

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2016] NZREADT 35

READT 92/14

**IN THE MATTER OF**

charges laid under s 91 of the  
Real Estate Agents Act 2008

**BETWEEN**

**THE REAL ESTATE AGENTS  
AUTHORITY (per CAC 304)**

Prosecutor

**AND**

**WALLACE LIONEL MORRIS** of  
Auckland, Real Estate Agent and  
Company Director

Defendant

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Mr G Denley - Member  
Ms C Sandelin - Member

**HEARD** at AUCKLAND on 7 September 2015 (with subsequent written submissions)

**DATE OF SUBSTANTIVE DECISION** 19 January 2016 [2016] NZREADT 4

**DATE OF THIS PENALTY DECISION** 25 May 2016

**COUNSEL**

Ms N Copeland, for the prosecution  
Mr R O Parmenter, for the defendant

**DECISION OF THE TRIBUNAL ON PENALTY**

***Introduction***

[1] By a decision dated 19 January 2016, *Complaints Assessment Committee 304 v Morris* [2016] NZREADT 4, we found Mr Morris guilty on one charge (charge two) of misconduct brought by Complaints Assessment Committee 304. Charge one was dismissed.

[2] The finding of misconduct was on the basis that the defendant wilfully or recklessly breached the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 in failing to disclose certain information to a trustee of the Maranatha Charitable Trust when he met with the trustees on 12 June 2012.

***Our Findings***

[3] In finding the defendant guilty of misconduct in respect of charge two, we stated:

*[78] With regard to Charge 2, the defendant either knew, or should have inferred, that Mr Massam had leased the Battery Building to William Hughes Ltd and intended to have 297A Church Street purchased by the trust, but the then other trustee of MCT was oblivious to these strategies. In that context he attended the MCT trustees' meeting of 12 June 2012 as if an independent advisor and gave the trustees advice regarding the sale and purchase of real estate; and, furthermore, he had conflicts of financial interest being entitled to substantial commission on the sale contract of 297A Church Street, which had already been entered into by Mr J Massam whether for himself or MCT, and any profit made by William Hughes Ltd from subletting MCT's Battery Building would belong to the defendant.*

*[79] The effect of RR 6.1, 6.2 and 6.4 overlaps. In terms of R 6.1, the defendant owed a duty of trust to a vendor, Ms Ruissen, to keep her informed of his activities on behalf of the Trust and he failed to do that. In terms of R 6.2, the defendant excluded Ms Ruissen from information she needed in her role as a trustee and vendor and it was unfair (and incompetent) that the defendant did not treat with her. In terms of R 6.4 there was a concerning withholding of information which "should by law or fairness" have been provided to her by him.*

*[80] We agree with Ms Paterson that the defendant was highly conflicted at the 12 June 2012 meeting and must have known, or should have known, that he was unable to give objective real estate agency advice to the Trust and was likely to mislead the owner (and prospective vendor) Ms Ruissen. He needed to disclose his personal interests in the meeting's agenda items and also the actions he and Mr Massam had been taking on behalf of the Trust. He breached a clear duty of trust to the Trust and to Ms Ruissen. That seems to have been wilful but it was at least reckless in terms of s 73(c)(iii) of the Act. In the circumstances, it is arguable whether the defendant risked breaching any confidence due from him to Mr J Massam but, in any case, an adequate update could have been given to Ms Ruissen and it was misconduct to purport to be giving independent real estate advice to the Trust."*

### **Submissions for the Prosecution**

[4] Ms Copeland (as counsel for the prosecution) noted that 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.

[5] In *CAC v Spencer* [2013] NZREADT 55 at paragraphs [15]-[16] we agreed in principle that penalties imposed should promote accountability and include a deterrent element, with financial penalties set at a level to provide an effective deterrent taking into account modern commission rates.

[6] Ms Copeland submits (for the prosecution) that, having attended the 12 June 2012 meeting as an "advisor", and then purporting to advise the trustees as to their options, Mr Morris was bound to make his personal interests in the various transactions plain; but instead, he failed to disclose to Ms Ruissen, the elderly co-trustee of Mr Massam:

- [a] That he (Mr Morris) was the selling agent for the Church Street property that the MCT was “*considering*” investing in, with a direct financial interest in the sale;
- [b] That, in fact, Mr Massam had already signed an unconditional sale and purchase agreement, agreeing to purchase the Church Street property for \$1.5m;
- [c] That Mr Massam had already signed a listing agreement for the MCT Properties with Mr Morris’ company, giving him a direct financial interest in the MCT, for example, deciding to sell rather than renovate; and
- [d] That he had an interest in any decision to sell the Battery Building (at least on paper) through his company William Hughes Ltd, theoretically (it is put) the lessee of that building.

[7] It is also put that, in doing so, we found that the defendant breached a clear duty of trust to MCT and to Ms Ruissen which we considered seemed wilful but it was at least reckless in terms of s 73(c)(ii) of the Real Estate Agents Act 2008.

[8] Ms Copeland submits that the defendant deliberately, or at least recklessly, withheld important information from Ms Russein and in doing so breached a clear duty of trust to MCT and Ms Ruissen. For the Committee, she respectfully submits that the appropriate penalty in this case is a fine in the range of \$7,000-\$10,000 and a censure; and that, while this is a significant financial penalty, it is still only in the mid-range of the fine available for misconduct and, it is submitted, is entirely justified by the misconduct engaged in by the defendant in this case.

### ***Submissions for the Defendant***

[9] Mr Parmenter submits that the maximum fine “*at risk*” is \$15,000. He accepts that, in the ordinary course of events, once we made the finding that Mr Morris had a conflict of interest at the 12 June 2012 meeting of trustees, we would have to mark our disapproval by a fine but the question is the level of the fine. He asks: “*Is it in the range which could be described as “minimal” (say, up to \$5,000 or a third of the maximum fine)? Is it what I would describe as “mid-level” (say, up to \$10,000 or up to two-thirds of the maximum fine)?*”

[10] He submits that the offending found by us merits a fine in the lower range; and that there are personal circumstances which support the plea for a lower range fine.

[11] Mr Parmenter also submits that:

- “4. *There were no adverse consequences for the MCT as a result of the conflict:*
  - a. *The Church Street property, bought by Mr John Massam in his name, was settled by him or one of his nominees, i.e. MCT suffered no loss. In my submission, given that MCT was not named as a purchaser, there was never a risk that MCT would have to buy if it did not want to; and*
  - b. *The MCT Building was sold and settled. Cawthray Motors completed the transaction. Mrs Ruissen must have agreed to the sale, which*

*did not include the maligned tenancy of William Hughes Limited (which the Tribunal has held to be a genuine commercial transaction).*

5. *In respect of the Church Street issue, I submit that the Tribunal did see some merit in Mr Morris's position that he was bound by his obligations as, what might be called a "purchaser's agent", not to disclose the facts of purchase by Mr Massam to an outsider. The Tribunal said this: In the circumstances, it is arguable whether the defendant risked breaching any confidence due from him to Mr J Massam but, in any case, an adequate update could have been given to Ms Ruissen and it was misconduct to purport to be giving independent real estate advice to the Trust. What I am submitting is that the Tribunal could well decide that Mr Morris did have some basis for his actions in respect of Church Street."*

[12] It is emphasised that Mr Morris is in his mid-eighties; he has had no previous disciplinary issues; and that life has been financially hard on him and his family business in recent times.

[13] Mr Parmenter concludes as follows:

*"7. I do mention, also, that the imposition of a censure is not some "soft" punishment of no consequences. For those of us involved in a profession, being marked by leaders of our profession as deficient by way of censure is a severe blow. I make that submission to support the proposition that a low level fine (with a censure) should not be seen as lacking in denunciation.*

8. *He is an old man of very poor means and with limited years ahead of him with which to rebuild his financial position and his reputation. My submission is that he is deserving of some mercy."*

### **Our Conclusions**

[14] We agree with the penalty submissions for the prosecution in principle. Indeed, Mr Parmenter does not seem to particularly demur from them and we take into account the factors he has covered.

[15] We also take into account standard principles of sentencing including factors such as aggravating and mitigating features, and remorse. We accept, of course, that the principal 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.

[16] 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; although that approach is inappropriate to the circumstances of Mr Morris.

[17] The defendant is a very experienced real estate agent. He should have known that a trustee co-owner of property must not be cut out from or misled about dealings, or even proposals for the future of that property. Real estate agents cannot stand behind one co-owner of property and ignore the status of another or any other co-owner of that property.

[18] In terms of our assessment of the facts, submissions, and justice overall, the defendant is fined \$6,000 to be paid to the Registrar of the Authority at Wellington within one calendar month of this decision, and we also formally censure the defendant.

[19] 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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Ms C Sandelin  
Member