BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 71

READT 31/14

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE (per CAC 20005)**
	Prosecutor
AND	**ALAN MORTON-JONES**
	Defendant

MEMBERS OF TRIBUNAL

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

DATE OF SUBSTANTIVE DECISION HEREIN – 24 June 2015 [2015] NZREADT 49

DATE OF HEARING ON PENALTY – 7 October 2015 at Auckland

DATE OF THIS DECISION ON PENALTY – 27 October 2015

COUNSEL

Ms C Paterson for the prosecution
Mr P Kennelly for the defendant

DECISION OF THE TRIBUNAL ON PENALTY

Background

[1] In our decision of 24 June 2015 [2015] NZREADT 49 we found the defendant guilty on four charges of misconduct.

[2] The allegations from the Committee against the defendant were that he had failed to account to three clients of his property management business for approximately $40,000 in rent received from tenants (charges 1 to 3). In each case, it was only after the defendant was threatened with the Police by the client that he made repayment.

[3] The Committee further alleged that the defendant then wilfully failed to comply with its requests for relevant records when investigating the matter, including failing to comply with a formal notice issued under s 85 of the Real Estate Agents Act 2008 (charge 4). In respect of that charge 4, we had *"no hesitation"* in finding the charge proved. We stated, refer *CAC v Morton-Jones* [2015] NZREADT 49 at paragraphs [107] to [108]:

"[107] ... We feel that the defendant was high handed, stubborn, and disrespectful in his dealings with the Committee in terms of s 85 of the Act ...

[108] We consider that failure to comply with the normal application procedures from the Committee in terms of s 85 is a very serious failure on the part of a licensee and is misconduct under s 73(1) of the Act set out above."

[4] On charges 1 to 3, we found that the defendant had (ibid at [115]):

"... taken on personal responsibility for the proper functioning of his property management business and was well aware of its financial position at all material times and of its accounting detail, including its bank accounts and its liabilities to its customers month by month."

[5] We found (ibid at paragraph [116]) that, in failing to account for rents received, as alleged in the charges, Mr Morton-Jones had failed to:

"... properly and honestly manage his property management business [showing] that his fitness to perform real estate agency work under the Act is questionable. In other words, there is a strong nexus between the conduct with which the defendant has been charged and his suitability to continue as a licensee."

[6] Further, we noted at [112] that the defendant appeared to have:

"... an attitudinal problem towards complying with his duties as a licensee under the Act."

Relevant Principles on Penalty

[7] We are appreciative of counsel for the prosecution having encapsulated submissions under the above heading which are substantially as follows.

[8] It is well established that penalty decisions of professional disciplinary tribunals should emphasise the maintenance of high standards and the protection of the public through specific and general deterrence. While this may result in orders having a punitive effect, this is not their purpose; *Z v CAC* [2009] 1 NZLR 1; *CAC v Walker* [2011] NZREADT 4. Section 110(2) of the Act sets out the orders available following a finding of misconduct.

Misconduct involving client money

[9] Any finding that reflects a lack of absolute probity when dealing with client money will be treated seriously by us, as has been emphasised in a number of previous decisions.

[10] In *CAC v Downtown Apartments Ltd (in liquidation) and Anor* [2010] NZREADT 06 at [63], we found proved that the licensee company had drawn on deposit funds in its trust account without the complainant purchaser's consent and before the relevant sale and purchase agreement had gone unconditional. We held at that paragraph [63] that such conduct was: *"... at the high end of disgraceful conduct [striking] at the very heart of the duties of a real estate agent as set out in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009."* We

stated that had the defendant company not already ceased trading and been in liquidation, we would have made an order cancelling its licence.

[11] In *CAC v N* [2012] NZREADT 18, the defendant made transfers of funds totalling $76,650 to her personal bank accounts from the trading and trust accounts of a real estate company of which she was director and 50 per cent shareholder. The defendant repaid the funds in full and voluntarily surrendered her licence. We nevertheless concluded that the only appropriate penalty was an order cancelling the defendant's licence.

[12] In *CAC v Ross* [2012] NZREADT 4, a client mistakenly paid deposit funds of $6,164 into the defendant salesperson's personal bank account. The defendant retained part of these funds, transferring only $3,780.67 to the trust account of his former employing agent. The defendant retained the funds on the grounds that he was owed commission in respect of the relevant transaction.

[13] We held ibid at [24]:

> *"The penalty imposed by us must have a deterrent element in order to emphasise, both to the defendant and the wider industry, the importance of strict compliance with rules as to money received by licensees in respect of transactions."*

[14] Although neither the lessor or the lessee in respect of the transaction had suffered any loss as a result of the defendant's conduct, we noted that the case disclosed a concerning casualness over the handling of client monies. We imposed penalty orders suspending the defendant's salesperson's licence for three months and ordering that he repay the funds retained to his former principal and pay $1,000 costs.

[15] Ms Paterson puts it to be particularly significant that we found that Mr Morton-Jones exhibited a lack of honesty in operating his property management business.

[16] In *CAC v Gollins* [2015] NZREADT 2, we considered the case of an agent who had back-dated an agency agreement and attempted to pass it off as having been signed some time previously to support his claim for commission. There we held:

> *"[42] We consider that members of the public and agents of good standing would both consider that an agent attempting to pass off an agency agreement signed two years after the event as a document signed at the time so as to obtain commission would be regarded as disgraceful conduct. Dishonesty of any nature runs contrary to the principals of registration and privileges that go with any registration. As Tribunals and Courts have said in numerous cases, registration as a professional lawyer, doctor and real estate agent carries with it privileges but also the obligation to behave in a certain way. Dishonesty of any type is met with the highest degree of disapprobation by registration bodies and by members of the public who must retain confidence in the honesty and integrity of agents."*

Failure to comply with the Committee's request for information

[17] As noted above, the failure by Mr Morton-Jones to meet his obligations to the Committee investigating the complaints against him was, in itself, very serious.

[18] In *CAC v Li* [2015] NZREADT 48 the licensee failed to disclose, on four occasions, that his niece was the purchaser (or vendor) in property transactions he acted on. He then lied to the Committee investigating his conduct. In light of the licensee's very early guilty plea and his cooperation with the Authority, we were persuaded not to cancel Mr Li's licence, but imposed a suspension of close to the maximum (17 months from a starting point of 24) and fined him $10,000.

[19] As noted in the opening submissions filed for the Committee in this matter, similar failures by lawyers have been regarded seriously by the courts.

[20] In *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83, the High Court said as follows in relation to non-compliance with a requirement of a Standards Committee.:

> *"[108] Furthermore, we consider any refusal to comply with a lawful requirement made by an investigating Committee to be a potentially serious matter. Any suggestion to the contrary would not be consistent with the approach taken recently in this Court. In Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No 2) for example, Cooper J said:*
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> > *"[108] The purposes of the Lawyers and Conveyancers Act include maintenance of public confidence in the provision of legal services, protection of consumers of legal services and recognition of the status of the legal profession. To achieve those purposes the Act provides for what it described as "a more responsive regulatory regime in relation to lawyers and conveyancers". The provisions of Part 7 of the Act dealing with complaints and discipline are central to achieving the purposes of the Act. I consider that legal practitioners owe a duty to their fellow practitioners and to the person involved in administering the Act's disciplinary provisions (whether as members of a Standards Committee or employees of the New Zealand Law Society) to comply with any lawful requirements made under the Act. There must also be a duty to act in a professional, candid and straightforward way in dealing with the Society and its representatives. It is completely unacceptable for a practitioner to engage in what appears to have been an abusive campaign such as Mr Parlane conducted here."*
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> *[109] The duties to which I have referred do not exist to protect the sensibilities of those involved in administering the Act's disciplinary provisions. While courtesy is a normal aspect of professional behaviour expected of a practitioner, it is not an end in itself. The purpose of the disciplinary procedures is to protect the public and ensure that there is confidence in the standards and probity met by members of the legal profession. It is therefore axiomatic that practitioners must co-operate with those tasked with dealing with complaints made, even if practitioners consider that the complaints are without justification ..."*

The Submissions for the Defendant

[21] The main submission from Mr Kennelly (as counsel for the defendant) is that the defendant's licence not be cancelled.

[22] Mr Kennelly submits that there has never been any problem with defendant complying with his obligations as a licensee under the Real Estate Agents Act 2008.

It is put that the issue here was that the complaint related to the management of rentals and the defendant believed that we had no authority over his running a rental business because it is not real estate agency work. It seems that the defendant disputes the detailed findings in our said decision of 24 June 2015 and submits there was never any direct evidence of dishonesty but admits there were problems with payments for which he took responsibility because he was the only one ultimately responsible for running the rental management company.

[23] It is put for the defendant that there was no contract for services between the landlords and the defendant personally and the contracts were with Rodney Real Estate Ltd as a separate entity. Counsel for the defendant then puts it *"No other Tribunal has found any wrongdoing. Ms Logan complained to the Police, The Serious Fraud Office, and the Tenancy Tribunal and the [defendant's] position is they all dismissed her complaints. The [defendant] finds it difficult to accept that he was found to have acted dishonestly when none of the other Tribunals had found him to have done so."*

[24] Mr Kennelly then seeks to distinguish various case authorities referred to by the prosecution as we covered them above and, inter alia, emphasises that property management is not real estate agency work; that there is no evidence of money being placed in accounts other than those of the relevant landlords so that there is no conduct akin to taking funds for personal use it is submitted; that there was no lack of honesty on the part of the defendant; that the defendant was always truthful to the Real Estate Agents Authority, its investigator, to the Committee, and to us.

[25] Mr Kennelly also puts it that the charges before us were proved on the balance of probability rather than beyond all reasonable doubt. He then states:

> *"13. There was confusion by the respondent. He did not see the complaint being about his personal conduct but that it related to the business. There was in his view no refusal to comply with a lawful requirement by an investigating Committee as mentioned above. The CAC request was in fact responded to as fully as possible on the basis there were issues with the office computer. It has to be accepted that the confusion did exist and there were the two investigations going on at the same time. Again, with respect, the authority relied upon is distinguishable."*

[26] Mr Kennelly concludes by submitting that the interim suspension of the defendant's licence, which we ordered on 16 December 2014 after proper procedures, has destroyed the defendant's reputation and meant he has been unable to secure alternative employment and has been forced to sell his family home to subsist. Mr Kennelly also emphasises, as covered in our substantive decision herein, that the defendant has sold the rental business in question. It is put there is no evidence that the defendant has ever failed any audits of his real estate agency trust account.

[27] It is also put that he is not in a financial position to pay a fine.

[28] Yet again, the defendant seems to attach blame to two of the landlords in that they did not check their bank accounts and notice they had not received rental payments from him or his company.

[29] Mr Kennelly concludes with the statement that *"in all the circumstances, which are unusual, suspension is appropriate and no more than what has already been sustained"*.

The Submissions for the Prosecuting Authority

[30] Ms Paterson submits that, given the misconduct proved against Mr Morton-Jones, no penalty less than cancellation is appropriate.

[31] She emphasises that we found that the defendant's conduct lacked honesty, that he was high-handed and disrespectful towards the Committee, and that he has an attitudinal problem towards his obligations as a licensee. She submitted that we were correct in noting that those findings go directly to the defendant's suitability to continue as a licensee.

[32] Ms Paterson submitted that given that the misconduct found proved involved the mishandling of significant amounts of client money, exacerbated by the defendant's subsequent attitude towards the Committee's investigation, Mr Morton-Jones is not fit to continue to hold a real estate agent's licence and that his licence should be cancelled.

[33] Ms Paterson also observed that we may also consider that a significant fine, as was imposed in *CAC v Li* (supra), is necessary in the interests of denunciation and deterrence, given the importance of promoting and enforcing the highest standards on the part of licensees entrusted with client funds.

Outcome

[34] Standard principles of sentencing include factors such as aggravating and mitigating features, and remorse. The theme of non-acceptance of our findings as outlined in the submissions for the defendant is concerning. We accept, of course, that the principal purpose of the Real Estate Agents Act 2008 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.

[35] 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 profession from offending in a like manner in the future. Having said all that, it is often appropriate to consider rehabilitation of the professional, and that may involve requiring a licensee to undergo training or education.

[36] As we stated orally at the end of the penalty hearing at Auckland on Wednesday, 7 October 2015, we cannot disagree with the content of the thoughtful submissions from Ms Paterson on behalf of the prosecuting Authority. As we have already made clear in our substantive decision, we still wonder whether the defendant quite understands the seriousness of his conduct and the curious attitudinal problem he has adopted towards the Committee and us in our assessment

of his offending. We endeavoured to explain that issue to him orally at the hearing of 7 October 2015 and we would like to feel he is now remorseful and understanding of the reasoning we carefully set out in our decision of 24 June 2015.

[37] We again emphasise the submission for the prosecuting Authority that the defendant's licence be revoked is compelling in many ways. However, we prefer to take the following more moderate approach of suspension of that licence on the expectation that, if there is any further offending by the defendant then, upon the annual review of his licence, it not be renewed.

[38] We now confirm the penalties which we imposed on Mr Morton-Jones at the end of that penalty hearing of 7 October 2015 as follows:

[a] The defendant's licence as a real estate agent is hereby suspended for nine months from 7 October 2015.

[b] The defendant is fined $2,000 but due to his current poor financial position, that need not be paid to the Registrar of the Authority at Wellington until 30 September 2016.

[c] The defendant is required forthwith to complete the usual ongoing verifiable educational requirements to the satisfaction of the Registrar of the Authority.

[d] The defendant is to undertake to the satisfaction of the Registrar of the Authority within the next six months the following Open Polytechnic courses, namely, US4702 – Implement internal controls and conduct internal checks and audits in real estate firms; and US26152 – Explain the principles of ethics applying to real estate practice.

[39] 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 G Denley
Member

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Mr J Gaukrodger
Member