buying land and subdividing it and, sometimes, had a house renovated or erected, but those activities created losses overall and relevant income tax and GST was not paid. Indeed, as well as aiding her said partner's company to fraudulently avoid a significant GST sum, she and her companies did not seem to pay income tax or GST for about five years.

The Evidence of Mr R G Garlick

[27] Mr R G Garlick, referred to above, gave evidence in support of the application. He has been a real estate agent practising in Wellington for about 27 years and is currently the majority shareholder, licence holder, and director of Leaders Real Estate (1987) Ltd which employs approximately 180 salespeople dealing in real estate in the Wellington area. He holds an engineering degree from Auckland University and has completed most of a B.Com degree.

[28] Mr Garlick has known the applicant since she joined Leaders as a trainee in 1998 and came under his direct control in the usual way. He said that at no stage had she given any ground for any concern in respect of her being a fit and proper person for the purposes of the Act. After some years from 1998 she had left Leaders but returned in about 2008 and was still an employee of Leaders until she voluntarily put her licence on hold in 2011.

[29] Mr Garlick stressed that *"in respect to my opinion of the applicant being a fit and proper person, the only incident that gave rise to concern prior to the tax evasion matters was a complaint to the REAA and that was in respect to a sale in Wright Street, Wellington and the complaint alleged that she had not disclosed to one party the possibility of a subdivision occurring nearby."* Mr Garlick put it that *"I have never evidenced prior to the tax matters any dishonesty on the part of the applicant in any business matter"*. He has seen nothing to change his mind and emphasises that there is a job available to the applicant at Leaders should she be granted her licence in terms of this current review.

[30] Mr Garlick then concluded his evidence-in-chief as follows:

"12. That should the applicant be granted her licence and take up employment with my company I offer to this Board a commitment to supervise the applicant in her dealings when in my company's employment and to mentor her and offer advice should she require. As part of the supervision process, I undertake to keep an eye on her dealings and to meet regularly with her to discuss the transactions in which she is involved.

13. *I believe that the appellant is a fit and proper person for the purposes of the legislation to have her licence restored to her. I stand by her in that regard.*
14. *I further confirm that it is my understanding that the applicant intends to take up my company's offer of employment if possible."*

[31] Mr Garlick admitted that he did not know the precise detail of the applicant's offending against revenue laws but accepted that they came out of financial mismanagement. He saw that offending as "*an unfortunate but closed chapter in her [the applicant's] life*" and said that he had never had any concerns about her behaviour. It was put to him by Ms Earl whether he would impose additional supervision on the applicant if she returned to work for Leaders. He seemed to respond that Leaders have systems for compliance which follow strict processes, that none of the agents actually handle money, that the applicant has easily complied with those procedures in the past and he would not expect "*any further intrusion by me or Leaders*", and she will be required to observe her contract of service but that the requirements of the Act for Leaders to supervise her will be strictly observed.

[32] In re-examination, Mr Garlic added that the processes of Leaders are fairly exacting and Leaders has a chain of command and systems regarding the processing of paper and it would be hard for a real estate salesperson "*to get it wrong*". However, he did emphasise that he would readily accept whatever restrictions we might impose, if we grant this application, including his meeting with the applicant weekly to review her work files. He put it that: "*if the Tribunal defines what it requires of me regarding supervising the applicant, I shall comply*".

The Evidence of Mr E G Murrell

[33] Mr Murrell is a senior local body member and prominent company director, including as a director of Esplanade Realty Ltd of Mana, trading as Tommy's. He is a Justice of the Peace.

[34] In about 2007 he first met the applicant in the real estate industry when she came to work at an agency of which he was the general manager. She worked at that agency for about two years under his direction. He was responsible for compliance matters in respect of the agency's business operations and the conduct of agents. Accordingly, he had a daily overview of every agent working under his managership, including the applicant. During that time Mr Murrell was entirely satisfied with the ethical behaviour and conduct of the applicant and he had no concerns as to her character and fitness to be an agent. Since then he has had intermittent contact with her on a professional basis. She has explained to him the circumstances of the 2011 complaint against her and of the prosecutions brought against her by the Inland Revenue Department. He concluded his evidence-in-chief as follows:

- "17. Be that as it may and being aware of those matters I have no difficulty whatsoever in standing by the applicant and recommending her for the return of her sales persons licence so that she might return to the industry. I have sufficient knowledge of the applicant to say that I believe that she is an honourable and honest person and the IRD matter did surprise me when I heard of them. However, in light of my knowledge of the applicant I*

am of the view that those matters were an aberration and totally out of character.

18. *I do not believe that the applicant will ever offend again. I have total confidence in my estimation in this regard."*

[35] In the course of his evidence-in-chief, Mr Murrell mentioned that he is experienced at giving ethical advice to fellow real estate agents and to mentoring some of them. He is confident that, if the applicant felt she had any difficulties of any type, she would either approach him or some other senior person in the industry.

[36] Under cross-examination, Mr Murrell said that if the applicant applied to his company to be a real estate salesperson now he would *"take her on"*, although he knows that the Porirua area is not her favoured area of work and that she prefers the Wellington city area. He emphasised that he considered the applicant's work and ethics were exemplary and he had no issues with her whatsoever as a salesperson. He felt that the offending covered above seems quite out of character to the person he knows her to be. He would not expect those past problems to impact upon her future work if we grant her application. He considers the applicant to be an outstanding agent and excellent at dealing with people; and he feels he knows that because he dealt with her on a daily basis for two years.

Other General Evidence in Support of the Applicant

[37] By consent, nine other evidential statements were adduced in support of the applicant and we now cover generally matters raised in them.

[38] One male witness had known the applicant for about 25 years and been mentored by her and lifted from a life which seemed to be going nowhere to the director and shareholder of a residential property maintenance company. He said that was largely with the encouragement of the applicant who, inter alia, manages his bank accounts and the administration of his staff and financial commitments, including cash flow, management, and office administration. He now has an excellent credit rating and a successful business. He is aware of the offending of the applicant covered above but trusts her with his business and his life and believes she is a person of the utmost integrity and professionalism.

[39] A female witness has been a close friend of the applicant since meeting her at university in 1990 believes her to be honest and eminently suitable to continue to work in the real estate industry. That witness is aware of the applicant's said offending and knows that the applicant is extremely remorseful and disappointed in herself but wishes to put that behind her and move positively ahead in her life. The applicant has on a number of occasions provided that witness with wise counsel in various ways and shown her genuine kindness. She refers to the applicant as a very humble person, most willing to help others, and having a truly philanthropic spirit. She said that the applicant has helped her grow her small crafts business with sound advice about business concepts and web development techniques and ideas.

[40] Another female witness is a property manager who has held a real estate agent's licence for 17 years and known the applicant for many years and is aware of the IRD prosecutions. That witness has also been greatly helped in various ways by the applicant on a gratuitous basis and considers that her said offending *"runs*

entirely against the character of the person I know". She regards the applicant as a person of high integrity and high professionalism.

[41] Another such witness, a male, is a Wellington property owner who has been the principal of a real estate agency. He is aware of the IRD prosecutions and considers that conduct completely out of character for the applicant. He considers that conduct was a *"singular one off type of incident, something that would never occur again and I have no difficulty whatsoever in providing to and for the applicant my highest reference and recommendation"*. He concludes:

"10. I can highly recommend the applicant and, with her vast knowledge, experience of the wider property industry, her professional qualification and enthusiasm, believe she has a lot to offer the real estate industry should she be granted her salesperson's licence."

[42] There is also evidence from a female Transpower executive providing further examples of dedicated support for her from the applicant, both personally and in business, entirely on a gratuitous basis because the applicant would not accept any money or reward of any type from this deponent who seems to have needed such support as she had left her home country of Iceland in 2007. That deponent states that the applicant is the only real estate agent she would ever entrust with her business.

[43] Another male witness has known the applicant since the early 1980s, has been encouraged by her to obtain a university degree, and has been advised and counselled by the applicant in many ways and considers the applicant to be an honest person and open to that witness about her difficulties in offending with the IRD. He has worked together with the applicant on a prototype of an E-Commerce website relating to the real estate industry and says that the applicant has imparted much business knowledge to him and that he would absolutely trust the applicant with any business dealing including dealings in real estate.

[44] Another male witness employed the applicant in 2002 when he was the owner/operator of a real estate agency. He found the applicant, in dealing with clients, to be courteous, professional, knowledgeable, and to display a high standard of ethical behaviour. He is aware of the IRD prosecutions. He is firmly of the view that the applicant is a person of integrity for the purposes of the real estate industry and a fit and proper person with high standards who will never repeat any offending. He would be entirely happy to offer her employment and to be a mentor to her in any way at any time should she obtain back a real estate salesperson's licence.

[45] Another female witness, a licensed real estate agent, gives similar evidence to previous witnesses to the effect that the applicant is a person who does things by the book, that the IRD offending was completely out of character, the applicant is very remorseful and, in the opinion of that witness, a person of complete honesty and integrity, and a fit and proper person to have her licence restored. She has also been mentored and assisted by the applicant in the real estate industry.

[46] Finally, there is evidence from another real estate agent in Wellington. He has been a licensed real estate agent since 1986 and has the highest respect for the applicant whom he has always found to be very honest in her dealings with the highest integrity. He is aware of the problems with the IRD and of the applicant's remorse and embarrassment. He states that he has received much support from the concern and wisdom of the applicant and observed that, if an issue ever arises for

him in the practice of real estate, she is the first person he contacts for guidance and advice.

The Submissions for the Registrar

[47] It is submitted by Ms Earl for the Registrar that we were correct, in *Revill*, to emphasise that the primary consideration on any review under s.112 is that we must be satisfied objectively, on sufficient and adequate information, that the candidate is a fit and proper person, bearing in mind the consumer protection purpose of the Act.

[48] Ms Earl observed that it is axiomatic that, for consumers, real estate transactions are often the largest and most important they will enter into in their lives and, accordingly, can be stressful for all parties concerned. She submitted that it is essential that consumers are able to rely on the honesty and integrity of licensees who act in such transactions. We agree. She also noted that decisions about whether or not to grant licences to those previously convicted of criminal offences form a key part of ensuring consumer protection and delivering the Act's purpose.

[49] Ms Earl submits for the Registrar that the decision to decline Ms Foot's application for her licence to be reinstated should stand.

[50] She submits that, given the seriousness of the tax evasion convictions, Ms Foot has not discharged the onus on her to provide sufficient and adequate information to satisfy us that she is now a fit and proper person to hold a licence.

[51] It is also put that the convictions do not relate to a one-off event in the applicant's youth; that the convictions relate to a deliberate and sustained course of conduct, over a period of years, calculated to result in a significant financial advantage to the applicant to which she was not entitled; that the offending involved deliberately misleading the Commissioner of Inland Revenue and resulted in a significant criminal penalty; and that these matters all go directly to the applicant's probity and reliability and must raise significant consumer protection concerns.

[52] We can accept that the applicant's offending occurred after she had commenced practice as a real estate professional and so her burden is heavier than it would be on a candidate for admission (rather than, in this case, re-admission).

[53] It is also put that we may feel that there is a degree of minimisation in the applicant's evidence, in that she continued to emphasise the role of her co-offender (and domestic partner) in instigating the offending, rather than her own such role.

[54] Ms Earl observed that while the applicant has some support from within the industry and an offer of employment, that factor is not determinative of her application, as was discussed in *Parlane*; but it is just one factor to be taken into account. We agree.

[55] The Registrar respectfully invites us to decline the application for review.

The Stance of the Applicant

[56] We covered above the evidence of the applicant and that given on her behalf by various witnesses only two of whom were required for cross-examination in addition to the applicant, namely, Messrs R G Garlick and E G Murrell.

[57] In his opening submissions, Mr Smith noted that the issue is whether or not the applicant is a fit and proper person of good character to warrant the return to her of her salesperson's licence. We referred above to the evidence on her behalf but record the following from Mr Smith's initial submission, namely:

- “3.1 The previous remarkable professional career and history.*
- 3.2 The openness of Ms Foot when faced by the Inland Revenue Department with these matters. The openness with her employer and her placing voluntarily of her licence on hold when these matters arose.*
- 3.3 That there has been no attempt to deny the offending, no attempt to minimise except for the real and justified assertion that the architect of these offences was not herself.*
- 3.4 That she acknowledges that she should have resisted even if not fully aware of consequences or of illegality but certainly does not deny that what was happening was wrong.*
- 3.5 Her genuine remorse recorded not only today but also at the time as evidenced in the probation officer's report and her then counsel's submissions and accepted by the sentencing Judge.*
- 4 The evidence of those in the real estate industry given today. This evidence is important for the following reasons:*
 - 4.1 That she has three offers of employment.*
 - 4.2 That she has support props in place for supervision and counsel.*
 - 4.3 That even despite this offending a number of people very experienced in the industry believe in her and believe in her integrity and further believe that she will never offend again in any way.*
- 5 In respect to the remaining witnesses that the following is seen to be relevant:*
 - 5.1 That there are people who truly believe in her and support her.*
 - 5.2 That she has been generous in her endeavours, professionally and personally in helping people and has, it is submitted, done more than most in assisting those who need help and in that regard one only has to look at her work for Mr Brooking and with Ms Vine for confirmation of the type of person that is before this Tribunal.”*

[58] Of course, Mr Smith very helpfully referred to relevant law fairly much as covered above. He accepted that the burden is on the applicant to satisfy the Registrar, and then us, that she is a fit and proper person to hold a licence and that the standard of proof is the ordinary civil standard of on the balance of probabilities. He accepted that sufficient adequate information must be provided to meet that onus and that standard of proof.

[59] As Mr Smith emphasised, our focus should be forward looking, it is not our function to punish the applicant for past conduct, and the issue is worthiness and reliability of the applicant for the future. Mr Smith also accepted that the onus on a person who has erred in a professional sense following admission to the profession is heavier than upon a candidate for admission. We also accept, of course, that it is important to look at the facts of the case in the round and not just have regard to the fact of previous conviction or convictions.

[60] Mr Smith noted that the error of conduct on the part of the applicant was, to some extent at least, under the influence of her domestic partner who was described by the District Court sentencing Judge (His Honour Judge J Walker) as the architect of the offending.

[61] Mr Smith emphasised that the applicant has been involved in real estate work for 16 years and the evidence provided to us shows, he submits, that she is highly regarded in the industry, has three offers of employment, and has support processes in place where she can be employed and she will be well regarded and well supervised. He also put it that she is very motivated in terms of working in the real estate industry again.

[62] Mr Smith put it that the applicant's proposed employer, Leaders Real Estate through the said Mr Garlick, is conscious of the requirements of s.50 of the Real Estate Agents Act 2008 which requires that a salesperson be supervised and that company has a supportive and ongoing educational process for its agents and she will be well supervised there if we grant this application.

[63] In terms of the case authorities, Mr Smith submits that in this particular case the applicant deserves a second chance at her career. He acknowledges that the applicant will need to apply for an annual renewal of licence so that any failure on her part (if we allow her to re-enter the industry) could be fatal to her career in the light of events to date with regard to the Inland Revenue Department.

[64] Mr Smith submits, inter alia, that the applicant is well able in respect of the office of a real estate agent to honestly execute it truly and without malice, affectation or partiality. He also puts it that the evidence shows that the applicant has the necessary knowledge to operate as a successful and upright real estate agent with 16 years experience and is considered highly in the industry and to have ability.

[65] Finally, Mr Smith put it that the applicant does not seek prohibition of publication of her name or of these proceedings and she has accepted her lapses in respect of the Inland Revenue Department obligations and does not seek to hide behind suppression. He submits that, throughout her said tribulations with the Court process, she has handled herself with integrity.

Discussion and Outcome

[66] As Mr Smith put it, the applicant has not minimised her offending, fully accepts her guilt, and appears extremely remorseful. It is put for her that, if we are minded to readmit her to the real estate industry, she will willingly accept the most stringent supervision conditions and will not offend again.

[67] Mr Smith observes that there could not be much of a risk to consumers because, if she receives back a real estate salesperson's licence from us, she will be

taking employment at Leaders where agents are closely supervised and do not handle money in any way.

[68] Ms Earl emphasised that the said IRD offending of the applicant involved “*mens rea*”. We realise that. She puts it that the applicant’s prime offending was as sole director of three companies involved in property development in a relatively small way and the applicant accepts that she, rather than her companies, is “*the real offender*”.

[69] There is no dispute that the offending required knowledge of wrongdoing on the applicant’s part, continued over a period of about nine years, and involved a large sum of money.

[70] Ms Earl queried whether the applicant could be suitable to deal with significant real estate monetary transactions where honesty and integrity is paramount and expressed the concern that she might leave Leaders and commence her own business. However, it is understood that at least for the time being there would be a condition preventing the applicant from doing that i.e. that the applicant may only operate as a real estate salesperson on the basis of being an employee of Leaders unless the Registrar allows otherwise.

[71] Ms Earl observed that the appellant’s co-offender at material times, who is still her domestic partner, is a master builder and that the applicant allowed him to be the architect of the offending rather than exercising her own independent judgment at material times contrary to revenue laws. Ms Earl observed that the applicant’s offending arose out of property development and yet now the applicant wishes to be a real estate salesperson who deals in realty. Ms Earl queries whether the applicant’s evidence shows that she has insight into her said offending and puts it that there is a need of the highest level of honesty and integrity in the real estate industry to protect consumers.

[72] We take into account the factors raised by Ms Earl.

[73] In terms of our frequent references above to the concept of supervision we observe that s.50 of the Act requires that salespersons be properly supervised and managed. It reads as follows:

“50 Salespersons must be supervised

- (1) *A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager.*
- (2) *In this section properly supervised and managed means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure—*
 - (a) *that the work is performed competently; and*
 - (b) *that the work complies with the requirements of this Act.”*

[74] We are satisfied that the Leaders Agency operated by Mr Garlick is particularly conscious of s.50 of the Act and Leaders seems to have a very supportive and educational ongoing process for its agents and, of course, we are requiring specific supervision for Ms Foot from Messrs Garlick and Murrell in particular.

[75] We understand the Registrar having declined the application from Ms Foot to be issued a real estate salesperson's licence in terms of her fraudulent offending against our revenue laws. However, the Registrar has not had the benefit of the full adversarial hearing as we have. Also, there has been strong evidence adduced to us in support of the character of the applicant. Of course, the offending against our revenue laws was very serious and cannot be put into any type of favourable context in itself.

[76] We are conscious that we have had a quite different body of information put before us regarding this application than did the Registrar. Of course, a review of such a decision of the Registrar is fact specific. The issue of whether or not the present applicant, is a fit and proper person is a judgment call for us. Although we come to a favourable decision for the present applicant, we regard her situation as borderline. We are conscious that some members of the public might not consider it a good look that there can be licensed salespersons under the Act who have been found guilty of significantly defrauding the Inland Revenue.

[77] However, we have stood back and considered the totality of the evidence adduced to us and have concluded that the applicant is a fit and proper person to hold a licence as a salesperson under the Act. We are comforted that our granting of the application on the terms outlined below will facilitate the applicant working within the setting provided by Leaders at Wellington with, seemingly, excellent supervision and mentoring of agents. If the applicant should leave that work setting or structure, then there may be a case for further thought upon her next annual licence renewal.

[78] We record that our member Mr J Gaukrodger sees some similarity of this case with that of *Ms L v The Registrar of the REAA* [2013] NZREADT 47 where, understandably, the Registrar had not been satisfied that Ms L was a fit and proper person to hold a salesperson's licence because on 2 August 2012, after trial by jury, she was convicted of permitting premises to be used for the manufacture of methamphetamine. In a fairly detailed decision our paragraph [23] read:

"[23] Very simply put, the stance of the applicant is that she was totally unaware that two men were likely to manufacture methamphetamine on her premises. We are conscious that, as set out below, she was sentenced on the basis of having turned a blind eye to the likely criminal offending of the said two males."

[79] In *L*, we covered relevant law in some detail, in a fairly similar manner to that set out above, and expressed our outcome as follows:

Outcome

[59] We are extremely conscious of the need to confine the issue of real estate licenses to persons who are clearly fit and proper, and it is appropriate that the Registrar of the Authority deals strictly with applications. However, having stood back and absorbed all the above we think that the stance of the applicant is credible and, in any event, that she deserves a second chance at her career. The case law covered above endorses, inter alia, a forward looking approach, rather than punishment for past conduct, and a consideration of the facts of the case in the round rather than a focus on Court convictions.

[60] According, we grant the application. We are comforted by the fact that, in the usual way, the applicant will need to apply for her annual renewal of licence so that any failures on her part (and we do not anticipate any) could be fatal to her career in the light of events to date."

[80] We are conscious that if we grant Ms Foot's application, or review – as it technically is, to us, the applicant has a job available at Leaders in Wellington as a real estate agent under the auspices of Mr R G Garlick a very experienced real estate agent, as supervisor and in a firm with well-regulated procedures and business management, and she has the support of a number of experienced persons in the industry. Also, if she steps out of line in any way, we would not expect her licence to be renewed in terms of the statutory annual reviews; and, as covered below, she is to be subject to certain quite stringent conditions of her operation as a real estate agent.

[81] Accordingly we grant the application on the basis that the real estate salesperson's licence to be issued to the applicant will be subject to the following conditions:

- [a] The licensee may only work as a salesperson at an established agency such as Leaders Wellington, as an employee or independent contractor, and may not operate elsewhere or her own agency nor be in partnership without the consent of the Registrar.
- [b] The licensee is to be supervised, mentored, and advised by Mr R G Garlick on the basis that there is to be at least a weekly special meeting between Mr Garlick and the licensee to review her files and dealings and discuss any issues and, for her first year from the date of this decision, he is to provide the Registrar with (succinct) monthly reports about her work.
- [c] The licensee may not involve herself directly or indirectly in any business, other than that of a real estate salesperson or on a mentoring basis for others. In particular, she may not be in any way involved in any property development activity.
- [d] For the first year from this decision, the licensee is to have two monthly mentoring meetings with Mr Murrell who is to report to the Registrar after each such meeting.

[82] We observe that, prima facie, the public might wonder that a person who has committed a significant fraud against our revenue laws can operate as a real estate salesperson in terms of the need for complete integrity and honesty in the real estate industry. As we have covered above, the applicant has strong support, substantially from experienced people of integrity in the industry, and has a very sound record in her past as a real estate salesperson. She is highly regarded by her peers and we have imposed what we regard as strong supervisory conditions which should be effective. Also we accept that, within reason, the better approach in such a situation as the applicant's is that we look forward rather than backwards.

[83] We consider that Ms Foot has discharged her onus as we have outlined above. It is essential that consumers are able to rely on the honesty and integrity of real estate agents and be protected from any form of dishonesty.

[84] 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