

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 59

READT 046/17

IN THE MATTER OF

Charges laid under section 91 of the Real Estate Agents Act 2008

BROUGHT BY

THE REAL ESTATE AGENTS
AUTHORITY (CAC 413)

AGAINST

TRACY TAYLOR
Defendant

Hearing:

27 September 2018, at Auckland

Tribunal:

Mr J Doogue, Deputy Chairperson
Ms N Dangen, Member
Ms C Sandelin, Member

Appearances:

Mr M Hodge, on behalf of the Committee
Mr P Chambers, on behalf of the defendant

Date of Decision:

24 October 2018

**DECISION OF THE TRIBUNAL
(PENALTY)**

[1] The Tribunal has heard and determined a charge against Ms Taylor, (**the Licensee**) of misconduct brought pursuant to s 73(a) of The Real Estate Agents Act 2008 (**the Act**). The charge was found to be proved and the Tribunal must now impose the appropriate penalty on the Licensee.

[2] The full factual context of the charges as set out in the liability decision 9 July 2018 and we will not repeat it in detail. It is sufficient to note the main points relevant to the charges which were brought against the Licensee.

[3] In essence, the Licensee was instructed to participate in four real estate transactions purportedly as the selling agent. The transactions however had been arranged by the parties themselves and involved sales of properties to related parties. For each of the transactions in which she was involved the Licensee received a fee, or commission as it was described, of \$10,000. She received these payments without any need to carry out the general obligations incumbent upon a real estate agent. She did not need to market the properties for sale. She had only to draw up the form of agreement between the parties and arrange for its execution.

[4] The basis upon which the case was presented to the Tribunal was that the transactions that the Licensee was involved in had all the hallmarks of, and in substance were, transactions which were intended to mislead lending institutions into believing that the properties had a higher value than they in fact did. The further objective was that the bank or other lending institution would to lend more money on the security of the properties than otherwise they would.

[5] It is necessary to mention that the stance which the Licensee by her counsel, Mr Chambers, took at the penalty hearing before us was that the decision of the Tribunal was wrong in analysing the transactions in the way that it did. The substance of the contentions which counsel put forward was that it had not been proved that the Licensee had been involved in any untoward dealings, had done nothing wrong and that still did not understand as at the date of the hearing how she had allegedly breached the standards required under the Act and the regulatory regime established under it.

[6] It was the right of the appellant to continue to deny any wrongdoing. However, the result is that penalty must be assessed on the basis that the Licensee has not expressed any contrition or regret for her involvement in the transactions. It is also necessary to proceed on the basis that, given the absence of any insight on the part of the Licensee into the nature of the scheme that she had become involved in, that she must be at risk of behaving in a similar way in future if she were to be presented with an opportunity to receive income by facilitating transactions of a similar kind.

[7] The other implication arising from the approach which the Licensee has taken to the question of penalty is that if her view is genuinely held, then she lacks knowledge and judgement to a degree that calls into question her suitability to hold a real estate agents licence.

[8] One possible outcome open to the Tribunal is to impose a financial penalty. However, we were not provided with any material which addressed the ability of the Licensee to pay a financial penalty. Our impression is that she could not pay a fine. It would not be possible to impose a fine which adequately serve the needs of deterrence, both general and specific, that the offending in this case calls for.

[9] It is the view of the Tribunal that in imposing penalty, the options are limited to either a suspension of the Licensee or cancellation of her license.

[10] An order of suspension is postulated upon the view that while it is appropriate for the Licensee to not participate in the real estate business for a period of time, at the conclusion of which there should be no reason why he or she cannot resume working in the industry.

[11] A suspension order can have at least two effects. The first is that it has the potential effect of amounting to a penalty in its own right because of the deprivation of income that the Licensee would have earned in the suspension period. This assumes that the Licensee has remained in the real estate industry and not sought work elsewhere. It would not apply to someone who had taken employment in another type of business. The second effect is that the making of a suspension order is likely to be harmful to the reputation of the Licensee. One potential consequence of a suspension

order is that it may have the effect of limiting future employment opportunities for the Licensee once it becomes known that he or she has previously been suspended.

[12] The Tribunal has carefully considered whether an order of suspension should be imposed in this case.

[13] In the first place, we consider that the Licensee became involved in the transactions because she is commercially naïve and did not think through the consequences of what she was doing. It may have been that she was induced to turn a blind eye to the possibility of a fraudulent scheme because of the easy commissions which were on offer. What was being offered to her was an opportunity to make some money without any real effort being required on her part.

[14] We were concerned by the licensee continuing denial of any wrongdoing and a lack of understanding of how she could have done anything wrong.

[15] It is necessary to deal with some particular points that Mr Chambers made in his submissions. One contention was that there was doubt about whether any concluded fraudulent enterprise had been attempted or had been completed. We understand the contention to be that unless such a scheme was proved to have existed, the Licensee could not be guilty of misconduct. No authority was put forward to support this view.

[16] Before we set out our conclusions on this particular contention it is necessary to consider a further proposition that Mr Chambers put forward. It was to the effect that any supposed mortgage “ramping” fraud was doomed to failure because the bank would have been provided with information that showed that there was a substantial mark-up from the first in each case. The substance of the submission, as we understand it, is that that would have been possible for the bank to review the consideration provided for the first transfer which was the transaction preceding the one that they were to provide finance for.

[17] In our view while this was theoretically possible, it is not open to a Licensee to effectively justify assisting a fraudulent scheme on the basis that it was the responsibility of other parties to identify the correct nature of the transaction that was

being financed. Nor is it a sustainable argument that no harm was done because it was possible that the bank would have identified the jump in value between the first transaction and the one this was financing and that would have led to a line of enquiry which would have exposed the attempt to obtain excessive lending. But this may or may not have occurred and it was not legitimate for the Licensee to assume as a certainty that this would occur.

[18] A Licensee who makes herself available to assist individuals engaged in a dishonest scheme, crosses the line from legitimate practice into deliberate wrongdoing. Conduct of the kind established in this case has a serious effect on the objective in section 3 of the Act which is to foster confidence in the way real estate transactions are carried on in New Zealand. Whether the individuals involved had devised a scheme which was sufficiently sophisticated to actually dupe a lending institution is neither here nor there.

[19] While Ms Taylor claims that she did not understand what the purpose of the principals was in this case, she knew that there was something amiss. Had she paused to question why she was being paid a considerable sum of money for very little effort, she would have appreciated that the situation that she found herself in was too good to be true. She should have appreciated that the persons engaged in the scheme were not going to pay \$10,000 per transaction to her unless they received some benefit from the involvement in the transaction of the Licensee herself and the agency which she represented. We consider that the principals chose to do this because having a licensed real estate agency and a legitimate real estate business involved could help to lend an appearance of legitimacy to the transactions. That in turn would assist their purpose.

[20] We do however acknowledge that the Licensee was not personally involved in the apparent dishonest scheme which the principals had devised. Any benefit that she obtained was limited to the commission she received.

[21] There is no doubt that the conduct here fell below the required standard expected of a Licensee. We further accept, though, that that was not the worst case of its type which can be imagined. We cannot exclude the possibility that the Licensee got involved out of naïveté and that this was not a case of deliberate and cynical offending.

[22] We further consider that a suspension is justified because in its own way it will involve a substantial financial penalty on the Licensee who will be prevented from earning income during the period for which the suspension takes effect.

[23] In its discussions concerning penalty the Tribunal has also considered whether in addition to a suspension there ought to be imposed a requirement to undergo additional training. Such a requirement offers the possibility of allaying any concerns arising from the denial on the part of the Licensee that she had done anything wrong and her failure to appreciate why her conduct was not acceptable.

[24] Mr Hodge in the course of his helpful submissions noted, though, that additional training cannot supply an agent with judgement that she has been demonstrated to lack. We would broadly agree with the submission. There must be some doubt, even if training and education were ordered, that it would bring about any substantial or genuine change on the part of the Licensee.

[25] However, it is possible that if the Licensee was ordered to undergo training or education pursuant to section 93 (d) of the Act that she would, sensibly, take advantage of the opportunity that this would present for her to improve her understanding of the industry that she is involved in and the obligations of licensees such as herself.

[26] We also note that the Licensee says she made an attempt to obtain guidance from her manager¹. Quite why her attempts were not successful is not clear. At the time of disclosing the transaction to her manager, the Licensee apparently told him that there was little chance of the purchaser acquiring finance. He may not therefore have appreciated that he should intervene and check the circumstances of the sale transaction generally.

[27] We appreciate that Ms Taylor has experienced very real hardship in her personal life. While factors such as this must take second place to ensuring that the objectives of the Act set out in s 3 are met, we consider that some weight can be attached to them.

¹ Licensee's "will say" statement paragraph 15

[28] We consider that an order for suspension coupled with a censure and a direction to undergo additional training will provide adequate deterrence in the circumstances of this case.

[29] There is need for the Tribunal to send a signal to those engaged in real estate agency business that not only is conduct of this kind a contravention of a licensee's obligations but is also a contravention which is serious in kind. While on this occasion the penalty imposed has been less than cancellation of the licence, such an outcome will be the correct penalty in other cases of licensees lending assistance to mortgage-fraud schemes.

[30] For all of these reasons, we make the following orders:

- [a] the licensee is censured;
- [b] there will be an order that her license is suspended for a period of 18 months from the date of this decision;
- [c] an order pursuant to section 93 of the Act that the licensee undertake not fewer than three training or education sessions, the content of that program to be agreed between the licensee and the Authority. Failing such agreement, we reserve leave to either party to seek further directions from the Tribunal.

J Doogue
Deputy Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member