

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2015] NZREADT 33

READT 060/14

**IN THE MATTER OF** charges laid under s.91 of the  
Real Estate Agents Act 2008

**BETWEEN** **REAL ESTATE AGENTS**  
**AUTHORITY (per CAC 303)**

Prosecutor

**AND** **PATRICIA KERR**

Defendant

**MEMBERS OF TRIBUNAL**

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

**HEARD** at THAMES on 25 March 2015 (with subsequent affidavit evidence)

**DATE OF THIS CONFIRMATORY DECISION** 7 May 2015

**APPEARANCES**

Ms J MacGibbon for the prosecuting Authority  
No appearance by or for the defendant

**DECISION OF THE TRIBUNAL AFTER FORMAL PROOF**

***The Charge***

[1] On 1 July 2014 the defendant, formerly a licensed real estate agent, was charged as follows:

***“Charge 1***

*Complaints Assessment Committee 303 charges Patricia Kerr (former licensee) with misconduct, in that her conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.*

***Particulars***

*Between April 2012 and June 2013, the former licensee failed to account to Gordon and Ruth Christopher for at least \$10,703.70 rental money paid in*

*respect of 9 Adams Road and 207A Hill Street, Thames, when acting as property manager.”*

[2] It is clear law that property management is not “*real estate agency work*” as defined in s.4 of the Real Estate Agents Act 2008 (“the Act”); and the above charge of misconduct is framed under s.73(a) of the Act which reads:

**“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] Ms Kerr’s licence was cancelled in January 2014, apparently, for failing to comply with annual educational requirements. She did not appear at the fixture, nor did she participate in preliminary procedures. She was not represented before us. Accordingly, this prosecution proceeded by way of formal proof. On 30 March 2015 we received a letter from the defendant advising that she would not attend any hearing and understood it would proceed “*without my attendance*”.

***The Allegations***

[4] The complainants live in England but are the owners of two properties in Thames, namely, 207A Hill Street and 9 Adams Road. At all material times, the licensee was the property manager of the two properties.

[5] The complainants allege that when the defendant acquired the Ray White franchise at Paeroa in October 2011, she assumed responsibility for managing those two rental properties.

[6] A tenant of 207A Hill Street, whose rent was in arrears, was removed in June 2012. The licensee appointed a new tenant of that property in August 2012. The new tenant paid most of her rent but the complainants have not received any of this from the licensee.

[7] In respect of 9 Adams Road, since early 2012 only a small proportion of the rental income collected by the licensee has been paid to the complainants.

***The Evidence for the Prosecution***

[8] The main witness for the prosecution is Mr Gerald Gallacher, a senior investigator at the Real Estate Agents Authority. He states that the Committee received a complaint from the complainants who live in England but are the owners of the said two properties in Thames. The defendant was their property manager for

both properties. While acting as a property manager for the complainants, Ms Kerr failed to pay money owed to them.

[9] Mr Gallacher also outlined the efforts he has made to contact Ms Kerr. It seems clear that she does not wish to take any steps in the proceeding.

[10] Ms Kerr is currently unlicensed after having her licence cancelled due to non-compliance with her continuing education requirements.

[11] She had acquired the Ray White Paeroa franchise in October 2011 and then assumed responsibility for managing the complainants' properties at 207A Hill Street and 9 Adams Road.

[12] Mr Gallacher stated that the complainants enlisted the service of Ms Maree Craig, an accountant, to ascertain the amount of money owing to them. Ms Craig was provided with rental summaries from Ms Kerr and, using those summaries, she calculated the various amounts owing. We refer below to evidence adduced to us from Ms Craig by affidavit subsequent to the hearing and pursuant to leave.

[13] Mr Gallacher adduced to us, inter alia, those rental summaries and Ms Kerr's schedule or spreadsheet of the monies which should have been paid to the landlords. These were related to deductions for collection commission, and for one repair item, and to the bankings of the defendant for the landlords.

#### *The Property at 207A Hill Street, Thames*

[14] Mr Gallacher noted that a tenant of 207A Hill Street whose rent was in arrears was removed in June 2012. He advised that in August 2012 Ms Kerr appointed a new tenant who paid most of her rent but the complainants have not received any of this from Ms Kerr.

[15] He confirmed that Ms Craig prepared a schedule of what should have been paid to the owners for the property at 207A Hill Street and that has been adduced to us through him.

[16] Mr Gallacher noted that the total shortfall for this property is \$6,694.80. This is calculated on \$9,520 which was due to the complainant for the period of August 2012 to March 2013 but minus \$1,400 which was not collected, \$678.16 in repairs, and \$747.04 in commission and GST.

#### *The Property at 9 Adams Road, Thames*

[17] Mr Gallacher states that in respect of the property at 9 Adams Road, since early 2012, only a small proportion of rental income collected by Ms Kerr has been paid to the complainants. In April 2013, the tenancy agreement was terminated on the basis that the tenant had arrears of only \$3,265.00

[18] He confirmed that Ms Craig also prepared a schedule of what should have been paid for the property at 9 Adams Road. That shows that the total shortfall for this property is \$7,590.88. He calculated that on \$11,315 as due to the complainants for the period of November 2011 to March 2013 but minus \$2,955 which was not

collected (\$3,265 less arrears of \$310 brought forward from previous period), less \$769.12 in commission and GST.

#### *Summary of Calculations*

[19] Mr Gallacher states that all this creates a total of \$14,285.68 owed by the licensee to the complainants, but they have received only \$3,582.06. Accordingly there is a shortfall of \$10,703.62

#### *Further Alleged Money Owed*

[20] A further shortfall of \$4,866.88 is also alleged by the complainants.

[21] This is the amount of \$5,360 rent collected by the defendant between April and June 2013, i.e. after the accountant's analysis until the property management ceased. The amounts are \$3,360 (Hill Street rent) plus \$2,000 (Adams Road rent) less commission plus GST.

[22] Nothing of that amount was paid to the complainants.

#### *Lack of Contact with Ms Kerr*

[23] As part of Mr Gallacher's investigation he attempted to contact Ms Kerr, but the telephone numbers held by the Real Estate Agents Authority did not find her and he had no replies to his emails to her.

[24] He stated that on 30 January 2014 a process server (by the name of Michael Holt) served a copy of the disclosure documents on Ms Kerr in Auckland.

[25] Mr Gallacher also stated that between 1 to 19 July 2014, a process server named Shirley Walters attempted to serve a copy of the charge and Committee decision on Ms Kerr. Numerous visits were made to the address and the documents were handed to a woman who refused to identify herself as Ms Kerr but was believed to be Ms Kerr.

[26] Mr Gallacher said that on 30 July 2014 the said process server, Michael Holt, attempted to serve the charges and Committee decision on Ms Kerr as he had previously identified her in January 2014, but no one was at the address and the documents were nailed to the door by Mr Holt.

#### ***The Evidence of Ms Maree Craig the said Accountant for the Complainants***

[27] The context of Ms Craig's affidavit of 22 April 2015 reads:

*"I, Maree Craig, an accounting team member from Accounted4 Ltd swear:*

- 1.1 *As part of my role in the accounting team at Accounted4 Ltd, while preparing Gordon and Ruth Christopher's 2013 financial statements and as instructed by our overseas clients, I requested rental statements pertaining to 9 Adams Road and 207A Hill Street from their property manager Pat Kerr. I was unable to reconcile the rental statements to our client's bank account completely.*
- 1.2 *I emailed Ruth Christopher on the 21 May 2013 to advise of the discrepancies and said I would prepare a spreadsheet for each property from the information that I had at hand. These reconciliations were based on our client's bank account and the rental statements provided. Pat Kerr did not forward any further information.*
- 1.3 *I prepared a reconciliation for the period August 2012 to March 2013 for the property at 207A Hill Street. This document I prepared is annexed and marked "MC1".*
- 1.4 *I prepared a reconciliation for the period November 2011 to March 2013 for the property at 9 Adams Road. This document I prepared is annexed and marked "MC2".*

### **Discussion**

[28] The prosecution submitted that we should find that the defendant's withholding of rental monies, owed to the complainant property owners, is misconduct.

[29] It is settled law that, under the Act, the onus of proving charges rests with the Authority but the standard of proof is that of the balance of probabilities. We confirm the decision which we gave at the conclusion of the formal proof hearing at Thames, on 25 March 2015, that we find the charge proven as laid and as set out above.

[30] We record that, nevertheless, we required from Ms MacGibbon (as counsel for the prosecution) a succinct affidavit from the said Ms Craig, as accountant for the complainants who reside in England, and as covered above.

[31] We also noted that, having found the charge proved, we need to move on to the aspect of penalty. We allowed the prosecution three working weeks from 25 March 2015 (which we now extend to run from the date of this confirmatory decision) to file submissions on penalty from the Authority's perspective so that a copy of them can be forwarded to the defendant, if she can be traced or to the last address held for her, in case she wishes to respond within reasonable time to be fixed by us. We consider that one calendar month suffices in that respect.

[32] Accordingly, we issue this decision confirming our finding of misconduct against the defendant as we advised in the courtroom at Thames on 25 March 2015. We contemplate issuing a decision on penalty soon after the said deadlines for submissions on penalty.

[33] 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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Ms N Dangen  
Member