

## **BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2016] NZREADT 16

READT 055/15

### **IN THE MATTER OF**

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

### **BETWEEN**

**GOLLINS COMMERCIAL LTD**

Applicant

### **AND**

**REGISTRAR OF THE REAL ESTATE  
AGENTS AUTHORITY**

Respondent

## **MEMBERS OF TRIBUNAL**

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

**HEARD** at WELLINGTON on 8 December 2015

**DATE OF THIS DECISION** 12 February 2016

## **COUNSEL**

Mr J Waymouth for the applicant  
Mr M J Hodge for the Registrar

## **DECISION OF THE TRIBUNAL**

### ***Introduction***

[1] Gollins Commercial Ltd (“the company”) has applied to us for a review of a decision of the Registrar of the Real Estate Agents Authority declining its application for a company agent’s licence.

[2] The Registrar decided not to grant the company a licence because she concluded that its sole director, Mr Christopher Gollins, was not a proper person to be an officer of a licensee company under s 43(1)(c) of the Real Estate Agents Act 2008.

### ***Background***

[3] Mr Gollins was previously employed by Colliers Real Estate. He currently holds an individual real estate agent’s licence.

[4] On 15 January 2015, following a referral to the Authority by Colliers, we found that, by signing a backdated agency agreement for work done in an attempt to support his claim for commission or compensation, Mr Gollins had acted in a manner that was deceptive and had committed a “*deliberate act of dishonesty*” (*Complaints Assessment Committee (CAC20002) v Christopher Gollins* [2015] READT 2. We therefore found that Mr Gollins

had engaged in disgraceful conduct. Subsequently, on 16 April 2015, we decided to censure and fine Mr Gollins for his misconduct.

[5] On 6 July 2015 the company, of which Mr Gollins is the sole director, applied for a company agent's licence under the Act.

[6] On 28 July 2015, the Manager of Licensing for the Authority (who holds delegated power to carry out the functions of the Registrar) wrote to Mr Gollins and advised that the company's application for a licence had been declined for the above reason. The company seeks a review of the Registrar's decision to refuse to grant it a licence.

### **Relevant Sections of the Act**

[7] Section 36(3) of the Act stipulates that a company "*may*" be licensed as an agent if at least one officer of the company satisfies the Registrar that he or she meets the requirements set out in s 36(1) of the Act. These are that the officer:

- [a] Is 18 years of age (s 36(1)(a));
- [b] Is not prohibited from holding a licence under s 37 (s 36(1)(b));
- [c] Is "*a fit and proper person to hold a licence*" (s 36(1)(c));
- [d] Has the prescribed qualifications (s 36(1)(d)); and
- [e] Has obtained 3 years' experience in real estate agency work within the previous 10 years (s 36(1)(e)).

[8] Section 43(1) of the Act states that the Registrar "*must*" grant a licence to an applicant if, after hearing any objection to the issue of a licence, the Registrar is satisfied that the applicant:

- [a] Is entitled to be licensed as an agent under s 36 (s 43(1)(a));
- [b] Is not prohibited from being licensed as an agent under s 37 (s 43(1)(b)); and
- [c] In the case of a company, "*any person who will be an officer of the company if the application is granted is, by reason of both his or her personal character and his or her financial position, a proper person to be an officer of a licensee company*" (s 43(1)(c)).

[9] Section 43(3)(a) of the Act provides that if the Registrar is not satisfied that the applicant is entitled to be licensed as an agent, the Registrar must decline the application.

### **The Case for the Applicant**

[10] Mr Waymouth dealt appropriately with the relevant statutory provisions and, essentially (and correctly), submits that the issue at stake is whether Mr Gollins, as the proprietor of the applicant company, is a fit and proper person to hold an agent's licence.

[11] Mr Waymouth submits that must follow from the fact that Mr Gollins is now, and at all material times was, the holder of an agent's licence in his own name that he complies with s 36(1)(c) (i.e. is a fit and proper person to hold a licence).

[12] Naturally, Mr Waymouth covered our decision in *REAA v Gollins* (supra). In particular, he emphasised that we found at paragraph [44] of that decision “*on the facts the Real Estate Agents Authority have not proved that this was a wilful or reckless breach*” of s 126 of the Act with regard to the invoice Mr Gollins had issued for commission. Mr Waymouth noted that at paragraph [42] of that decision we had found that Mr Gollins’ conduct was disgraceful with respect to passing off an agency agreement two years after the event as the document signed at the time and this so as to obtain commission. Mr Waymouth emphasised that in our penalty decision *REAA V Gollins* [2015] READT 26 we did not suspend or cancel Mr Gollins’ licence which was that of an agent not as a salesperson, and we gave reasons for not doing that.

[13] The overall submission from Mr Waymouth is that the Registrar’s reasoning as at 28 July 2015 for declining to issue a real estate agent’s licence to the company is inconsistent with the reasoning in our said decisions regarding Mr Gollins himself. He particularly referred to the Registrar having stated in that 28 July 2015 letter:

*“In light of the Tribunal’s findings regarding dishonesty I have determined by reason of your personal character that you are not a proper person to be an officer of a licensee company”.*

[14] Mr Waymouth also detailed various favourable points relating to Mr Gollins’ conduct as covered in our said decisions but, essentially, he strongly submitted that Mr Gollins should be able to commence trading as a real estate agent under “*the corporate veil*”, namely, as Gollins Commercial Ltd, when he is currently able to trade as a real estate agent under his own name.

[15] In further typed submissions, Mr Waymouth submitted that one cannot be accepted by the Authority as being a fit and proper person for one purpose but not for another. He submitted that the applicant has no prior unsatisfactory history as a company director; he has never failed to comply with any obligations under relevant legislation such as the Companies Act 1983, the Financial Markets Conduct Act 2013, nor the Takeovers Act 1993. It is submitted that the applicant has never been prohibited or disqualified as a director of a company nor been permitted to be a director under conditions; and there is no matter in his past behaviour to prevent him trading as a real estate agent with the protection of a corporate structure. Mr Waymouth pointed out that if Mr Gollins is incorporated, a consumer can complain to the Authority in terms of the Act or the Real Estate Agents (Professional Conduct and Client Care) Rules 2012 and could take action against Gollins Commercial Ltd under the same provisions.

[16] Sir Robert Jones testified as to why he supported the applicant as a fit and proper person to hold a real estate licence. Of course, we accept that Sir Robert is (as Mr Waymouth put it) “*a most eminent business person in commercial real estate*”. With regard to Mr Gollins, Sir Robert stated “*there are few practitioners in the Wellington region who have been involved in commercial real estate as long as he has. As said, he is widely known and liked for his integrity in the industry*”.

[17] Sir Robert Jones made himself available for cross-examination in the course of which he seemed to be saying, inter alia, that it was not uncommon for business-people to backdate documents or, indeed, sign them in blank, and that commerce is built on trust. We certainly accept the latter point but feel sure that people like Sir Robert would not backdate documents nor sign them in blank. With regard to the said cases involving the applicant before us, Sir Robert opined that the applicant had been rather naïve and has

been punished accordingly and Sir Robert emphasised that he still has full trust in the applicant in relation to very valuable realty transactions.

[18] There were supportive testimonials from Mr Chris Parkin, a well known Wellington investor and business person, and from Ms Alison May Lawson of Lower Hutt who retired in 2011 as the regional manager of the Real Estate Institute of New Zealand. She has known Mr Gollins from when he first commenced his career in real estate and she utilised him to train other real estate agents at REINZ education seminars and, in particular, at national conferences.

[19] Mr Waymouth submits that he has established a totality argument because we have now had the benefit of considerably more detailed evidence and have heard much more wide ranging and detailed legal submissions than were put to the Registrar.

### ***The Submissions for the Registrar***

[20] Counsel for the Registrar (Mr M J Hodge) submits that the decision to decline the company's application for a company agent's licence was correctly made by the Registrar and should stand.

[21] Mr Hodge puts it that, for a company to obtain an agent's licence, all the following statutory requirements must be met:

- [a] The company must satisfy the requirements in s 36(1) (refer to s 43(1)(a)); and
- [b] The company must not be prohibited from being licensed as an agent under s 37 (refer to s 43(1)(b)); and
- [c] Any person who is an officer of the company must be a proper person to be an officer of a licensee company (refer s 43(1)(c)).

[22] It is accepted by the Authority that the company satisfies the first two of these requirements but (it is submitted) not the third requirement i.e. the test under s 43(1)(c).

[23] Mr Hodge observed that the company's application for review seems to have been brought on the basis that the test in s 43(1)(c) does not apply in its case or, if it does, it adds nothing to the test in s 36(1)(c) and was therefore satisfied by the applicant company. It is submitted for the Authority that both of these propositions are wrong.

### ***Issue 1: Does Section 43(1)(c) Apply?***

[24] Section 43(1)(c) applies to all applications for a company licence. As Mr Hodge put it, this must be the case in light of the purpose of the Act, which is to protect consumers and promote public confidence in the performance of real estate work.

[25] The words "*after hearing any objection to the issue of a licence*" are included in s 43(1) for the avoidance of any doubt to make clear that the Registrar's decision must be made after any objection is heard.

[26] Section 43 applies to applications for renewals of licences (by virtue of s 52(2)). However, the formal objection process prescribed by the Act does not apply to the renewal of licences.

***Issue Two: Whether the Tests in section 36(1)(c) and section 43(1)(c) are Different?***

[27] Section 36(1)(c) requires an individual who applies for an agent's licence to satisfy the Registrar that he or she is a fit and proper person to hold an individual's agent's licence. Under s 36(3), at least one officer of a company must satisfy this requirement as a necessary, but not sufficient, condition to that company being granted a licence as an agent.

[28] Section 43(1)(c) requires that any person who will be an officer of a company if the company's application is granted is, by reason of both his or her personal character and his or her financial position, a proper person to be an officer of a licensee company.

[29] That these are different tests is self-evident given that Parliament has chosen to include them both in s 43(1). There would have been no need for Parliament to have included s 43(1)(c) if that test was duplicative of the fit and proper person test in s 36(1)(c).

[30] It is put that s 43(1)(c) has a wider application than s 36(1)(c). By virtue of s 36(3), only one officer of the company is required to satisfy s 36(1)(c), whereas any person who will be an officer of the company must satisfy s 43(1)(c).

[31] If this was the only reason for including s 43(1)(c), then s 43(1)(c) could simply have stated that the fit and proper person test in s 36(1)(c) must be satisfied by all officers of the company. Indeed, s 43(1)(c) need not have been included at all and s 36(3) could simply have stated that all officers of the company must satisfy s 36(1)(c).

[32] Mr Hodge submits that s 43(1)(c) was included because all officers of the company, including any officer who might satisfy s 36(1)(c) in the context of holding an individual's agents licence, must satisfy the additional requirement contained in s 43(1)(c) (i.e. personal character and financial position). We agree.

[33] This additional requirement is necessary if the statutory objective of consumer protection is to be achieved because matters relating to whether a person is a "*proper person*" apply differently in the context of an individual application than they do in the context of a company application.

[34] There may be concerns about an individual's background or behaviour that would not warrant preventing him or her holding a licence as an individual agent, but would mean that it would not be suitable for the individual to be a director of a licensed real estate company. It may be that a person's past behaviour reflecting on their honesty or character may have been such that he or she should not be permitted to trade with the protection from personal liability offered by the corporate structure. Any tendency to dishonesty or other forms of misconduct may be better checked if the person knows that he or she has to act in their own name and with unlimited personal liability.

***Issue 3: The Present Case***

[35] As noted above, in *Gollins* we found that Mr Gollins' conduct while acting as an agent for Colliers constituted both disgraceful conduct and unsatisfactory conduct. In reaching these findings, we commented that:

*"[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 principles of registration and privilege 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.*

[36] Similarly, when imposing a penalty on Mr Gollins, we commented that (*Complaints Assessment Committee (CAC20002) v Christopher Gollins* [2015] NZREADT 26): “[25] ... put simply an agent who is found guilty of disgraceful conduct involving fraud must be seen to be receiving a penalty which reflects the abhorrence of the real estate profession to such behaviour.”

[37] In essence, our findings were that Mr Gollins’ behaviour had fallen far short of the behaviour expected of a licensed real estate agent. Moreover, at the time we made our decision on guilt, it appeared that Mr Gollins had not gained any insight about his conduct nor did he appear to fully appreciate the magnitude of his behaviour; as we noted when delivering our judgment on penalty, it was reported in a newspaper in February 2015 that Mr Gollins had said that:

*“What I did was dumb, not dodgy”.*

*“Two former Foodstuffs executives gave evidence that every dollar claimed was correctly owed to me and should have been paid, after more than four years’ work earning it.”*

*“Most fair-minded people won’t miss the absurdity of Foodstuffs, NZ’s second largest company, benefiting from regulations designed to protect consumers.”*

[38] The Registrar acknowledges that we decided that Mr Gollins’ conduct did not warrant our interfering (by way of suspension or cancellation of his licence) with his ability to act as an individual licensee. However, Mr Hodge observes that it does not follow that Mr Gollins should automatically qualify for the additional benefit of being permitted to trade under the protection of a limited liability company.

[39] Mr Hodge puts it that Mr Gollins’ dishonest and deceptive conduct was serious. Being permitted to be a director of a licensee company is a privilege, not a right, and is accompanied by serious responsibilities, exemplified by the numerous obligations placed on company directors under various statutes, which do not apply to sole traders. It is the respondent’s submission that particular risks exist in the real estate context; real estate agents are often required to advise inexperienced consumers on the sale or purchase of their largest asset and it is vital that individuals can rely on them to do so with the utmost integrity, as well in relation to their dealings with contractual documents and client funds. It is the Registrar’s responsibility to take these considerations into account when making decisions under s 43 of the Act. We agree.

[40] We accept that it follows from the above submissions that *res judicata* issues raised on behalf of the applicant company do not apply. It is not correct that a person who has satisfied s 36(1)(c) of the Act should automatically be taken to have satisfied s 43(1)(c) of the Act.

[41] The respondent submits that the decision of the Registrar was correct in law and properly founded so that the application for review ought to be dismissed.

## **Discussion**

[42] We also had the benefit of final succinct oral submissions from each counsel dealing with what we have covered above.

[43] Mr Hodge emphasised the point that the applicant company does not have a right to be licensed but may seek that privilege if it complies with the statutory requirements. Mr Hodge also submits that the fact that Mr Gollins personally holds an agent's licence is not entirely determinative of a requirement of such a licence to his company. We agree.

[44] Both counsel accept that, whether or not Mr Gollins' company is to be licensed as it seeks, is a matter for us to determine on the precise facts before us. We certainly agree with that. We are conscious that whereas s 36(1)(c) requires (to the satisfaction of the Registrar) an individual applicant for a licence to be "*a fit and proper person*", s 43(1)(c) so requires that any officer of a company applicant be "*a proper person*" and that be "*by reason of his or her personal character or financial position*".

[45] We also agree with Mr Hodge that, in dealing with the applicant previously in our said decisions, we have been rather kind as, ordinarily, any form of dishonesty should lead to suspension or, possibly cancellation of licence, but we found this to be a rare case as we explained in those decisions.

[46] We agree that it cannot be a correct principle that, because an individual holds a licence, then any company incorporated by that individual is entitled to be similarly licensed. The Registrar needs to stand back and look at the full picture. We can understand that in this case she declined to licence the applicant company because its proprietor had been found guilty by us of concerning dishonesty. The Registrar is to be commended for requiring the highest standards and applying her judgment.

[47] We take the view that whatever way one approaches the issue now before us, which is whether Gollins Commercial Ltd should have the privilege of holding and operating under a real estate agents licence, the question is whether Mr Gollins is a fit and proper person. As to whether he seeks incorporation with a view to limiting his personal liability in the usual way for business or for tax advantages, or whatever, is rather peripheral. The issue is whether he is a fit and proper person for his company to be issued the privilege of the licence. We can understand that Mr Gollins would like the company structure for his business so that his son and a family friend could come and work for him more conveniently, although that is a very peripheral aspect.

[48] In *CAC v Gollins* [2015] READT 2 we went to quite some effort to explain that although we had found Mr Gollins guilty of misconduct involving a deliberate act of dishonesty, we did not consider that he should lose his licence nor even have it suspended in view of the particular aspects we analysed in that case. We are conscious of Mr Hodge's submission that, nevertheless, we cannot be sure that Mr Gollins is a proper person to be the sole director of a licensed company. Despite what we say in paragraph [40] above we take the view that, generally speaking, it is rather inconsistent to allow a person to have a licence and trade as an individual real estate agent but not to allow that person to so trade should that person incorporate himself or herself.

[49] We feel that the same reasons that we provided previously for not cancelling or suspending Mr Gollins' licence in the case mentioned remain extant now. There is no reason to find that it is acceptable to have Mr Gollins operate a real estate agent's licence individually but not as a director of a corporate. For all that has been said, we find no reason to deny the grant of such a licence to the applicant company and we are

particularly of that view when we focus on the rights and concerns of protecting consumers. Just as we decided previously that consumers were not at risk when dealing with Mr Gollins, so we do not see any risk to them in dealing with him as a company.

[50] We now confirm what we stated at the end of the hearing on 8 December 2015. We emphasised we have previously treated Mr Gollins rather kindly but do not condone his misconduct. However, we feel that in this rather rare case he remains a fit and proper person to be licensed under the Act and, having heard a much fuller case than was put to the Registrar, we granted the company's application as at and from 8 December 2015. We confirm that.

[51] For the benefit of other licensees, we also record our having pointed out to Mr Gollins that we are not impressed by guilty and penalised licensees trying to subsequently gild the lily about their relevant conduct through newspaper reporters. He had advised a reporter that our leniency (in his cases cited above) "*clears him of suspicion*" and that he "*felt vindicated by the decision*". His attitude of apology in that respect is pleasing.

[52] 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