

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 30

READT 003/20

IN THE MATTER OF

An Application for Review of a Registrar's
decision, under Section 112 of the Real
Estate Agents Act 2008

BETWEEN

PHILLIP JULIAN CAVANAGH
Applicant

AND

THE REGISTRAR OF THE REAL
ESTATE AUTHORITY
Respondent

Hearing:

30 June and 1 July 2020, at Auckland

Tribunal:

Hon P J Andrews (Chairperson)
Ms C Sandelin (Member)
Ms F Mathieson (Member)

Appearances:

Mr S Judd, on behalf of the Applicant
Ms E Woolley on behalf of the Registrar

Date of Decision:

23 July 2020

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Cavanagh has applied for review of the Registrar's determination, dated 17 January 2020, to decline his application for a salesperson's licence.

Background

[2] In around January 2004, Mr Cavanagh completed the required training and was granted a certificate of approval as a real estate salesperson, under the Real Estate Agents Act 1976 ("the 1976 Act"). He was engaged at the Mt Albert branch of Barfoot & Thompson. In around 2006 he and a fellow salesperson, Mr Raghu Aryasomayajula, became involved in a business of acquiring properties capable of being subdivided, for development and on-sale for a profit.¹

[3] Initially, the business was carried on lawfully. However, with time, they became financially stretched and short of working capital necessary to finance development on newly-subdivided sections. Neither Mr Cavanagh nor Mr Arysomyajula had sufficient facilities to raise finance to meet their increasing capital requirements.

[4] Mr Cavanagh and Mr Arysomyajula then embarked on a strategy of arranging for various third parties to apply to banks for mortgages to purchase properties in their own names. The mortgage applications contained false information, including the value of the properties being inflated to cover the anticipated cost of development, and false details of the applicants' financial positions. Incentives were offered to the third parties, including the promise of a lump sum payment or the opportunity to get onto the property ladder.

[5] Once mortgage funds were obtained, they were transferred to various entities and used for developing vacant sections, or to pay off credit card and other debts. The deception was uncovered by the Agency, which alerted the banks. The total loss to lenders amounted to \$3,844,287.37, on loans advanced of \$12,988,950.

¹ This summary has been prepared by reference to the judgment of the Court of Appeal in *Arysomyajula v The Queen* [2011] NZCA 633, and the sentencing notes of District Court Judge A E Kiernan in *Serious Fraud Office v Cavanagh* CRI-2009-004-023457, 22 October 2009.

[6] On 3 October 2007, the Real Estate Licensing Board granted an application by the Real Estate Institute of New Zealand for Mr Cavanagh's certificate of approval to be suspended, pursuant to s 98 of the 1976 Act. In a decision issued on 23 October 2008, the Board found that Mr Cavanagh, Mr Arysomayajula, and one other person had demonstrated "misconduct revealing character of a kind inconsistent with the responsibilities of a certified salesperson".² In a decision dated 18 December 2008, the Board found that it was in the public interest that Mr Cavanagh's certificate of approval be cancelled.³

[7] The Tribunal understands that Mr Cavanagh was adjudicated bankrupt in October 2008.

[8] Both Mr Cavanagh and Mr Arysomayajula were jointly charged with obtaining by deception, fraud, and using a document for pecuniary advantage in relation to 16 specific transactions, between August 2006 and June 2007. Mr Cavanagh entered a guilty plea, and on 22 October 2009, was convicted and sentenced to a term of imprisonment of two years and five months.⁴ Mr Arysomayajula was found guilty after a trial in the District Court and sentenced to imprisonment for four years and six months.⁵ His appeal to the Court of Appeal against his conviction and sentence was dismissed.⁶

[9] In reaching the final sentence of two years and five months' imprisonment imposed on Mr Cavanagh, the sentencing Judge adopted a starting point of five years' imprisonment, then took into account the aggravating features of the sophistication, extent and duration of the offending and its effect on the victims of the offending, and the mitigating factors of his guilty plea (which the Judge accepted had been entered at the first reasonable opportunity), and his co-operation with the prosecuting authorities (which included giving evidence for the prosecution at Mr Arysomayajula's trial). The Judge accepted that Mr Cavanagh's guilty plea and co-operation were an acceptance

² *Real Estate Institute of New Zealand Inc v Arysomayajula & Ors* Real Estate Agents Licensing Board 2008/635, 23 October 2008

³ *Real Estate Institute of New Zealand Inc v Arysomayajula & Ors* Real Estate Agents Licensing Board 2008/650, 18 December 2008.

⁴ *Serious Fraud Office v Cavanagh* DC Auckland CRI-2009-004-023457, 22 October 2009.

⁵ *R v Arysomayajula* DC Auckland CRI-2009-004-20929, 9 November 2010; DC Auckland CRI-2009-004-20929, 3 February 2011.

⁶ *Arysomayajula v The Queen* [2011] NZCA 633.

of responsibility for the offending, and she was satisfied that he was truly remorseful. The Judge also took into account the fact that Mr Cavanagh was a first offender.

[10] Mr Cavanagh was released from prison after serving approximately one third of his sentence. Following his release from prison, he worked for Mr Gary Deeney, who is a property and town planning consultant, and (in partnership with another person) a property investor and landlord. Mr Cavanagh was employed doing property maintenance, building, and related jobs on Mr Deeney's and his partner's projects. For the past six years, he has been an on-site building manager for a 35-unit apartment building in Auckland, attending to tenants' needs, maintaining the building's common areas, and undertaking general apartment repairs as required.

[11] In May 2015, Mr Cavanagh began an apprenticeship in building and construction. He is nearing the completion of his apprenticeship.

[12] Through his building work, in 2017, Mr Cavanagh met Ms Lockwood, the principal of Hallmark Real Estate in Auckland ("Hallmark"), when he was doing work on Ms Lockwood's apartment. In June-August 2019, Mr Cavanagh looked after some rental properties for Ms Lockwood, while she was away.

[13] In March 2019, Mr Cavanagh completed and satisfied the required assessment standards for the NZ Certificate in Real Estate (Salesperson) through the Unitec Institute of Technology.

The Registrar's determination

[14] On 4 July 2019, Mr Cavanagh applied to the Authority for a salesperson's licence, by submitting an application form, application fee, record of his salesperson's certificate qualification, curriculum vitae, personal references (including one attesting to his ability as a real estate salesperson), and a letter of offer of employment from Hallmark. He gave consent to enquiries being made in relation to the application.

[15] As part of his application, Mr Cavanagh was required to complete a statutory declaration. Among the statements included in the declaration was the following:

...

4. I have not been convicted, whether in New Zealand or another country, of a crime involving dishonesty (or a crime that, if committed in New Zealand, would be a crime involving dishonesty) within the 10 years preceding this application.

...

[16] Mr Cavanagh did not refer to his convictions (which were less than ten years before his application), but stated in his covering letter:

I was previously licensed under the Real Estate Agents Act 1976 and had my licence suspended in December 2007 and ultimately cancelled pursuant to this Act in December 2008 with a 10 year suspension stand down period, that period will lapse on October 22nd this year.

[17] On 14 August 2019, Mr Cavanagh was advised that his application would be “on hold until October 2019, which is when your 10 year stand down period is over”, and that the application would be reviewed at that point. On 3 December 2019, Mr Cavanagh was asked to provide the Judge’s sentencing notes. He provided these on 9 December.

[18] On 18 December 2019, the Registrar advised Mr Cavanagh of his intention to decline his application under s 43(3) of the Real Estate Agents Act 2008 (“the Act”),⁷ and gave Mr Cavanagh the opportunity to comment before he made a final decision on the application.

[19] The Registrar stated that based on the information provided with his application, he was not satisfied that Mr Cavanagh was a fit and proper person to hold a salesperson’s licence under s 36(2)(c) of the Act. He noted that the Real Estate Agents Licensing Board had decided on 18 December 2008 that it was in the public interest that his certificate of approval be cancelled, and that under the 1976 Act, cancellation of a certificate was indefinite.

[20] The Registrar also referred to Mr Cavanagh’s conviction and sentence, stating that “the effect on the victims, the length of time that the offending occurred and the

⁷ The Real Estate Agents Act 2008 replaced the Real Estate Agents Act 1976, and came into force on 17 November 2009.

number of transactions, a total of 16, are of concern to me as Registrar”. The Registrar continued:

I am also concerned about the sophistication and planning that went into these real estate-related fraud schemes. While the 10-year period under section 37 of the Act has passed, I must take your offending into consideration in deciding whether you are fit and proper under section 36 of the Act to hold a real estate licence. Although you have been punished for your offending, I question your merit and reliability due to the seriousness of the offences and the fact that they were committed while performing real estate agency work. Therefore, I consider your offending casts a longer shadow than the 10-year minimum under section 37 of the Act.

[21] The Registrar also recorded that Mr Cavanagh had incorrectly stated in the statutory declaration in his application that he had not been convicted of a crime involving dishonesty within the 10 years preceding the application.

[22] Mr Judd responded to the Registrar on behalf of Mr Cavanagh. He submitted that as s 37(1) of the Act covers the situation where a person has been convicted of a criminal offence involving dishonesty and imposes a 10-year stand down period, that conviction cannot, in itself, be a reason for deciding that a person is not fit and proper under s 36(2). He submitted that the Registrar was required to take a forward-looking approach, assessing the applicant’s worthiness and reliability for the future.

[23] Mr Judd submitted that Mr Cavanagh had provided evidence in the form of references, qualifications, and a job offer, that would clearly qualify him as fit and proper, but for the historical offending, and there was no evidence that he was not fit and proper apart from that offending. He submitted that Parliament had decided that a 10-year stand down period was sufficient, so the historical offending should no longer be a consideration. He submitted that the effect of s 37(1) of the Act is that Mr Cavanagh is entitled to a second chance to work in the industry, provided that the evidence shows that he is now a fit and proper person despite the historical offending.

[24] In his letter of 17 January 2020, the Registrar formally declined Mr Cavanagh’s application for a salesperson’s licence, on the basis that he was not satisfied that he was a fit and proper person to hold a licence. In setting out his reasons for this determination, the Registrar repeated his references to the cancellation of Mr Cavanagh’s licence in 2008, and Mr Cavanagh’s conviction and sentence in 2009. He

recorded that the convictions for crimes involving dishonesty made him ineligible to hold a real estate licence for a period of 10 years, pursuant to s 37(1)(a) of the Act.

[25] The Registrar then referred to the submissions made by Mr Judd, and reconsidered the information previously supplied to him, in the form of references, qualifications, and the offer of employment. He noted that only two of the references referred to Mr Cavanagh's offending and rehabilitation. He said that it was difficult to understand the nature of the role Mr Cavanagh had been offered at Hallmark, as the company's website contained no current listings, or any information about the company itself. He noted that the website was in breach of s 121 of the Act (as to required name information). The Registrar concluded:

I do not agree with Mr Judd that you are clearly qualified as a fit and proper person to hold a licence based on the references, your qualification and the job offer.

I have noted that the sentencing Judge described your offending as sustained, premeditated fraud and found your degree of culpability to be very high. The extent of your deception was almost \$13,000,000, described by the Judge as being at the very highest end of the decisions before [her] at the time. One of the [principal] features of your offending was the sophistication and planning that was involved. Your offending was prolonged, involving a sustained course of conduct over many months and many transactions. It is also clear that your offending had an enormous effect on a number of victims. These findings are of great concern to me, particularly given that your offending directly related to real estate agency work and continue to cast serious doubt on your fitness to hold a licence in the future.

In the light of the above sentencing notes, and while the 10-year period has passed, I consider the seriousness and nature of your offending continues to be highly relevant in assessing your worthiness and reliability for the future and whether you are a fit and proper person to hold a licence.

I have also taken into account that, as recently as 1 June 2019, you made an incorrect statutory declaration regarding your convictions and there is no comment from Mr Judd on this point.

After considering the totality of the evidence before me, I am not satisfied you are a fit and proper person to hold a real estate licence.

Therefore, I have declined your application under section 43(3) of the Act.

Evidence

[26] The Tribunal heard evidence from Mr Cavanagh, and three witnesses who had provided references in support of his application: Mr Deeney, Ms Lockwood, and Ms Hayes. All witnesses provided statements of their evidence, and were available for cross-examination and questions from the Tribunal.

[27] Mr Cavanagh was closely questioned as to his offending, and in particular his role in it. He rejected the suggestion that he had attempted to understate the gravity of his offending, by describing it in his statement of evidence as “mistakes” and “misconduct”. He said he used the term “misconduct” in the sense that it is used in the Act (as distinguished from “unsatisfactory conduct”).

[28] He further said that he understood fully the gravity of his offending and its effect on the banks who made loans, and ordinary people who were left with mortgage debts. He said he accepts that he was wrong, and accepts full responsibility for his offending. He said he is exceptionally sorry for the effect of his offending on others, that he changed his victims’ lives for the worse, and that he cannot change the outcome.

[29] Mr Cavanagh said that his property developments with Mr Arysomayajula were a natural extension of his real estate sales work. He said he had no addiction or personal issues, and at the time was young, successful at real estate sales, greedy, and thought he would succeed at everything he did.

[30] Mr Cavanagh was asked what he had done to address the conditions that led to his offending. He responded that his lifestyle is completely different, and he is a different person both inside and outside. He has been working for wages, in a structured and controlled environment, with defined hours. He said he has matured, and realised that he does not need the “trappings” he had formerly. He has come to understand what is important in life, and is more cautious and careful.

[31] Mr Cavanagh said he has spent much of the last five years caring for his parents. They, with the support of his two brothers (who live overseas), decided to appoint him under a Power of Attorney to help them in their advanced years. Mr Cavanagh’s father died in June 2017, but he continues to provide the sole family support for his mother, who has Alzheimers, and lives in an aged-care home. Mr Cavanagh said that the time spent caring for his parents has been a great lesson in what is important in life.

[32] Mr Cavanagh was asked how he could be certain that the offending could not happen again. He responded that the offending was tied to his property development business, and he does not have either the nature or desire to be involved in property

development. He also spoke of working closely with Ms Lockwood at Hallmark, and his expectation that everything he did would be checked and discussed with her.

[33] Mr Deeney has known Mr Cavanagh since around 1991. In the period 1995-1999, they purchased and developed two properties together, renovating an existing house and building a second house. Subsequently, Mr Deeney embarked on further projects with another partner, and Mr Cavanagh pursued his career as a real estate salesperson.

[34] Mr Deeney supported Mr Cavanagh when he was convicted and sentenced. He employed Mr Cavanagh before he was sentenced, and after his release from prison. Mr Cavanagh has worked for him on a number of building sites over the last 12 years. He currently employs Mr Cavanagh as Building Manager of one of his apartment buildings. He said Mr Cavanagh was one of very few people he has met who took complete responsibility for his actions. He was impressed that Mr Cavanagh did whatever work he could find with a view to building a new career path for himself.

[35] Mr Deeney described Mr Cavanagh as an excellent project manager and administrator, who has carried out a range of administration and research tasks, is very good at identifying items that need maintenance, or issues such as faulty workmanship, and is friendly with an open personality so gets on well with tenants and others involved in projects. Mr Deeney has had no cause to be concerned about Mr Cavanagh's honesty and integrity over the 12 years he has worked for him, or at any time throughout their 30-year relationship. He is fully aware of the actions that led to Mr Cavanagh's conviction and sentence, and believes that his wrongdoing was an aberration.

[36] Mr Deeney was asked what insight Mr Cavanagh had into his offending at the time he was charged. He responded that he had full understanding that what he had done was wrong, and that he would be sentenced to imprisonment, and lose his salesperson's licence. That has not changed over the years, but he said that Mr Cavanagh is now a different, and better, person. He said Mr Cavanagh has had 13 "hard years in the wilderness", of hard physical work and roadblocks confronting him every day since his release from prison.

[37] Ms Lockwood has been in real estate since 1981. She is a licensed real estate agent. She has worked with a number of large real estate franchises, in particular with supervision and mentoring of salespeople, which she said requires a one-on-one involvement, on a daily basis. She has operated Hallmark since 2005 as an independent real estate agency involved in managing clients' property portfolios and selling residential, rural, and commercial properties, as well as businesses and residential leasing. It is a small agency, and she is the only licensee involved in it.

[38] She met Mr Cavanagh in 2017, when he was one of the builders working on her apartment. It was clear to her that he was very passionate about working in real estate. She said Mr Cavanagh was very open about his convictions, and the earlier cancellation of his licence, and provided her with a copy of the Judge's sentencing notes. She said Mr Cavanagh took responsibility for his actions and was full of remorse for them.

[39] Ms Lockwood has offered Mr Cavanagh a position at Hallmark. She said he would be working closely with her, and under her instruction, supervision, and mentoring. She would approve all listing agreements, and would review all aspects of his work for clients, including client decision making, meetings, and negotiations.

[40] Ms Lockwood intends to retire in about three to five years' time, and over that period would like to mentor Ms Cavanagh, and to pass on to him the knowledge she has gained over her career, so that he becomes knowledgeable and skilled in a broad and diverse spectrum of real estate, and in a position to take over the Hallmark business when she retires.

[41] Ms Lockwood was cross-examined as to her proposed supervision of Mr Cavanagh. She said they would work as a pair, and she understood that she would need to help him to establish himself and gain a profile. She said Mr Cavanagh has a relationship-building ability and has shown himself to be good with people. She is aware that Mr Cavanagh was convicted of serious offences but has no concerns that he will offend in the future. She said that Mr Cavanagh has made that clear, and she will have close contact with what he is doing, and what he is saying to clients and

customers. With the very close working environment, she does not see how he could “step out of line”.

[42] Ms Hayes has known Mr Cavanagh for over 11 years. He introduced himself to her at a tennis club where she was practising as a beginner. Mr Cavanagh was a regular player in one of the higher grades and offered her coaching assistance. She described Mr Cavanagh as having a generosity of spirit, and willingness to help others and put other peoples’ needs before his own.

[43] Ms Hayes said that Mr Cavanagh was very open and honest with her (and other players at the tennis club) about the circumstances of his conviction and sentence, and the suspension then cancellation of his real estate salespersons licence. She has read the Judge’s sentencing notes and discussed it with him. She said it is abundantly clear to her that Mr Cavanagh very much regrets and is very repentant of his conduct.

[44] Ms Hayes had also watched Mr Cavanagh care for and support his aged mother, who is ill, and his late father, as both his brothers live overseas. She is certain that Mr Cavanagh is completely rehabilitated and will not reoffend or engage in any unprofessional or unbecoming conduct as a real estate salesperson. She has no doubt that if she were selling her property, she would engage Mr Cavanagh as selling agent, and that he would apply all his skills and effort into the job at hand to achieve the best possible result for her.

Proposed Scheme of Supervision and Undertakings

[45] During the hearing, Mr Judd presented a memorandum setting out a proposed scheme of supervision in relation to Hallmark’s offer of employment of Mr Cavanagh, recording undertakings (which were confirmed at the hearing) by Mr Cavanagh and Ms Lockwood. We summarise the provisions of the supervision scheme, as follows:

- [a] Ms Lockwood undertakes that if Mr Cavanagh is granted a salesperson’s licence she will engage him as a salesperson, and will supervise, mentor, and train him, by:

- [i] reviewing and approving all advertising material, ensuring that all such material complies with legal and regulatory requirements;
- [ii] working closely with him in preparing appraisals and considering marketing and advertising strategies;
- [iii] discussing and agreeing with him proposed agency agreements with clients, discussing and agreeing marketing plans for properties, reviewing and approving reports to clients, and attending significant meetings with clients;
- [iv] reviewing and approving offers proposed to be presented to or by clients, and working with him to ensure all required disclosure is provided;
- [v] approving and supervising auctions, tenders, and any other method of sale undertaken by him;
- [vi] reviewing and approving agreements for sale and purchase that are made through Hallmark, correspondence relating to sale negotiations, and advising clients regarding agreements;
- [vii] working closely with him during the period between an agreement for sale and purchase and settlement, including liaising with solicitors, arranging pre-settlement or other required inspections, assisting with apportionments of rates and utilities bills, and ensuring that a transaction report is created recording relevant steps and communications; and
- [viii] complying with the Authority's Professional Standard on Supervision, and ensuring that he completes all ongoing professional development requirements.

- [b] Further, Ms Lockwood undertakes that:
- [i] all payments by clients for marketing or otherwise, and all deposits, will be made to Hallmark's bank account, and Mr Cavanagh will not have access to that account; and
 - [ii] if she has any concerns about his honesty or integrity, Ms Lockwood will immediately report such concerns to the Registrar, and would be willing to provide such information to the Registrar as to his progress as the Registrar reasonably requests on a regular basis (three-monthly) for at least one year.
- [c] Mr Cavanagh undertakes that he will advise Ms Lockwood of any approaches from prospective clients, and they will work together to prepare appraisals and proposals. He is happy to work closely with Ms Lockwood, and to be supervised and mentored by her in his real estate agency work.
- [d] Mr Cavanagh further undertakes that that he will not engage in property development work for such period of time as the Tribunal considers appropriate.
- [e] Mr Cavanagh accepts that he should be treated as a new salesperson for the purposes of s 36(2A) of the Lawyers and Conveyancers Act 2006, so will need to hold a licence for six months before he can prepare or give advice on agreements for sale and purchase under s 36(2) of that Act.

Relevant statutory provisions

[46] Section 3 of the Act sets out the purpose of the Act:

3 Purpose of Act

- (1) The purpose of the Act is to 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.
- (2) The Act achieves its purpose by—

- (a) regulating agents, branch managers, and salespersons:
- (b) raising industry standards:
- (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[47] Section 36 and Section 37(1)(a) of the Act set out the provisions as to entitlement to a licence, as relevant in the present case

36 Entitlement to a licence

...

- (2) An individual may be licensed as a salesperson if the individual satisfies the Registrar that he or she—
 - (a) has attained the age of 18 years; and
 - (b) is not prohibited from holding a licence under s 37; and
 - (c) is a fit and proper person to hold a licence; and
 - (d) has the prescribed qualifications.

37 Persons prohibited from being licensed

- (1) The following persons are not eligible to hold a licence:
 - (a) a person who has been convicted, whether in New Zealand or another country, of a crime involving dishonesty (or a crime that, if committed in New Zealand, would be a crime involving dishonesty) within the 10 years preceding the application for a licence.

...

[48] Section 4 provides that the term “crime involving dishonesty” is to be interpreted in accordance with the definition of that term in s 2(1) of the Crimes Act 1961.

Applications to review Registrar’s determinations to decline or cancel a licence

[49] The principles as to determining an application to review a Registrar’s determination to decline or cancel a licence are well established. As relevant to Mr Cavanagh’s application:

- [a] The Tribunal will make its own assessment of whether it is satisfied that he is a fit and proper person to hold a licence.⁸ Each case is determined

⁸ *Revill v Registrar of the Real Estate Agents Authority* [2011] NZREADT 41, at [11].

on its own facts, with reference to the material available to the Registrar, and any additional material provided to the Tribunal.

[b] The onus is on the applicant to satisfy the Tribunal, on the basis of “sufficient and adequate information”, that he is a fit and proper person to hold a licence. The standard of proof is the ordinary civil standard of the balance of probabilities.⁹

[c] The factors relevant to the assessment of whether an applicant is a fit and proper person to hold a salesperson’s licence are:¹⁰

[i] The focus is necessarily forward-looking. The function of the Registrar, and the Tribunal on review, is not to punish the applicant for past conduct, but to assess the applicant’s worthiness and reliability for the future.

[ii] The onus of a person who has erred in a professional sense following admission to the industry is heavier than that on a candidate for admission.

[iii] The Registrar (and the Tribunal) must look at the facts of the case “in the round”, and not just have regard to the fact of a previous conviction or convictions.

[iv] The Tribunal has placed emphasis on the presence of robust supervision and support structures available to the applicant in the proposed workplace.¹¹

[50] In *Revill*, the Tribunal accepted that the primary consideration is the principle that it must be satisfied objectively that the applicant is a fit and proper person, and

⁹ *Revill*, at [13].

¹⁰ *Revill*, at [15], citing *Re T* [2005] NZLR 544, at 547 (in relation to the required assessment under the Law Practitioners Act 1982).

¹¹ *Revill*, at [42].

that this assessment is to be made by reference to the consumer-protection purpose of the Act, as set out in s 3.

Application of principles – previous Tribunal decisions

[51] The Tribunal was referred to a number of Tribunal decisions on applications for review of the Registrar’s refusal to grant or renew a salesperson’s licence. While previous decisions are of limited assistance, given the need to consider applications on the basis of their own particular facts and circumstances, it is appropriate to set out summaries of these decisions.

[52] In *Revill*, the Registrar declined to issue a licence applied for in 2011, where the applicant had 25 convictions over the period from 1969 to 2002, including for sexual offences (1985 and 2002), possession and cultivation of cannabis (1996–2000), violence and firearms offences (1976–1986) and driving offences (1971, 1992, and 1983).

[53] The Tribunal discussed the convictions, and evidence before it that in the years following the latest convictions, the applicant had successfully “set about changing his approach to life”. On the totality of the evidence, the Tribunal concluded that the applicant was a fit and proper person to hold a licence. One of the factors taken into account was that the applicant would be working in an agency offering “seemingly excellent supervision and mentoring”, but the Tribunal noted that if he were “to leave that setting or structure, then there may be a case for further thought upon his next annual licence renewal point”.¹²

[54] In *Mason v The Real Estate Agents Authority*, the Tribunal considered an application for review on the papers.¹³ The applicant had applied for a licence in August 2012. At that time, he had convictions for crimes involving dishonesty (including nine for burglary and six for theft), all of which were more than ten years before his application. The applicant had obtained the required real estate

¹² *Revill*, above fn 8, at [42].

¹³ *Mason v The Real Estate Agents Authority* [2013] NZREADT 7.

qualifications and had positive reports as to his work in other areas, albeit nothing in the real estate industry.

[55] The Tribunal accepted a submission for the Registrar that the applicant's contention that he had changed his life since his offending was not supported by sufficient and adequate information. It concluded that he had not established on the balance of probabilities that he was a fit and proper person to hold a licence. However, the Tribunal went on to say that it had misgivings about disposing of the matter on the papers, and gave the applicant an opportunity to seek an oral hearing.

[56] In *Parlane v The Registrar of The Real Estate Agents Authority*,¹⁴ the Tribunal declined an application for review. The Registrar had declined the applicant's application for a licence, on the grounds that he was not a fit and proper person. The Registrar had regard to disciplinary findings against the applicant by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal for misconduct and unsatisfactory conduct in a professional capacity, which had led to his being struck off the Roll of Barristers and Solicitors. The Registrar also referred to the applicant's failure to satisfy her that he had a prospective employer willing to employ him as a salesperson, and who would undertake to support him in that role on a day to day basis.

[57] The Tribunal was conscious that a cause of the applicant's offending was illness rather than character, and suggested that it was possible that if he could satisfy the Registrar at some stage that he could be employed as a real estate agent on a basis involving much supervision and mentoring, a licence could be granted to him, and he would in effect be on trial for a year until his licence needed renewal. However, on the evidence and submissions put to it, the applicant had not satisfied the Tribunal that he was a fit and proper person to hold a licence.

[58] In *Foot v The Registrar of The Real Estate Agents Authority*,¹⁵ the Tribunal concluded that a licence could be granted to the applicant, who had been convicted on charges under the Tax Administration Act 1994, involving the evasion of \$222,171 in income tax and GST. While those convictions were not for "crimes involving

¹⁴ *Parlane v The Registrar of The Real Estate Agents Authority* [2013] NZREADT 94.

¹⁵ *Foot v The Registrar of The Real Estate Agents Authority* [2015] NZREADT 24.

dishonesty”, the Registrar was not satisfied that the applicant had the requisite level of honesty and integrity for re-entry into the real estate industry.

[59] In allowing the application for review, the Tribunal considered evidence in support of the applicant’s character, and took particular comfort from the fact that the applicant would be working in an agency which was particularly conscious of its obligations under s 50 of the Act (as to supervision), and that the applicant would be subject to specific conditions. The Tribunal further noted that if the applicant were to leave that agency, there might be a case for further thought upon the next renewal of her licence.

[60] In *Napier v The Registrar of The Real Estate Agents Authority*,¹⁶ the Tribunal allowed an application for review from an applicant whose application for renewal of his licence had been declined by the Registrar. The applicant had been found liable in High Court civil proceedings for misuse of funds, breach of duties as director of a company, and associated fiduciary duties, in the sum of \$1.418 million. The proceedings were eventually settled, and the judgment debt repaid. The Registrar considered that the High Court judgment called into question whether the applicant had the requisite level of honesty and integrity to remain in the industry.

[61] In allowing the application, the Tribunal found that the Registrar had not been wrong to place emphasis on the High Court judgment, and to regard it as a significant factor in her assessment of whether the applicant was a fit and proper person to hold a licence, as findings of misappropriation, and breach of fiduciary duties must give rise to a very serious concern as to an applicant’s fitness to hold a licence. However, at the time of the Tribunal hearing, that conduct had occurred five years previously, and before the applicant entered the real estate industry. Further, the applicant had carried out real estate agency work without any complaint having been made against him, and had the support of clients, the agency employing him, and people in his locality, all of whom were aware of the proceedings.

[62] Further, the Tribunal had a detailed statement of the measures that would be taken by the agency to ensure supervision and monitoring of the applicant’s real estate

¹⁶ *Napier v The Registrar of The Real Estate Agents Authority* [2017] NZREADT 64.

agency work. The assurances given in that statement were a significant factor in the Tribunal's determination.

[63] Finally, we refer to *Real Estate Agents Authority v A*, a judgment of the High Court on appeal from a decision of the Tribunal.¹⁷ In that case, the Registrar had determined that the applicant's licence would not be renewed, after she had been convicted on charges under the Tax Administration Act in relation to unpaid tax of \$233,866.31 involving a personal business. During the period of the offending, the applicant had spent approximately \$278,000 on on-line gambling. The Registrar concluded that the applicant was not a fit and proper person to hold a licence.

[64] The Tribunal concluded that its decision came down to its assessment of the steps the applicant had taken to address her gambling addiction and to remove herself from involvement in the business, and the measures put in place by the agency which employed her, concerning her supervision and management of her professional work, and management of her financial affairs.

[65] The Registrar appealed to the High Court. The Court found that the Tribunal was wrong to conclude on the evidence before it that the applicant had established that she was a fit and proper person to be licensed. The Court contrasted the brevity of the period between the applicant's offending and consideration of the application for review¹⁸ with *Revill*, where the Tribunal had evidence as to how, over a period of 15 years, the applicant had concentrated on turning his life around, and evidence that he had "grown and matured". The Court considered that the evidence did not show that the applicant had acknowledged the true nature of the offending, and the frailties that made the offending possible, or demonstrate how those weaknesses were being overcome, but acknowledged that there might be a point in the future when she could do this.

¹⁷ *Real Estate Agents Authority v A* [2017] NZHC 2929.

¹⁸ The applicant was convicted in July 2016, the Registrar declined the application to renew the applicant's licence in October 2016, and the Tribunal's decision allowing the application for review was issued on 1 March 2017.

Submissions

[66] Mr Judd submitted for Mr Cavanagh that the Registrar went beyond his authority by, in effect, extending the prohibition period of ten years specified in s 37(1)(a) of the Act, arising out of his convictions. He submitted that the Registrar's responsibility is to decide if an applicant is a fit and proper person, based on the evidence provided at the time of the application. He submitted that Mr Cavanagh's prior convictions remained relevant only if there is evidence to suggest that he is likely to engage in similar conduct again. He submitted that there was no such evidence before the Tribunal.

[67] Mr Judd submitted that the purpose of ss 36 and 37 of the Act is to protect the public, but also to give people a second chance. He submitted that Parliament could have provided that persons convicted of dishonesty offences are prohibited for life from holding a salesperson's licence, or it could have given the Registrar a discretion to extend the prohibition beyond ten years, on the basis of the seriousness of the offending involved, but had chosen not to do either.

[68] Mr Judd submitted that once the prohibition period under s 37 has been served, the Registrar must treat the applicant like any other applicant, and limit the consideration to whether, on the evidence, the applicant is a fit and proper person at the time of the application. He submitted that the Registrar must take a forward-looking approach, based on an applicant's present character, but in the present case, although acknowledging that approach, the Registrar had in fact considered only Mr Cavanagh's historic offending.

[69] Mr Judd did not submit that the convictions were irrelevant to the consideration of whether Mr Cavanagh was a fit and proper person, but submitted that it was not for the Registrar to, in effect, extend the prohibition period, unless there was evidence supporting doing so. He submitted that there was no such evidence in this case; rather, the evidence was that Mr Cavanagh is a fit and proper person to hold a licence.

[70] Mr Judd submitted that the only matter relied on by the Registrar in addition to Mr Cavanagh's historical offending, when declining his application on 17 January 2020, was that:

... as recently as 1 June 2019, you made an incorrect statutory declaration regarding your convictions.

[71] He submitted that this was unfair to Mr Cavanagh and gave a misleading impression of what he said in his application. He referred to Mr Cavanagh's statement in his covering letter of 4 July 2019 (set out at paragraph [15], above) that he had been previously licensed, but his licence had been cancelled with a ten-year suspension period, which would lapse on 22 October 2019. He submitted that Mr Cavanagh had in fact been open and honest about his past, and his application was submitted early, but very clearly on the basis that it could not be granted until the prohibition period had expired. He submitted that it was clear that the Registrar understood the position, as Mr Cavanagh was advised that his application would be on hold, until the end of the prohibition period.

[72] Mr Judd referred to Mr Deeney's evidence that Mr Cavanagh has been engaged as an on-site building manager for some years, in which position he has keys to apartments, and has dealings with tenants, the landlord, and a range of other people. He submitted that this establishes that Mr Cavanagh has shown that a high level of trust and confidence can be placed on him. He submitted that there was nothing that suggested that there are now any issues as to Mr Cavanagh's character or honesty, and the Tribunal could give significant weight to Mr Deeney's evidence.

[73] Similarly, Mr Judd submitted that there was nothing in Ms Hayes' evidence or cross-examination that should lead to any concern as to Mr Cavanagh's present character. He submitted that Ms Hayes had been clear that Mr Cavanagh had been frank with her about his convictions, and she has absolute trust and faith in him.

[74] With regard to Ms Lockwood's evidence, Mr Judd submitted that she had been under no obligation to assist Mr Cavanagh, but was doing so because she believes in him, and would not do so unless she had utmost faith and confidence in him. He submitted that Ms Lockwood is an experienced real estate agent, who will be well able to supervise, mentor, and guide Mr Cavanagh back into the industry. He submitted

that the supervision scheme and undertakings by Ms Lockwood and Mr Cavanagh provide powerful comfort that Mr Cavanagh would be in a one-on-one arrangement of support and supervision, providing significantly more protection than would be available in a larger agency.

[75] We record that the Tribunal asked Mr Judd to take instructions from Mr Cavanagh as to whether the supervision scheme could include a provision that he discloses his convictions to prospective clients or customers. Having done so, Mr Judd submitted that given that there was significant publicity of Mr Cavanagh's offending at the time he was before the Real Estate Agents Registration Board, and at the time of his conviction and sentence, and the possibility of further publicity, it would be disproportionate to require such disclosure. He submitted that it would not address the question whether Mr Cavanagh is a fit and proper person, and would achieve only shame and embarrassment for something that had happened a very long time ago.

[76] Ms Woolley submitted that the Tribunal has the benefit of a great deal more evidence than was available to the Registrar, in particular in the area of supervision. She submitted that the Tribunal should consider whether it is "satisfied" that Mr Cavanagh is a fit and proper person, given that the supervision scheme has only recently been provided.

[77] Ms Woolley submitted that the Registrar properly carried out a forward-looking assessment, and the seriousness of the offending was a proper consideration in that assessment. She submitted that it is not helpful to submit that Mr Cavanagh has not been dishonest recently, as he has not been in a position where that could occur.

[78] With respect to Mr Judd's submissions as to Mr Cavanagh's statutory declaration, Ms Woolley submitted that the Registrar does not submit that his declaration counts against his being granted a licence. She submitted that the Registrar did not decline to grant a licence as further punishment for Mr Cavanagh's offending, and that the decision was made on the basis of meeting the purposes of the Act of consumer protection, and the promotion of public confidence in the industry.

[79] Ms Woolley submitted that the Tribunal must ask itself how serious Mr Cavanagh's offending was, whether he has insight into his offending and has fully addressed it and reformed, and whether he is fully remorseful and rehabilitated. She submitted that in his evidence at the hearing Mr Cavanagh was not able to explain how his offending arose, and what the circumstances of it were. She submitted that this must raise a concern as to whether he has been truly open about the offending and his role in it. She submitted that the fact that Mr Cavanagh is not prepared to "front-foot" the issue and disclose his convictions raises a question as to his honesty, candour, and integrity. She submitted that this is directly relevant to whether allowing him to hold a licence would promote public confidence in the industry.

[80] In discussing the previous Tribunal decisions, Ms Woolley submitted that none of them had considered offending that is at the level of seriousness in this case. She submitted that Mr Cavanagh's offending could not be seen as an aberration of youth, a one-off incident, or the result of an addiction or illness. In the circumstances, she submitted, the Tribunal needs evidence of "complete reform".

[81] With respect to the supervision scheme, Ms Woolley submitted that it was put forward only after questions from the Tribunal, and would be difficult to enforce. She further submitted that it relies heavily on Ms Lockwood, and referred to a disciplinary finding against her for non-compliance with one of the rules in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. ("the Rules"). She queried whether Ms Lockwood fully appreciated her own obligations under the Rules, and the seriousness of Mr Cavanagh's offending. She also submitted that there is no provision as to a replacement for Ms Lockwood, should that be required.

[82] Mr Judd made brief submissions in reply. He submitted that Mr Cavanagh had accepted full responsibility for his offending when he pleaded guilty to the charges against him at the earliest opportunity, when he gave evidence for the prosecution in the trial of Mr Arysomayajula, and in his evidence to the Tribunal. He submitted that Mr Cavanagh has fully acknowledged his offending, and paid for it in his sentence of imprisonment.

[83] He further submitted that Mr Cavanagh had given evidence of having turned his life around since his offending, with his evidence of the work he has done in construction and his building apprenticeship, his work for Mr Deeney (including as an on-site building manager), his having undertaken study for real estate qualifications, and his caring for his parents. He submitted that the Tribunal can be satisfied that there is strong evidence of Mr Cavanagh's reformation, and that he is a fit and proper person to hold a licence.

[84] Mr Judd also submitted that all cases are factually different, and the question for the Tribunal is whether he is a fit and proper person to hold a licence, today. He submitted that a critical difference between Mr Cavanagh and the applicant in *A*, is that it is now 13 to 14 years since his offending, whereas the applicant's offending in *A* was very recent. Mr Judd noted that it was acknowledged by the High Court in *A* that the applicant might be able to meet the fit and proper person criteria in the future.

Discussion

Mr Cavanagh's convictions

[85] Mr Judd's acknowledgement that the convictions are not irrelevant to the assessment of whether Mr Cavanagh is a fit and proper person to hold a licence was properly made. The Registrar was right to regard them as a serious factor. The convictions cannot be ignored, particularly as they related to offending while he held a salesperson's licence and was working in the industry, and they were closely related to his real estate agency work. The victims of his offending were people and entities with whom a licensee will have contact: potential purchasers of properties, and lending institutions.

[86] But the convictions are not necessarily determinative. While they are a significant factor, the Tribunal must take a forward-looking approach, and must assess whether now, 13 years after the offending, and 11 years after his conviction and sentence, Mr Cavanagh is a fit and proper person to hold a salesperson's licence. That assessment will involve consideration of what he has done over the period since the offending to reform and rehabilitate himself.

Mr Cavanagh's statutory declaration

[87] The statement in the statutory declaration required to be completed by Mr Cavanagh was clear: he was required to declare that he had not, in the ten years previously, been convicted of an offence involving dishonesty. Mr Cavanagh had been convicted of such an offence within that period, but he did not disclose the convictions. The Registrar was entitled to raise the point.

[88] In *Revill*, the fact that the applicant had failed to disclose his convictions did not prevent the Tribunal from allowing his application for review. The Tribunal accepted that the applicant always expected the Registrar to be fully advised of and analyse the convictions.¹⁹ In *Mason* the applicant did not refer to his convictions in his application for a licence, and this was a factor taken into account by the Tribunal.²⁰

[89] In this case, while Mr Cavanagh should have set out his convictions, he advised the Registrar that his licence had been cancelled, and would remain so until some months later, and he authorised enquiries to be made of relevant authorities. In the circumstances, we can take the same approach as was taken in *Revill*, and accept that Mr Cavanagh expected the Registrar to be fully advised of the convictions. Mr Cavanagh did not seek to conceal the convictions, and provided the Judge's sentencing notes immediately upon request.

The supervision scheme

[90] Ms Woolley was correct that the supervision scheme was provided in response to questions from the Tribunal. It should have been evident to Mr Cavanagh from a reading of relevant Tribunal decisions that in circumstances where an application for a licence is made where there has been conduct that is of concern, that the Tribunal can derive considerable assistance from assurances of detailed supervision, support, mentoring, available to the applicant. We have no doubt that the Registrar would be similarly assisted.

¹⁹ *Revill v Registrar of The Real Estate Agents Authority*, above fn 8, at [36].

²⁰ *Mason v The Real Estate Agents Authority*, above fn 13, at [22] and [34]–[35].

[91] However, Ms Lockwood was clear at all times in her evidence as to her commitment to providing support, supervision, and mentoring for Mr Cavanagh, and had produced a detailed employment agreement. When requested, she readily provided and committed herself to the more formal supervision scheme presented to the Tribunal.

[92] Ms Woolley also submitted that the extent of detail of the scheme might suggest that Mr Cavanagh is not in fact a fit and proper person to hold a licence. We do not accept that we should draw any adverse inference from the detailed nature of the scheme. First, on a careful reading it can be seen that it sets out – albeit in more detail – what is generally required by way of supervision under s 50 of the Act and r 8.3 of the Rules. Secondly, it allows transparency, and is a ready reference point for assessing Mr Cavanagh’s progress.

[93] We do not accept Ms Woolley’s submission that the scheme is “unenforceable”. A supervision and mentoring scheme cannot be considered as imposing conditions on an applicant’s licence. The Act does not give either the Tribunal or the Registrar jurisdiction to impose conditions on a licence.

[94] What a supervision scheme does is to provide the Tribunal, and the Registrar, with a transparent, public, assurance that the applicant will be supported, mentored, and supervised in a manner that will promote the purposes of the Act of consumer-protection and maintaining public confidence in the industry.

[95] Ms Woolley was critical as to Ms Lockwood’s knowledge of the Rules, and raised this as a factor to be considered by the Tribunal when considering the supervision scheme. We accept Mr Judd’s submission that there is some unfairness in that submission, and that Ms Lockwood will ensure that she is cognisant of the Rules which have particular relevance to her supervision and mentoring of Mr Cavanagh.

Our assessment

[96] We take into account that the fact that the relevant offending occurred while Mr Cavanagh was a licensed salesperson, and involved real estate agency work, means

that the onus of establishing that he is a fit and proper person is a heavier one than might otherwise be the case.

[97] We also take into account that the offending was very serious, involving 16 transactions, over many months, where the total “deception” was \$13 million, and resulted in actual losses of \$4 million. It was properly described as sophisticated and planned offending, leading to a sentencing starting point of 5 years imprisonment (before taking into account Mr Cavanagh’s guilty plea and assistance). Further, there was no evidence before us that his victims have been compensated for their losses.

[98] The Tribunal has heard strong evidence as to the steps Mr Cavanagh has taken since his offending towards reform and rehabilitation. We accept that his guilty pleas and agreement to give evidence on behalf of the prosecution in Mr Arysomayajula’s trial demonstrate his acceptance and acknowledgment of his wrongdoing. That acceptance and acknowledgement is also demonstrated by his having been open about his offending with more recent acquaintances such as Ms Hayes and Ms Lockwood.

[99] The evidence given by Mr Deeney strongly supports Mr Cavanagh’s evidence of accepting that he had to take steps to change his approach to life. We have no reason to doubt Mr Deeney’s assessment that Mr Cavanagh is now a different, and better, person than he was before, as a result of what he described as “13 hard years in the wilderness”, the hard physical work involved in working through his builder’s apprenticeship, and the “roadblocks” he has faced since his release from prison.

[100] The fact that Mr Cavanagh has been the on-site building manager of a 35-unit apartment building for the past six years, has acted a property manager for Ms Lockwood, and that he has been Power of Attorney and cared for his elderly parents, also supports a conclusion that Mr Cavanagh is not now of the same character as he was when he was convicted.

[101] Looking at all of the evidence in the round, and taking a forward-looking approach, while his convictions raises the question as to whether Mr Cavanagh is a fit and proper person to hold a salesperson’s licence, we must also take into account the following:

- [a] It is evident that prior to his offending Mr Cavanagh demonstrated a strong and successful work ethic as a real estate salesperson.
- [b] Mr Cavanagh acknowledged his offending, pleaded guilty at the earliest opportunity, gave evidence for the prosecution at Mr Arysomayajula's trial, and gave evidence before us of having accepted his convictions and acknowledged his wrongdoing.
- [c] The offending was 13 years ago, and Mr Cavanagh has served his term of imprisonment. Section 37(1)(a) provides that a person who has been convicted of a crime involving dishonesty within the 10 years preceding the application for a licence is prohibited from holding a licence. The Act does not make the convicted person permanently ineligible to hold a licence.
- [d] We accept that Mr Cavanagh has had faith and trust placed in him in his position as on-site building manager and property manager for Ms Lockwood, and there is no evidence that that faith and trust was misplaced. He has also had the responsibility of Power of Attorney in respect of his parents' affairs.
- [e] Mr Cavanagh has taken steps to reform and rehabilitate himself.
- [f] There have been no concerns raised as to his honesty and integrity, other than in respect of his convictions.
- [g] We have received, and rely on, a scheme of close support, supervision and mentoring and undertakings given by Ms Lockwood and Mr Cavanagh. We anticipate that any issue as to compliance with the supervision scheme will be reported to the Registrar.

[102] Having further considered the purposes of the Act of consumer protection and maintenance of confidence in the real estate industry, we have reached the conclusion that Mr Cavanagh is a fit and proper person to hold a salesperson's licence.

[103] We are conscious that we have reached this conclusion notwithstanding our request for Mr Judd to take instructions as to whether Mr Cavanagh would undertake to advise potential clients and customers of his convictions, and Mr Judd's submission that requiring such disclosure would be disproportionate, given the time since the convictions. We take Mr Judd's point that the convictions are a matter of public record, and non-publication has not been sought in relation to this proceeding.

Outcome

[104] Mr Cavanagh's application for review of the Registrar's determination to issue him with a salesperson's licence is granted. Mr Cavanagh may be granted a salesperson's licence.

[105] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of 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.

Hon P J Andrews
Chairperson

Ms C Sandelin
Member

Ms F Mathieson
Member