

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 59

READT 004/14

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

BETWEEN **THE REAL ESTATE AGENTS AUTHORITY (CAC 20002)**

Prosecutor

AND **HARDEV BRAR (licensed salesperson)**

Defendant

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 22 July 2015

DATE OF THIS DECISION 6 August 2015

APPEARANCES

Ms C P Paterson, counsel for the Authority
The defendant on his own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] Hardev Brar faced misconduct charges laid against both him and John Chand on 8 January 2014 by Complaints Assessment Committee 20002. However, Mr Chand's charges have now been determined so that this decision relates only to Mr Brar a licensed real estate salesperson.

[2] The following charges were initially laid against Mr Brar:

- [a] One charge of misconduct pursuant to s.73(c)(i) of the Real Estate Agents Act 2008 ("the Act") in that his conduct consists of a wilful or reckless contravention of ss.134 and 135 of the Real Estate Agents Act 2008; in the alternative, misconduct pursuant to s.73(b) of the Act in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work (failure to obtain the consent of the vendor in circumstances where the prospective purchaser was a related person);

- [b] (Jointly with Mr Chand) one charge of misconduct pursuant to s.73(b) of the Act, in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work (failing to ensure full and fair disclosure of his interests to Kiwibank).

[3] At the hearing of those charges on 3 September 2014 Mr Brar gave evidence in which he denied the factual basis of the Committee's charges, namely, that a prospective purchaser of a property, Ms Kaur, was an employee of his business, the Curry Lounge Indian Restaurant in Manukau. However, he accepted that he had signed a letter to the effect that Ms Kaur was his employee when in fact she was not. He confirmed that he read that letter and signed it, but that its content was false. He confirmed that he knew the contents of the letter were untrue at all material times.

[4] After hearing Mr Brar's evidence, counsel for the prosecution sought an adjournment to take instructions on amending the charges against Mr Brar in light of his evidence before us. Accordingly, on 18 September 2014, counsel for the prosecution filed a memorandum seeking leave to file an additional charge reflecting Mr Brar's evidence of 3 September 2014. That is a charge of misconduct pursuant to s.73(a) of the Act, particularised as follows:

"Signed a document, namely a letter dated 15 February 2011, relating to the employment of Ms Gurpreet Kaur, the contents of which were known by him to be false."

[5] The previous charges against Mr Brar were withdrawn upon our accepting the filing of the above new charge and Mr Brar pleading guilty to it.

Further Factual Background

[6] The charges arise out of a conditional agreement for the sale and purchase of 225 Puhinui Road, Papatoetoe to Ms Kaur. In fact that purchase did not proceed because finance could not be arranged for Ms Kaur.

[7] Mr Chand was the listing agent for the property which was owned by Durang Investments Ltd in which Mr Chand was also a shareholder and sole director.

[8] Mr Brar introduced a prospective purchaser to the property, namely, Ms Kaur. She is acknowledged by Mr Brar to be a personal friend of his. Ms Kaur signed a sale and purchase agreement for the property conditional on finance. Ms Kaur's application for loan finance to Kiwibank included a letter signed by Mr Brar which stated that Ms Kaur was a permanent employee of the Curry Lounge Indian Restaurant. Mr Brar signed that letter in his capacity as director of that Curry Lounge.

[9] The key aspects of Mr Brar's evidence before us at the first hearing of the charges on 3 September 2014 were:

- [a] He has known Ms Kaur since 2007. She is a friend. Mr Brar accepted that they had some business dealings together as well.
- [b] Mrs Kaur is not an employee of the Curry Lounge, nor was she on 15 February 2011.
- [c] Mr Brar introduced Ms Kaur to the property at 225 Puhinui Road and Ms Kaur soon made an offer on that property.

- [d] The sale and purchase agreement in respect of 225 Puhinui Road was entered into on 15 February 2011.
- [e] Mr Brar was aware that the sale and purchase agreement was conditional upon finance from Kiwibank.
- [f] Ms Kaur prepared the said letter which Mr Brar signed.
- [g] Mr Brar signed it because he wanted to help Ms Kaur.
- [h] He knew the contents were untrue when he signed it.
- [i] He signed the letter because Ms Kaur said she needed such a letter for "support".
- [j] The letter was signed on 15 February 2011 which was the same day the agreement for sale and purchase was entered into.
- [k] Mr Brar stated that he did not know that Ms Kaur intended to use the letter as support for her finance. He explained:
- "She was working full-time with the ... Meadowbank Caregiver and I ... believed that she was working full-time when she give me the income from the, that job. She was working full-time in the Meadowbank ..."*
- [l] Mr Brar explained that he did not think it would be possible for Ms Kaur to use the letter as support for her finance:
- "But I'm not sure she's going to be with the Kiwibank because there's a no proof, like no income proof, no, no money to go to her account, I didn't pay anything to her, how can she provide that, that's why I will be in the blind spot."*
- [m] He did, however, accept that he knew it was likely that Ms Kaur would use the letter or rely on it in some way, providing it to someone to show she was employed by him.

The Stance of the Prosecution

[10] The prosecution case in respect of above new charge is that Mr Brar signed a document that he knew to be false and did so knowing that the document would be used as evidence of income by Ms Kaur in order to obtain finance from Kiwibank for the purchase of the property. The income letter was signed on the same day that the sale and purchase agreement was entered into.

[11] The prosecution submits that the evidence establishes, on the balance of probabilities, that Mr Brar knew the income letter was to be used as evidence of income in relation to the Kiwibank finance application. It is put that is the only reasonable inference available when the evidence is assessed in context, i.e. taking into account the timeframe within which Ms Kaur was introduced to the property by Mr Brar, the sale and purchase agreement being entered into, with the income letter signed on the same date. In addition, Mr Brar acknowledged in his evidence that, after signing the income letter, he drove Ms Kaur to one of her visits to Kiwibank. In any case, as we record below, Mr Brar accepts the prosecution case and pleads guilty to the said new charge.

Misconduct

[12] The defendant has been charged with disgraceful conduct pursuant to 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; ...”

[13] We considered the ambit of the term disgraceful, as used in s.73, in *CAC v Downtown Apartments Limited* [2010] NZ READT 06 and:

“[55] The word disgraceful is in no sense a term of art. In accordance with the usual rules it is given its natural and popular meaning in the ordinary sense of the word. But s.73(a) qualifies the ordinary meaning by reference to the reasonable regard of agents of good standing or reasonable members of the public.

[56] The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess. See Blake v The PCC [1997 1 NZLR 71]

[57] The ‘reasonable person’ is a legal fiction of common law representing an objective standard against which individual conduct can be measured but under s.73(a) that reasonable person is qualified to be an agent of good standing or a member of the public.

[58] So while the reasonable person is a mythical ideal person, the Tribunal can consider, inter alia, the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the ... defendant.

[59] So, in summary, the Tribunal must find on balance of probabilities that the conduct of the ... defendant represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public.”

[14] Section 73(a) allows us to assess whether conduct is disgraceful both by reference to reasonable members of the public and agents of good standing.

[15] We have found on several occasions that s.73(a) may apply to conduct by a real estate agent outside of real estate agency work and, indeed, to conduct in his or her personal life. However, we have stated that in such cases, before a finding is made under s.73(a), a sufficient nexus must be demonstrated between the proven conduct and the fitness of the licensee to conduct real estate agency work.

[16] We have held that the guidance set out in *Pillai v Messiter* (referred to below) is relevant to the assessment of disgraceful conduct under s.73(a). In *CAC v Cui* [2015] NZREADT 1 we said:

"[50] We have previously applied the well known dicta in Pillai v Messiter (No 2) (1989) 16 NSWLR 197 (CA) ..., namely: "Departures from elementary and generally accepted standards, of which a ... practitioner could scarcely be heard to say that he or she was ignorant, could amount to such professional misconduct ... But the statutory test [misconduct in a professional respect] is not met by mere professional incompetence or by deficiencies in the practice of the profession, something more is required, it includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration ... "This dicta applies in s.73(a) cases (disgraceful conduct)."

Submissions for the Prosecution

[17] Ms Paterson submits that the defendant's conduct in signing a document that he knew to be false and knew would be used as proof of income by Ms Kaur is conduct that would reasonably be regarded by both real estate agents of good standing and reasonable members of the public, as disgraceful; and it is dishonest.

[18] The prosecution submits that the evidence clearly establishes that the income letter was signed by the defendant in the context of real estate agency work. It plainly occurred in the context of the defendant, who had introduced a purchaser to a property, assisting that purchaser to be in a position to complete the sale.

[19] However, it is put by Ms Paterson (for the prosecution) that even if we were not satisfied that the defendant was strictly carrying out real estate agency work for the purposes of the Act when he signed the income letter, there is a clear nexus between the defendant's conduct in knowingly signing the false document and his work as a real estate agent such that his conduct could amount to disgraceful conduct for the purposes of the Act. Ms Paterson emphasised:

- [a] The defendant was the real estate agent who introduced Ms Kaur, a personal friend of the defendant's, to a property that she subsequently agreed to purchase.
- [b] The sale and purchase agreement was subject to finance and the defendant knew that.
- [c] On the same day that Mr Kaur entered into the sale and purchase agreement, known by the defendant to be subject to finance, Ms Kaur asked the defendant to sign a letter purporting to verify her income from employment as a restaurant manager at the defendant's restaurant. The defendant agreed to do that knowing it was false.
- [d] The defendant stood to benefit from signing the income letter because, by assisting Ms Kaur to obtain finance in satisfaction of the condition in the sale and purchase agreement, the defendant stood to receive commission upon settlement of the sale.

[20] The prosecution submits that the evidence clearly demonstrates that the defendant must have known that the purpose of the income letter was for Ms Kaur to provide it to Kiwibank in support of her application for finance to purchase the property. It is put that the defendant's preparedness to sign a false document in those circumstances demonstrates his disregard for the integrity of the bank's processes and a willingness to deal dishonestly with documents to assist a friend subvert the loan application process and

thereby obtain finance that she otherwise may not have obtained. Ms Paterson observed that conduct has the potential to amount to criminal offending by Mr Brar himself, in that he could be said to have been a party to obtaining by deception by Ms Kaur (Crimes Act 1961, s.240) and/or a party to dishonest use of a document by Ms Kaur (Crimes Act 1961, s.228).

[21] Ms Paterson also submits that signing the income letter was clearly in the defendant's personal interest. It is put that if Ms Kaur had been successful in obtaining finance for the property, the transaction would have proceeded resulting in the defendant obtaining commission from the sale; so that it was therefore clearly in the defendant's personal interest that the transaction was completed in that the defendant stood to gain a financial advantage from assisting Ms Kaur in the way he did.

[22] We record that Kiwibank was not satisfied that Ms Kaur had sufficient income to service a mortgage so that her contract was cancelled by her lawyer. As it happens, on that same day Mr Brar brought another prospective purchaser to the property who purchased it on 28 February 2011 and took possession on 25 March 2011.

[23] It is also submitted for the prosecution that even if Mr Brar was not specifically aware that the income letter was to be provided to Kiwibank in support of Ms Kaur's application for finance, his conduct was nevertheless conduct that would reasonably be regarded by agents of good standing, and reasonable members of the public, as disgraceful. The defendant has acknowledged that he was aware the income letter would be used by Ms Kaur as evidence of income. The defendant has demonstrated a willingness to sign his name to a document that he knows to be false, and that he knows is intended to be used by another person as proof of income. It is put that conduct in and of itself, even without Mr Brar knowing specifically where or how the document is intended to be used, is dishonest and has the potential to amount to criminal conduct.

[24] The prosecution submits that Mr Brar's acknowledged conduct was disgraceful and would reasonably be regarded as such by agents of good standing and reasonable members of the public alike so that his conduct amounts to misconduct in terms of s.73(a) of the Act. The prosecution submits that, on the evidence before us, the said new charge is proved against Mr Brar and that a finding of misconduct is warranted in his case.

The Stance of the Defendant

[25] To his credit, at the resumed hearing before us on 22 July 2015, the defendant pleaded guilty to the above new charge and did not dispute the submissions for the prosecution as we have covered them above. Indeed, he seemed to accept them as put except that he does not wish to lose his licence under the Act. He stated to us that he made a mistake in signing the letter put to him by Ms Kaur. He emphasised that because of this prosecution he voluntarily suspended his real estate salesperson's license so he has not been in business as a real estate agent for about the past one and a half years. He advises that over that time he has been a labourer in the forecourt of a service station and only earns \$450 gross per week. Accordingly, he asks that we not impose any fine or costs. Overall, he asks us to view his offending "*sympathetically*".

[26] In answer to a question from Ms Dangen, Mr Brar said that about 18 months ago he voluntarily suspended his licence but he stressed that if he is able at any time he would very much wish to re-enter the real estate industry as a salesperson again.

Discussion

[27] Upon the defendant pleading guilty to the said new charge, both the other charges against him were withdrawn by the prosecution with our consent. Both parties asked that we deal with penalty forthwith and dispose of these proceedings against Mr Brar. Accordingly, we took a short adjournment to consider matters and then gave the following oral decision but strictly on the basis that we would expand our reasons for decision in writing over the next two or three weeks from 22 July 2015. That oral decision reads:

"I hardly need to say that Mr Brar is in a serious situation. The charge, he's pleaded guilty to, quite rightly in our view, is concerning. The fundamental thing about being a real estate agent is integrity. Accordingly, we want to put our views and reasoning in writing. But nevertheless, we will give you the bottom line outcome today, Mr Brar, because you have waited quite long enough.

Essentially, you signed the letter provided to you by Ms Kaur which contained a big lie. It was signed in the context of a real estate transaction. You either knew, or should have know, that it might influence a lender to Ms Kaur.

Real estate agents are people in a position of trust and simply must have integrity.

Your financial position is such that we don't impose a fine or costs upon you. We should do as these proceedings cost money.

Frankly, the logical decision is that your licence should be cancelled. That is, we should be revoking it which would mean you would certainly be out of the industry for five years.

However, rather than do that, we take the view, with quite some misgivings, that we will suspend your licence for the maximum, that is 24 months, but we will attach a rider to that suspension saying to the Registrar that, at the end of 24 months, if you seek re-instatement then she, the Registrar, must be satisfied at that point that you are a fit and proper person. As we understand it, that is the procedure anyhow. As we understand it, when you come out of suspension, the procedures set out in the Act require the Registrar to then decide whether are a fit and proper person just as the Registrar does every year upon renewal. That is supposed to happen every year. Accordingly, with a certain amount of misgiving, because we rather think our duty is that we should just cancel and revoke completely your licence, we are imposing a 24 month suspension on that basis.

So thank you for attending Mr Brar, thank you Ms Paterson. We will be putting that in writing with much more reasoning within 2 to 3 weeks."

[28] Accordingly, we simply record our agreement with the reasoning of Ms Paterson for the prosecution as we have set it out above. We stress that for Mr Brar to have signed a letter which he knew to be false and would be used as proof of income by Ms Kaur is so dishonest as to reasonably be regarded by both real estate agents of good standing and reasonable members of the public as disgraceful. It shows a concerning lack of integrity and willingness to act dishonestly. It created an important document which was false and dishonest.

[29] There do not seem to be any compelling mitigating features to that concerning conduct of the defendant, but he does profess remorse in the sense of expressing regret and apologising and he has pleaded guilty to the said new charge. The principle purpose

of the Act is to promote and protect the interests of consumers in respect of real estate transactions and promote public confidence in the performance of real estate agency work. One of the ways in which the Act achieves its purpose is by providing accountability through an independent, transparent, and effective disciplinary process.

[30] As Ms Paterson put it, the action of Mr Brar was in the context of real estate work but, in any case, there is such a nexus between knowingly signing a false document and the integrity needed for real estate work, that Mr Brar's conduct is disgraceful in itself and is in breach of s.73(a).

[31] As we have often said, professional standards must be maintained. The aspects of deterrence and denunciation must be taken into account. It is settled law that a penalty in a professional disciplinary case is primarily about the maintenance of standards and the protection of the public, but there can be an element of punishment. Disciplinary proceedings inevitably involve issues of deterrence, and penalties are designed in part to deter both the offender and others in the industry from offending in a like manner in the future.

[32] As indicated in our oral basic decision set out above, we are conscious that a cancellation of the defendant's real estate agents licence as a salesperson would put him out of the industry for at least five years in terms of s.37(1)(c) of the Act. He could then apply for such a licence but he would need to convince the Registrar, inter alia, that he is a fit and proper person to hold such a licence. Theoretically, it might be possible for the defendant to do that, perhaps, depending on his career and life over the next five years.

[33] Instead, we have decided to suspend Mr Brar's licence for 24 months but on the basis that he then still have the same onus of convincing the Registrar, on the balance of probabilities, that he is then a fit and proper person to hold such a licence at a time when he will by then have been out of the industry for about three and a half years. It seems from s.59 of the Act (which we set out below) that, theoretically, Mr Brar's licence will revive after 24 months if he also withdraws his voluntary suspension. If it were not for our requirement that he then satisfy the Registrar that he is a fit and proper person to hold a licence, he might have period of months before that issue was addressed by the Registrar upon annual renewal of the licence in terms of s.52 of the Act. Section 59 reads:

"59 Effect of suspension of licence

- (1) *A person is not a licensed agent, branch manager, or salesperson for the purposes of this Act for the period during which his or her licence is suspended.*
- (2) *At the end of the period of suspension the person's licence is immediately revived unless there is some other ground for cancellation or suspension of that person's licence under section 54, 110(2)(c), or 115."*

[34] Having said all that, we note from s.61 that a voluntary surrender of licence leads to its cancellation (s.61(3)) so that Mr Brar would need to apply to become licensed under s.36 of the Act which requires, inter alia, that he satisfy the Registrar that he *"is a fit and proper person to hold a licence"*.

[35] We observe that at present we think that Mr Brar has no real insight into the dishonesty involved in his offending. From hearing and seeing him give evidence, we feel he is so lax with the truth as to be the wrong type of person to be involved in real estate agency work.

[36] We accept that Mr Brar is being dealt with for one serious event of failure to meet professional standards. We may have been a little lenient in not revoking (as distinct from suspending) his licence and in not imposing a fine or costs; but we feel that his financial position is such that collecting any fine or costs would be futile.

[37] Accordingly, we confirm that Mr Brar's licence is suspended for 24 months from 23 July 2015 but on the basis of a strict condition or rider that, if he then seeks a licence to resume practice as a real estate agent, he must first convince the Registrar in the usual way that he is a fit and proper person to hold such a licence. We understand that the necessary procedures will focus on that issue in any case.

[38] 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.

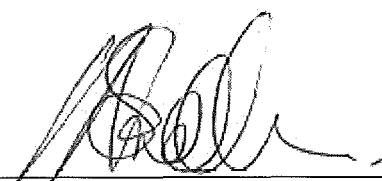


Judge P F Barber
Chairperson





Ms N Dangen
Member



Ms C Sandelin
Member