BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 51

READT 075/15

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agent's Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 404
AGAINST	DELAWAR HOOSAIN KUMANDAN Defendant

READT 058/16

AND IN THE MATTER OF	An appeal under section 111 of the Act
BETWEEN	DELAWAR HOOSAIN KUMANDAN Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC404) Respondent
Hearing:	25 June 2018, at Auckland
Tribunal:	Mr J Doogue, Deputy Chairperson Mr G Denley, Member Ms N Dangen, Member
Appearances:	Mr M Hodge, on behalf of the Committee No appearance by the defendant
Date of Decision:	21 September 2018

DECISION OF THE TRIBUNAL

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[1] Delawer Kumandan (**defendant**) faces four charges of misconduct laid by Complaints Assessment Committee 413 (**Committee**) (075/15). The defendant did not appear at the hearing of the charges against him on 26 June 2018. The hearing proceeded in his absence.

[2] It has been established on the evidence that he is a licensee under the Real Estate Agents Act 2008.

[3] The defendant has brought an appeal against the decision of the Tribunal to charge him. Because he did not appear in support of it, his appeal is dismissed for lack of prosecution.

[4] The statement of background is based upon the evidence which we reviewed in the course of the hearing. This part of the judgement which summarises the background is largely taken from the submissions of counsel for the Committee, Mr Hodge, which accurately state the position.

[5] At the time of the relevant conduct, the defendant was a licensed salesperson employed by Inia Sega, an agent who trades as Sega Realty. His license is currently voluntarily suspended.

[6] The defendant was the sole director and shareholder of Delprop Limited (**Delprop**), which he incorporated on 28 October 2014.

[7] A further entity who was involved in the transactions was Eric Lloyd (**Mr Lloyd)**. This person is a private individual with whom the defendant has had a number of business dealings, particularly in respect of the Tokoroa properties which are the focus of the present charges. Mr Lloyd was the director and shareholder of a company called Dimegasy Ltd (**DIL**). As such, he was the person with authority to execute contracts on the part of the company. The company was the vendor in the case of each of the transactions which give rise to the charges against the defendant.

[8] Mr Lloyd confirmed to the Committee's investigator that he has given the defendant authority to sign documents on his behalf, as health reasons make it difficult for him to sign documents himself. Eric Lloyd has indicated that he reviews all documents before the defendant signs.

[9] The defendant provided the investigator with a copy of a general power of attorney, dated 8 September 2014, executed by Eric Lloyd in favour of the defendant. The company purported to provide a power of attorney to the defendant which was signed by Mr Lloyd. Both powers of attorney confer authority in wide terms.

[10] The first three charges all relate to the defendant's actions in buying and selling a number of properties in Tokoroa. A common feature of these transactions is that they were on-sold with contemporaneous settlement dates, with the transaction subject to finance. The defendant acted in a dual capacity in that he was both signing the agreements on behalf of the vendor, DIL, and as a licensee representing the vendor.

[11] While there is no basis for attacking the validity of the powers of attorney which were granted to the defendant, the proceedings raise issues about the circumstances in which the defendant executed the agreements. On some occasions the agreements were signed by the defendant purportedly attaching the signature of another person to them. These aspects will be discussed further below.

[12] The evidence demonstrates that the defendant was closely connected with DIL. It was the submission for the Committee that in the circumstances he was "was effectively acting unilaterally". Our understanding is that that submission is based upon the facts that while the structure of the relationship between the defendant and DIL might have suggested that he was exercising a type of agency as the holder of a power of attorney, in practical affect the entire control of DRL had been ceded to him. Based upon the evidence we have reviewed, we agree with that submission.

[13] The on-sale transactions were for a significant percentage increase over the original purchase price, and the ultimate purchasers (or attempted purchasers) were persons the defendant had dealt with in a number of different property transactions. The following table shows some of the transactions and the unexplained price increases that were achieved following the purchase by the company and on-sale.

Address	Percentage increase at on-sale (rounded)
126A Higgins Rd	51 or 36% (two transactions)
70 Kelso St	51%
6 Colinton Plc	59%
5 Pohutukawa Plc	11%

[14] There is no evidence before the Tribunal which might explain increases of such a magnitude.

[15] Against this background, the first two charges allege that the defendant's conduct:

[a] was a wilful and/or reckless breach of r 6.2, in failing to disclose to lending institutions the close relationship he had with Dimegasy Investments Limited, such that he was not acting at arms' length (**charge one**); and

[b] in the alternative, amounted to seriously negligent or seriously incompetent real estate agency work, if the Tribunal is not satisfied that the defendant's conduct was wilful or reckless (**charge two**).

[16] The above charges are brought pursuant to s73 (c) which provides that a licensee is guilty of misconduct if his conduct consists of a wilful or reckless contravention of the Act, or other Acts that apply to the conduct of licensees or regulations or rules made under the Act.

[17] Charge three is a further charge of seriously negligent and seriously incompetent real estate agency work which particularly concerns the defendant's repeated failure to sign sale and purchase agreements in accordance with s 19 of the Property Law Act 2007 (**PLA**), which prescribes how attorneys must sign sale and purchase agreements for land.

[18] Charge four is that the defendant's aggressive and confrontational response to an inquiry from the Committee's investigator was disgraceful.

Charge one

[19] It is a notable feature of this case that the Committee has not elected to directly allege against the defendant that he was involved in mortgage fraud. The case as it was explained to us by Mr Hodge is that the conduct of the defendant resulted in the suppression of certain information about the transactions which the lending banks would have regarded as relevant when considering whether to make loans to facilitate the transactions.

[20] The factual matter about which they were kept in the dark was that the defendant was not just involved in the transactions as a licensee but also as a person with an interest in the agreements because he was associated with beneficial ownership of the company which was selling the properties.

[21] The Committee alleges that the practical steps that the defendant ought to have taken was to provide information which would have alerted the banks to the fact that not only was the defendant involved in the transactions as a selling agent, but he was also, because of the undisclosed power of authority, effectively controlling one of the entities that participated in the transactions.

[22] In charge one it was alleged that by virtue of the fact that Mr Lloyd was the director of DIL and because of the existence of the power of attorney which he gave to the defendant, the defendant was able to effectively control the transactions that DIL decided to enter into.

[23] In the six properties which are under consideration in these proceedings, the defendant has acted in transactions as both a licensee and as signatory on behalf of the company as the vendor:

[a] the sale of 15 Hinau Street, Tokoroa from the company to Piwakawaka Trust, by agreement dated 15 October 2014;

[b] the sale of 126A Higgins Road, Tokoroa from the company to Piwakawaka Trust, by agreement dated 6 November 2014;

[c] the sale of 70 Kelso Street, Tokoroa from the company to Cynthia Toriente, by agreement dated 6 November 2014;

[d] the attempted sale of 22D Hinau Street, Tokoroa from the company to SACSA Limited, by agreement dated 11 November 2014;

[e] the sale of 6 Colinton Place, Tokoroa from the company to Cynthia Toriente, by agreement dated 20 November 2014; and

[f] the attempted sale of 5 Pohutukawa Drive, Tokoroa from the company to Kismatt Singh and Maya Singh, by agreement dated 1 December 2014.

[24] Each of these transactions was subject to finance. Finance applications were made to Westpac and in four cases were successful. Westpac has confirmed that at no time were the defendant's involvement with the company or his holding a power of attorney disclosed to them. It only understood the defendant to be involved as a real estate agent in the transaction, and no more

Failure to disclose defendant's interest in transactions

[25] The point at which the Westpac bank and BNZ were exposed to risk was when the properties were on sold by DIL to the various entities who bought the properties and thereafter presented finance applications to the banks. It would, of course, have been in the interests of the banks at that point to know that there were recurring features about the transactions in that the same vendor and purchasers were reappearing as the properties were successively made subject to contract.

[26] The submission of counsel for the REA was that it would have been material for the banks to have understood that the defendant was not just the selling agent on the agreements for sale and purchase-a factor that was obvious on the face of the documents-but that he also had an interest in the transaction itself. They were prevented from obtaining that information because of the way which the defendant signed the agreements, concealing his involvement.

[27] In our view it is not clearly obvious that the banks would have been assisted for their attention to be drawn to the fact that the selling agent was involved in the transactions. Evidence, though, has been provided by a witness for the BNZ, Mr McPhee, to the following effect:

> 8 … when assessing finance applications, it is important for those in the banking industry to know that transactions are conducted at arms' length through an independent agent and that the sale price reflects the property's true market value. When assessing the risks associated with granting finance, it is vital for those in the banking industry to know with absolute transparency any interests that various parties involved in a transaction may have. This includes any personal interests or relationships by real estate licensees with any party on either side of a transaction.
>
> 13 I have also been advised that Mr Kumandan held a power of attorney in respect of Dimegasy Ltd. This information was not disclosed to us. As discussed above, disclosure of such interests is essential to those working in the finance industry, particularly in a situation such as this where the person holding a power of attorney is also acting in other capacities in other, contemporaneous transactions.

[28] It would seem therefore that at least from the perspective of the BNZ, it would have been relevant to the risk that that bank was weighing up for it to have been had it been explicitly informed that the defendant was involved in DIL. The bank would also have been assisted by knowing that the defendant held the power of attorney that he did in respect of DIL.

[29] We are prepared to accept Mr McPhee's evidence on these points. The evidence is not inherently unbelievable. Mr McPhee has the authority and credentials to make statements of the kind that he has.

[30] It is implicit in the position which the REA has taken in presenting its case that the defendant breached legal requirements in concealing his involvement from the trading banks so that they would not be aware of his involvement in transactions which they were being requested to finance.

[31] The approach which the Committee took was that the Acts and omissions of the defendant were such that to rules which were part of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (**the Rules)** had not been complied with, with those particular rules being 6.2 and/or 6.4. The allegation is that by not complying with those rules the defendant put themselves in breach of s 73(c) of the Act then that he was guilty of misconduct because of a wilful or reckless contravention of the Act.

Breach of R 6.2 and or R 6.4

[32] The question arises whether the rules impose any obligation on a licensee in the course of carrying out his/her duties to protect the position of a bank. Of course, an agent would be under an obligation to refrain from conniving at, assisting in or carrying out activities amounting to mortgage fraud. For example, if an agent knowingly drew up an agreement which had as its objective the commission of a fraud on a bank, or did so suspecting that was the case, he/she would prima facie be guilty of disgraceful conduct[1].

[33] As we have noted, the case which the Committee puts forward does not directly allege fraud against the licensee but rather that his conduct resulted in the relevant lending institutions not being given full information by the licensee about the transactions that the parties to the agreements were entering into, so that the banks lacked the necessary information to evaluate whether or not the transactions might amount to mortgage fraud. Possession of this information that was kept from them could have been material in making a decision whether or not to accept loan applications. But does this amount to breaches of the rules to which reference has been made?

Was there a breach of rule 6.2?

[34] Rule 6.2 provides as follows:

> 6.2 a licensee must act in good faith and deal fairly with all parties engaged in a transaction

[35] In our view two issues arise. The first is whether the plain wording of the rule favours the interpretation for which the REA contends. The second is whether there are matters of background such as the statutory objectives of the rule, the Act and the regulatory regime which might colour the meaning that is to be given to those words.

[36] On the literal wording of the rule, we consider that a financier is not "a party engaged in a transaction". We explain our reasons as follows.

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[1] *CAC v Taylor*

[37] Adopting the usual meaning attached to such expressions, financiers such as banks are not parties to a transaction and do not come within the scope of rule 6.2. We consider that our view is reinforced by the dictionary definition which refers to "parties" as including those persons making the two sides in a contract et cetera[2].

[38] Not uncommonly a financier bank enters into separate lending transaction with one of the parties to a contract in a separate transaction that is ancillary to and which follows upon the execution of a property contract. But they do not take part in "the transaction". We consider that the last words must refer to the transaction that a licensee is involved in rather than a financing transaction.

[39] A financing transaction will generally only give rise to rights and obligations between one of the parties to a real estate transaction, on the one hand, and the bank, on the other. That party in cases where an ASP is concerned, will be the purchaser.

[40] While a financing transaction may often have some relation to real estate, in that a loan to the borrower will be secured over the land, not every financing contract includes that feature.

[41] We consider that the preliminary view that we have just set out his confirmed by s 3 of the Act which sets out its purposes. Amongst others, the purpose of the Act is to promote and protect the interests of "consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work".

[42] "Transactions" are defined in section 3 as well and they do not make any reference to the provision of finance or other services that banks are involved in.

[43] A number of additional points can be made about this aspect of the definition. The phrase in its entirety suggests that the Act is concerned with transactions that occur in the context of transactions which have reference to real estate agency work. "Real estate agency work" is defined in S4 and the terms of that section specifically exclude:

> (iv) lending of money on mortgage or otherwise

[2] The Concise Oxford Dictionary, 4 Ed.

[44] We consider that it would therefore be surprising that a rule made as part of regulations that are apparently intended to give effect to the Act[3], should be applied in a way that gives effect to purposes involving parties other than those subject to real estate contracts and for the benefit of entities such as trading banks whose interests are not directly referred to in the Act.

[45] The further feature of the legislation which is influential is that it is a consumer protection enactment. Consistently with that character, its legislation that is unlikely to be concerned with providing additional safeguards for large-scale financial entities, that is to say trading banks, which operate in the mortgage lending market.

[46] Before we leave this aspect of the matter will be noted that Counsel in this case placed reliance upon the case of *Complaints Assessment Committee 20002 v Chand*[4]. Our understanding is that in *Chand* the question of whether the obligation in R 6.2 required good faith and fair dealing with the bank as a party engaged in a transaction was not a live issue. It would appear that the point was conceded and the main concern of the Tribunal was assessment of the appropriate penalty.

[47] If, as we consider to be the case, there was no obligation in relation to the banks to in good faith and deal fairly with all parties to the transaction under R 6.2, it follows that a failure to so act cannot amount to misconduct for the purposes of S73(c) of the Act. Nor could it amount to unsatisfactory conduct under s72(c).

Did the defendant breach rule 6.4?

[48] We have already made reference to the fact that the Committee also asserted that the defendant was guilty of misconduct pursuant to section 73 because he breached the requirements of rule 6.4. That rule provides so far as relevant

> 6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or unfairness be provided to a customer or client.

[49] We do not consider that this rule ought to be read as extending to financiers such as trading banks. We will not repeat the foregoing discussion in this decision about the sector which the rules were designed to protect. It is sufficient to say that we see no reason why the wording of r 6.4 should be given an extended

[3] See the regulation-making authority in close footnote S 156
[4] *Complaints Assessment Co 102mmittee 20002 v Chand* [2014] 102

interpretation so that a trading bank such as BNZ should be considered a "customer" or "client". The result is that the prosecution is unable to establish that there has been a breach of section 73 on the grounds that the defendant did not comply with rule 64.

Charge two

[50] The alternative charge is that the defendant is liable for misconduct under section 73 and that his conduct constituted seriously incompetent or seriously negligent real estate agency work.

[51] In this charge it is alleged that the conduct was carried out by the defendant "in ignorance of his professional and ethical duties and obligations so as to constitute seriously incompetent or seriously negligent real estate agency work".[5]

[52] The particulars supporting this charge are the same as those which were put forward in respect of charge one. What is different is that charge two, unlike charge one does not assert that the circumstances of execution of the loans was not the result of deliberate concealment of the involvement of the defendant in the transactions but rather was conduct that reflected serious incompetence or serious negligence in the course of carrying out real estate work.

[53] However, the allegation rests upon the assumption that there have been breaches of rule 6.2 and 6.4. We have already indicated our view that the dealings with the banks in this case did not amount to such breaches and therefore they cannot be used to establish the charges that are set out in charge two. Charge two is also dismissed.

Charge three

[54] This charge alleges that the defendant failed to comply with the requirements of the Property Law Act 2007 (**PLA)** when he signed various ASP's as the attorney of Mr Lloyd. As a result it is alleged that he was guilty of serious incompetence or had been seriously negligent contrary to s 73(b) of the act.

[5] BD 3

[55] Mr Hodge drew to our attention to a High Court authority, *Complaints Assessment Committee 20003 v Jhagroo*[6] where the application of s 73(b) was considered in the following passage:

> The words of s 73(b) must be given their plain meaning. Whether serious negligence or serious incompetence has occurred is a question to be assessed in the circumstances of each case … the Tribunal is well placed to draw a line between what constitutes serious negligence or incompetence, or mere negligence or incompetence, the Tribunal having considerable expertise and being able to draw on significant experience in dealing with complaints under the Act.

[56] S 19 provides as follows:

> ***19 Powers of attorney***
>
> *[a] Anything done by or to an attorney on behalf of the donor of a power of attorney has the same effect as if it had been done by or to the donor if—*
>
> *[i] it is within the attorney's powers; and*
>
> *[ii] it is done while the power of attorney is in force.*
>
> *[b] Subsection (1) applies subject to subsection (3) and section 12.*
>
> *[c] An instrument executed by an attorney on behalf of the donor of a power of attorney must—*
>
> *[i] be made in the name of the donor; and*
>
> *[ii] state that it is being executed on the donor's behalf by the donor's attorney; and*
>
> *[iii] otherwise be executed by the attorney in the same manner as would be required if the attorney were a party to the instrument.*

[57] Mr Hodge made the following submission concerning the application of that section and the circumstances of this case:

> 5.9 The defendant did not comply with s 19 of the PLA in any of the transactions for the six properties where Dimegasy was the vendor, in circumstances where he signed as the attorney for either Eric Lloyd or Dimegasy, and was also acting as a licensee in the transaction:
>
> (a) He either signed using an imitation of Eric Lloyd's signature, or his own signature. (While the former is not of itself a breach of s 19, it is submitted that imitating a donor's signature would still be considered highly irregular.)

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[6] *Complaints Assessment Committee 20003 v Jhagroo* [2014] NZHC 2077

(b) The only addition to the signature, in three out of the six agreements, was the word "Director".

(c) In none of the agreements is there any indication that the defendant was the person signing, such as by printing his name.

(d) Neither is there any indication that the defendant is signing as an attorney.

…

5.13 In this case, the defendant has failed to comply with s 19 on six occasions. He had made no apparent effort to ensure that he has signed in the correct form, despite the manner of signing being an obvious issue that a licensee should check in circumstances where an attorney is signing. Taken cumulatively, it is submitted that the repeated non-compliance goes beyond mere negligence and amounts to misconduct under s 73(b). This is especially so when seen in the wider context of this case, with the complete failure of the defendant to disclose his close relationship with Dimegasy.

[58] Counsel referred to the authority of *London County Council v Agricultural Food Products Ltd* [7]. The judgement in *London County Council* confirmed that using the donor's Signature without adding "PP" or anything to say the signature was made by an attorney, will still be valid but is bad practice because it is misleading.

[59] Questions of validity are not an issue in this case as they were in *London County Council.* But that case does provide some guidance on the view that the courts take of action such as that which were carried out by the defendant in this case.

[60] We agree that the overall circumstances in which the defendant signed agreements on behalf of the company are serious. In particular we are of the view that he must have understood that he could have no justification for imitating the signature of Mr Lloyd when he signed the agreements. In so doing he was deliberately presenting the document as being something that it was not.

[61] The prosecution's case is that the defendant was generally acting in such a way that was designed to conceal the fact that he was involved in the transactions

[7] *London County Council v Agricultural Food Products Ltd* [1955] 2 QB 218

both as a licensee and as a party with an interest in the company which was entering into agreements to sell the properties. This is said to be part of the larger scheme of obtaining finance through a mortgage fraud mechanism.

[62] We are not certain that the defendant actually falsely signed the agreements for that purpose. We note that on some of the occasions he actually appended his own signature to the document so on that occasion there was no attempt to pass off his signature as being the document of Mr Lloyd.

[63] Even without proof that the false signatures were designed to advance a mortgage fraud scheme, the conduct is serious in its own right. Counsel for the Tribunal was correct, we accept, in the submissions that he made concerning the deliberate imitation of the signature of Eric Lloyd.

[64] The present case is concerned with regulating the conduct of real estate licensees who function as important commercial agents in the real estate sale sector. It would be contrary to the interests of consumers and erosive of public confidence in the performance of real estate agency work[8] for such conduct to be tolerated. It is difficult to imagine any situation where the appending of a false signature could be seen as acceptable conduct on the part of a licensee.

[65] We accept that this basis for charging the defendant under S73 is valid. At best, the behaviour of the defendant reflects a failure to understand how he ought to exercise this signing power. Given that he appears to have not understood what was required of him, he ought to have obtained advice and guidance but did not. His conduct in marking the documents in such a way that it would give the impression it had been signed by Mr Lloyd was not an acceptable way of exercising the power. In our view it is self-evident that any reasonable licensee would take the view that the licensee doing so must either be seriously incompetent or to have gone about his/her tasks in a seriously negligent way.

Charge four

[66] A further charge is brought against the defendant of misconduct under section 73(a) of the Act having regard to the way in which he responded to the enquiries which were directed to him by the agency when an investigator approached him for that purpose.

[8] Both objectives under section 3 of the Act

[67] Mr Hodge rightly conceded that persons in the position of the investigator cannot be "thick-skinned" but even allowing for that fact that he considered that the conduct went beyond what was acceptable. Some of the comments which the defendant made in communications with the authority are so plainly unfounded and extreme that it is inconceivable that a reasonable investigator, although finding them unpleasant, would have taken them seriously. We refer in particular to the email which the defendant sent to Ms Gerrard[9] where he made reference to "thuggery" on the part of the investigator for asking questions of him and he spoke about "rogue officials". He also made reference to a "witchhunt" against him.

[68] Our view of this conduct is that it reflects very adversely on the defendant. On the other hand, the extremity of the statements and the fact that they are so obviously lacking in foundation means that they are, in truth, risible. We consider that the conduct would be regarded by agents of good standing or reasonable members of the public to be ridiculous rather than disgraceful.

[69] In the end, though, the reason why we have decided that the charge ought to be dismissed is that the conduct does not qualify disgraceful conduct because it does not fit with one the usual subcategories that are applicable. It does not involve criminal or fraudulent conduct or something of that kind. It is sometimes difficult to draw the line where disgraceful conduct starts and finishes. We do not consider, though, that the sort of blustering and aggressive conduct which the defendant manifested on this occasion is included in the type of activity which section 73 of the Act is aimed against.

Disposal of Charges

[70] In conclusion, we find Charge 3 is proved. The other charges are dismissed. In the light of the conclusions which the Tribunal has come to on the charges, it will be necessary to hear further from the parties concerning what orders ought to be made. The case officer is to take steps to allocate a further hearing of this matter so that we can hear submissions on the question of penalty.

[71] It is our suggestion that even though he did not appear at, and take part in, the hearing against him of the charges, the Licensee should if possible attend at the further hearing which will deal with the matter of penalty.

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[9] BD 352

[72] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Mr J Doogue
Deputy Chairperson

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Mr G Denley
Member

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Ms N Dangen
Member