

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 75

READT 075/17

IN THE MATTER OF

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

BETWEEN

COMPLAINTS ASSESSMENT
COMMITTEE 413

Applicant

AND

DELAWAR HOOSAIN KUMANDAN
Defendant

Hearing:

9 November 2018 at Auckland

Tribunal:

Mr J Doogue, Deputy Chairperson
Mr G Denley, Member
Ms N Dangen Member

Appearances:

No appearance for Appellant
Mr J Simpson, on behalf of the Authority

Date of Decision:

28 November 2018

PENALTY DECISION

[1] Mr Kumandan was found guilty of a charge of disgraceful conduct following charges against him that he signed as an attorney for either Mr Eric Lloyd or a company called Dimegasy Ltd as parties to real estate transactions. The charge against him was that he either signed using an imitation of Mr Lloyd's signature or he signed it with his own signature. Subsequently the explanation given was that he was an attorney for those two parties. He did not sign the signatures in such a way that indicated the existence of that power of attorney. On some occasions, then he altered the document in such a way as to give the impression that it contained the signature of Mr Lloyd when it did not.

[2] We accept that there is evidence that Mr Lloyd approved Mr Kumandan proceeding in this fashion even if his approval was retrospective in its effect.

[3] It was not clear whether Mr Kumandan carried out these actions in circumstances where he brought into existence what were false documents that if the fact of the attorneyship had been disclosed, the transactions would not have proceeded. However the circumstances were suspicious in that in our view the backdrop to the execution of these various documents was to assist an attempted mortgage fraud venture or enterprise by a person or persons unknown.

[4] Whether Mr Kumandan's behaviour was fraudulent in the sense that we have been discussing or not, it was highly irregular and improper. For those reasons we found that the charge against him of misconduct had been proved.

[5] The stage has now been reached where we are required to consider the issue of penalty.

[6] Submissions were made on the questions of penalty by the Authority. Mr Kumandan did not make any submissions on penalty. We agree with the submission of the Authority concerning penalty which was to the following effect:

3.1 The principle purpose of the Act is to "promote and protect the interests of consumers in respect of transactions that relate to real estate work and to promote confidence in the performance of real estate agency work".⁴ This is achieved by the regulation of agents, branch managers, and salespersons, by raising industry standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.

3.2 Accordingly, penalties for misconduct and unsatisfactory conduct should reflect the need to maintain a high standard of conduct in the industry, the need for consumer protection and promoting confidence in the industry, and the need for deterrence. The wide range of discretionary orders available on findings of unsatisfactory conduct or misconduct against a licensee are a key means of achieving these principles.

3.3 As set out in *Complaints Assessment Committee v Ganesh*:⁶

[19] A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The Tribunal should impose the least restrictive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.

3.4 Penalty in disciplinary proceedings engages both specific and general deterrence. There is a need to ensure that the licensee in question does not act in a similar way in the future.

3.5 In the present case, the Committee submits that both specific and general deterrence are engaged. While Mr Kumandan has not engaged in these proceedings and his licence is voluntarily suspended, his conduct should be recorded should he seek to resume working in real estate. Additionally, a strong message should be sent to other licensees about the importance of compliance with requirements under the Act and related legislation. (footnotes omitted)

[7] The following we consider are aggravating features of the conduct. In the first place, Mr Kumandan failed to disclose the fact that he was an attorney when he signed the documents on six separate occasions.

[8] Further the deliberate act of signing Mr Lloyd's signature on three of the Agreements for Sale and Purchases amounted to a deliberately misleading act. It was not an oversight or something of that kind. The deliberate act of signing Mr Lloyd's signature was objectionable because it not merely omitted to state that he, Kumandan was signing as an attorney, but it was potentially misleading to the opposite parties to the contracts.

[9] It is also relevant to sentence that Mr Kumandan has had a previous finding of misconduct against him for conduct amounting to disgraceful conduct under s 73(a) of the Act. His licence was suspended for a period of 12 months by the Tribunal on 13 April 2013. On that occasion Mr Kumandan had forged signatures on two Confirmation of Settlement forms which he sent to the solicitor acting for both parties making it appear as if the transactions had settled when in fact neither had. The

conclusion that we draw is that Mr Kumandan did not learn his lesson from this earlier appearance before the Tribunal. That would suggest that a substantial deterrent is required again on this occasion. The previous appearance is also relevant in that it would have left Mr Kumandan in no doubt about the seriousness with which producing misleading signatures of other parties is viewed.

[10] The Authority has submitted that suspension is justified again on this occasion, as opposed to outright cancellation of the licensee's licence. We agree that suspension has a deterrent effect, as Mr Simpson stated, because of the resulting loss of income to the licensee. The picture is a little less clear in this case though because Mr Kumandan is apparently not in New Zealand at present and his right to return is under contest. However we accept in a general way that suspension does represent a substantial penalty for the additional reason that it represents an adverse judgment made for a second time on Mr Kumandan by this Tribunal.

[11] The maximum suspension that could be imposed upon Mr Kumandan on this occasion is two years.

[12] The Authority, through its counsel, submitted that the appropriate penalty was a censure and a fine of \$7,500.

[13] We consider that there should be a censure. We also consider that all the circumstances relevant to offending would indicate that an adequate penalty would be also to suspend Mr Kumandan for 6 months and as well to fine him the sum of \$7,500. There will be orders accordingly.

[14] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

Mr J Doogue
Deputy Chairperson

Mr G Denley
Member

Ms N Dangen
Member