

**PURSUANT TO AN ORDER MADE IN THE DISTRICT COURT AT
DUNEDIN ON 2 SEPTEMBER 2016 (PURSUANT TO S 202 OF THE
CRIMINAL PROCEDURE ACT 2011), PUBLICATION OF THE NAME,
ADDRESS, OCCUPATION, OR IDENTIFYING PARTICULARS OF THE
APPLICANT AND ANY CONNECTED PERSON IS PROHIBITED**

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 10

READT 056/16

IN THE MATTER OF

An application to review a decision of the
Registrar pursuant to s 112 of the Real
Estate Agents Act 2008

BETWEEN

APPLICANT C
Applicant

AND

THE REGISTRAR OF THE REAL
ESTATE AGENTS AUTHORITY
Respondent

Hearing:

10 February 2017, at Dunedin

Tribunal:

Hon P J Andrews, Chairperson
Mr G Denley, Member
Ms C Sandelin, Member

Appearances:

Ms K Lawson-Bradshaw, on behalf of the
Registrar
Mr C Withnall QC, on behalf of Applicant
C

Date of Decision:

1 March 2017

DECISION OF THE TRIBUNAL

Introduction

[1] Applicant C (“the applicant”) has applied to the Tribunal for review of the decision of the Registrar of the Real Estate Agents Authority (“the Registrar”) dated 14 October 2016, declining to renew her salesperson’s licence (“the decision”). The application has been made under s 112 of the Real Estate Agents Act 2008 (“the Act”)

Background

[2] The applicant has been involved in selling real estate since the late 1980s. She has most recently been working at a real estate agency in [] (“the Agency”)

[3] On [], the applicant pleaded guilty in the District Court at [] to [] charges of aiding and abetting a company to apply PAYE deductions for a purpose other than payment to the Commissioner of Inland Revenue (“the IRD”), and five charges of aiding and abetting the same company to fail to furnish GST returns. The charges covered the period from July 2013 to September 2015, and arose out of her operation and control of a [redacted] manufacturing business (“the company”).

[4] Deductions of PAYE not accounted for totalled \$108,204.91, and GST not paid totalled \$125,661.40. The total tax not paid was, therefore, \$233,866.31.

[5] It was common ground that the genesis of the applicant’s offending was an addiction to on-line gambling. Mr Withnall advised the Tribunal that during the period of her offending the applicant spent in the order of \$280,000 on on-line gambling. In essence, the money not paid to the IRD was used to pay gambling debts. The applicant’s offending was described by a counsellor from the Problem Gambling Foundation as “effectively an escape behaviour”, and “closely associated with the pressures she faced as a business owner”.

[6] The applicant was sentenced on [2], to five months’ community detention and 200 hours’ community work (which we understand is close to being completed). She was also ordered to make reparation for the full sum of \$233,866.31, by way of

an immediate payment of \$60,000 (which has been paid) and payments of \$30,000 each eight-month period thereafter. The first of these payments is due on [].

[7] The applicant had applied for renewal of her salesperson's licence ("the licence") on []. She disclosed in her application the fact that she had been convicted of a crime involving dishonesty. She also disclosed that the company was being liquidated.

[8] The applicant was then asked to provide details as to her offending and the charges she faced, the likely penalties, and protections put in place by her employer to ensure that she was supervised and supported. The applicant responded to that request.

[9] On [], the Registrar advised the applicant that she intended to decline her application to renew her licence under s 43(3) of the Act. The applicant was advised that she had ten working days to make written representations as to why her application should not be declined. The applicant made a submission in response, and submissions were made on behalf of the applicant by counsel and by the manager of the Agency.

[10] A number of letters in support of the applicant were also submitted. These were from family members, friends, former clients, other members of the real estate industry, and her parish priest. The applicant also provided the Registrar with a copy of the Judge's sentencing notes. One submission, in particular, was that the applicant needed to work as a salesperson in order to be able to comply with the reparation order.

The Registrar's decision

[11] In her decision declining the applicant's application for renewal, the Registrar referred to the submissions and letters of support, and the sentencing notes. The Registrar was not satisfied that the applicant was, pursuant to s 36(2)(c) of the Act, a fit and proper person to be licensed as a salesperson. The Registrar's reasons may be summarised as follows:

- [a] Licence holders are required to act with the highest level of honesty and integrity. The applicant's convictions for "tax evasion", while not "crimes of dishonesty" under s 2(1) of the Crimes Act 1961, meant that the Registrar could not be satisfied that consumers could rely on her honesty and integrity in real estate transactions.
- [b] The consumer protection and tax payment provisions the Agency had put in place were "best practice" for any agency.
- [c] The applicant's actions had had an adverse impact on her employees.
- [d] While the applicant had taken steps to address her gambling addiction, insufficient time had elapsed to assume that she no longer had a gambling problem.
- [e] The offences, while not relating to the applicant's real estate agency work, would reasonably be regarded by reasonable members of the public as disgraceful, and could give rise to disciplinary action.
- [f] While noting the submission that continuing to work in the industry would enable the applicant to pay reparation, the Registrar had to consider the applicant's actions in the light of the Act's purpose to promote and protect the interests of consumers in respect of real estate transactions, and to promote public confidence in the industry. The steps taken by the Agency and by the applicant to address her gambling addiction were not sufficient to discharge the applicant's onus of satisfying the Registrar that she was a fit and proper person to hold a licence.

Evidence

[12] The Tribunal heard evidence from the applicant and from the Agency's General Manager, ["the manager"].

[13] The applicant gave evidence as to her addiction, and outlined the steps she has taken to address it. She has received, and continues to receive, counselling from the Problem Gambling Foundation. She has ceased any personal business activities and was firm in her evidence that she would not engage in any such activities in the future. She also said that she had allowed access to her bank account to her brother and sister, so that they now have access to all of her financial transactions.

[14] The applicant advised that she had agreed to terms on which the Agency was prepared to have her continue to be employed, and would comply with those and any further conditions. She also said that she had disclosed the convictions to those of her vendor clients who were not already aware of them. She had no difficulty with continuing to make such disclosure. She had not previously considered disclosure to purchasers but she appreciated that she had duties to purchasers as well.

[15] The manager referred to the measures put in place by the Agency before the applicant returned to work. These were set out in a letter to the applicant, dated 11 July 2016, as follows:

- [a] The applicant was to file her personal GST return, and pay any GST owing, before she could return to work. That she had done so was to be validated by the Agency's accountant.
- [b] The applicant was to increase her PAYE rate to 30%, not 20% as at that time.
- [c] The applicant consented to the Agency holding her GST in an Agency bank account until an accountant of her choosing instructed the Agency's accountant to make GST payments direct to the IRD on her behalf. The payments were to be made on or before the due date and were to be

adjusted from 6-monthly GST payments to 2-monthly GST payments as soon as it could be integrated into the IRD schedule.

[d] All payments made to the Agency by any of the applicant's clients and/or customers were to be communicated (with relevant contact details) to the Agency's accountant. The accountant would then email the clients and/or customers with an invoice and copy of the Agency's bank account details.

[16] The manager added in his letter that none of the Agency's contractors or employees have access to the Agency's audited trust account or any other bank account details apart from the Agency's accountant, and that ultimately, all IRD payments are the applicant's responsibility.

[17] In his evidence to the Tribunal, the manager confirmed that the Agency would continue to apply the measures set out above, and would monitor the applicant's commitment to disclosing the convictions to clients. He also confirmed the Agency's commitment to the ongoing support and monitoring of the applicant. He said that the Agency meets with the applicant each week and will continue to do so.

Submissions

The applicant

[18] Mr Withnall submitted for the applicant that up to the time she developed the addiction, her character was unblemished, she was a successful businesswoman, a successful and well-regarded real estate salesperson, and she was described as a "hard-working, honest and reliable person", someone who "is the first person to help someone in need", someone who "puts the need of others before those of herself, loyal to staff and clients, and a generous, kind and caring person".

[19] He submitted that none of the applicant's offending was reflected in her discharge and performance of her work and duties as a real estate salesperson. She had been the subject of only one complaint, in 2012, which led to a finding of

unsatisfactory conduct. The applicant had left the key to a property in the letterbox for a purchaser on settlement, and had told the purchaser that the vendors had both signed an agreement for sale and purchase on a certain day, when one of them had signed two days later. The applicant was censured and fined \$1,000.

[20] Mr Withnall advised the Tribunal that the applicant was recruited by the Agency in 2015. Before accepting the offer of employment, she had advised the Agency that she was under investigation by the IRD. She advised the Agency when charges were laid, and voluntarily stood down from real estate work pending resolution of the matter. The Agency notified the Authority accordingly. The applicant had returned to work at the instigation of the Agency, subject to conditions, and had continued to work as a salesperson until the decision was made not to renew her licence. Since that time, she had continued to work for the Agency, but not as a salesperson.

[21] Mr Withnall submitted that the Registrar's decision was based, at least in part, on an incorrect understanding of the nature of the charges on which the applicant was convicted and that she had, in error, concluded that the fact of the convictions was sufficient reason in itself to be satisfied that the applicant was not a fit and proper person to hold a licence. He submitted that the "fit and proper" assessment must be considered in the round, and not merely by reference to the fact of the convictions.

[22] Mr Withnall submitted that when all the relevant facts and evidence are properly considered, the applicant has discharged her onus of satisfying the Tribunal on the balance of probabilities that she is a fit and proper person to hold a licence. He submitted that her offending should be set against her long and successful career in real estate, the high regard in which she is held, and the support she receives within the real estate industry and elsewhere. He submitted that her offending was an aberration brought about by pressures and circumstances she was facing at the time, and was not an indication of bad character or lack of moral probity or ethics.

The Registrar

[23] Ms Lawson-Bradshaw submitted for the Committee that given the seriousness of her convictions, the applicant had not discharged the onus on her to satisfy the Tribunal that she is a fit and proper person to hold a licence. She submitted that the convictions did not relate to a one-off event in her youth, as an immature person. In contrast, they related to a deliberate and sustained course of conduct over a period of approximately two years, in which she had failed each month to do what she was required to do. She submitted that the offending was calculated to result in a significant financial advantage to herself to which she was not entitled.

[24] She submitted that while the applicant has said that she feels deep regret and shame as a result of going through the Court system, she had given little indication of having recognised the serious impact on her employees of her failure to pay KiwiSaver contributions. Ms Lawson-Bradshaw submitted that even at the hearing, the applicant had not mentioned the employees in her evidence.

[25] Ms Lawson-Bradshaw further submitted that it is relevant that the offending occurred after the applicant had been in practice as a real estate professional. She submitted that the burden on an applicant for renewal of a licence is heavier than it would be for an applicant for a new licence.

[26] Ms Lawson-Bradshaw referred to the Agency's proposal as to conditions which could be imposed on the applicant's licence being renewed so that she could resume work as a real estate salesperson. She submitted that the Act does not give the Tribunal power to make or enforce conditions on a licence and that the proposed conditions could not be taken into account to give the Tribunal comfort that the applicant's licence should be renewed.

[27] Ms Lawson-Bradshaw submitted that the only appropriate response to the applicant's offending is to decline to renew her licence, as she is not a fit and proper person to hold one. She added that this position may change, as the applicant is not

subject to the mandatory prohibition under s 37 of the Act,¹ so that at a later stage, if the applicant continues to take steps to address addiction, and demonstrates rehabilitation, she could reapply and her application would be considered afresh. However, she submitted, the applicant is not currently a fit and proper person to hold a licence.

Relevant authorities

[28] In its decision in *Revill v Registrar of the Real Estate Agents Authority*,² the Tribunal considered an application of the “fit and proper person” assessment in the context of an application for review of the Registrar’s decision not to grant a licence. The Tribunal referred to the judgment of the High Court in *Re M*, concerning a law practitioner.³ The Tribunal set out four features relevant to the required assessment, highlighted in *Re M* as follows:⁴

[a] The focus is necessarily forward-looking. The function of the Court is not to punish the applicant for past conduct. Rather, the issue is “*worthiness and reliability for the future*”.

[b] The onus on a person who has erred in a professional sense following admission to the profession, is heavier than that upon a candidate for admission.

[c] Due recognition must be given to the circumstances of youth where errors of conduct occurred when the applicant was immature.

[d] It is important to look at the facts of the case in the round, and not just have regard to the fact of a previous conviction or convictions.

[29] In *Revill*, the Tribunal was considering the fitness to hold a licence of an applicant who had 25 convictions dating from 1969 to 2002, including convictions for sexual offences, possession and cultivation of cannabis, violence and firearms offences, and driving offences. The Tribunal considered the nature and circumstances of the offending, the applicant’s conduct since the convictions, written testimonials provided to the Tribunal, and the evidence and submissions made by the branch manager of the agency at which the applicant hoped to be employed. The

¹ In particular, the offences on which she was convicted are not “crimes involving dishonesty”, as that term is used in s 37(1)(a) of the act.

² *Revill v Registrar of the Real Estate Agents Authority* [2011] NZREADT 41.

³ This judgement was referred to by the Tribunal in *Revill* as “*Re T* [2005] NZLR 544, at 547”. However, the correct reference is to *Re M* (note) [2005] NZLR 544, at [21]–[23].

⁴ *Revill*, at [15].

Tribunal referred in particular to, and took comfort from, the information provided by the agency, its consciousness of the requirement for salespersons to be supervised, and the supportive and educational process for its agents. The Tribunal granted the application for review, but noted that if the applicant were to leave the work setting and structure of the agency, there “may be a case for further thought upon his next annual licence renewal point”.⁵

[30] The Tribunal referred to its discussion of the “fit and proper” assessment in *Revill* in its later decision in *Foot v The Registrar of the Real Estate Agents Authority*.⁶ The applicant had been convicted (after pleading guilty) to 13 charges under the Tax Administration Act 1994. The offences were of aiding and abetting a company to evade tax (10), knowingly providing false, incomplete or misleading information to the Commissioner of Inland Revenue (2), and knowingly failing to provide an income tax return (1). The offending involved the evasion of \$222,171 in income tax and GST. She was sentenced to eight months’ home detention and 250 hours of community work. The Tribunal heard evidence from the applicant, the branch manager of the agency where she was employed, and the manager of an agency where she had previously been employed. The Tribunal also received testimonial statements supporting the applicant.

[31] The Tribunal recorded that it was satisfied that the agency employing the applicant was conscious of its obligations to supervise salespersons (under s 50 of the Act), and its ongoing supportive and educational processes. The Tribunal also recorded that the agency had well-regulated procedures and business management, and that the applicant had the support of a number of experienced persons in the industry. The Tribunal allowed the application for review, on the basis that the applicant’s licence would be subject to certain conditions.

Our assessment

[32] We accept that the convictions show that the applicant made a conscious decision each month, for about two years, not to file GST returns, not to pay PAYE,

⁵ *Revill*, at [42].

⁶ *Foot v The Registrar of the Real Estate Agents Authority* [2015] NZREADT 24].

and not to pay Kiwisaver contributions. Mr Withnall submitted that the applicant's offending was not a deliberate *commission* of an offence, rather, the offences were an *omission* to do what she was required to do. He submitted that the offending was "out there" for anyone to see. We do not consider that whether the offences involved commission or omission alters our consideration to any significant extent. Neither the Registrar nor the Tribunal can treat the convictions lightly. In accordance with the purposes of the Act, it is essential that clients and customers can rely on the honesty and integrity of licensees, and that they are protected from any form of dishonesty.

[33] The applicant's decisions have had a seriously adverse impact on her employees. We are concerned at the applicant's response to a question from Ms Lawson-Bradshaw regarding the impact on her employees. That response was that the employees appreciated that they had jobs and, while they were still annoyed that the KiwiSaver contributions had not been paid, they trusted her to do so (we understand, by way of the reparation order).

[34] In its assessment of whether the applicant should now be granted a licence, the Tribunal must take into account the matters set out in *Revill*, cited at [28], above. We accept Ms Lawson-Bradshaw's submissions that as a licensee of several years' standing, the applicant has a heavier burden in establishing that she is a fit and proper person than would a new applicant, and that her offending was not an error of youth, by an immature person.

[35] But in assessing whether the registrar was correct to decline the applicant's application to renew her licence, it is important to look at the facts of the case on the round, and the focus is necessarily forward-looking. We take into account that the applicant's offending did not relate to her work as a licensed salesperson, and we take into account the many statements supporting the applicant, from a wide range of people who have known and/or had dealings with her over many years. We also take into account the nature and extent of the support and supervision offered by the Agency. We have had the benefit from hearing oral evidence from the applicant and from the Agency's General Manager, and we have read the statements supporting the applicant.

[36] We have concluded that the decision as to whether the Registrar's decision not to renew the applicant's licence was correct comes down to our assessment of the steps taken by her to address her addiction and to remove herself from personal business involvement, and the the measures already put in place by the Agency concerning the nature of professional work that she may undertake, and management of her personal financial matters. Those measures are set out at [15], above.

[37] We accept that in large part the steps outlined by the Agency may be regarded as being "best practice" for any agency. However, we accept the manager's evidence that the proposals that the Agency will manage the applicant's GST and tax payments (see paragraphs [15] [a], [b], and [c], above) go beyond what is usual for the Agency. In particular, we accept that the proposal that the Agency will deduct withholding tax at a higher rate than was customary, in order to lower the burden of outstanding payments at a later stage, goes beyond normal Agency practice, and beyond "best practice".

[38] The steps taken by the Agency show that it recognises that if the applicant is licensed as a salesperson she will need particular supervision, and particularly careful management and monitoring. It is clear that the Agency is particularly conscious of its obligation as to supervision, and is committed to going beyond "best practice" in this case.

[39] We also take into account the applicant's evidence as to the steps she has taken to address her addiction, to make her bank account available to family members, to comply with the Agency's particular requirements, and to be open with clients about the convictions. Each of these gives the Tribunal comfort as to her fitness to continue practice as a salesperson.

[40] In both *Revill* and *Foot* the Tribunal gave particular consideration to the ongoing supportive and educational processes for the salespersons engaged by each of the agencies involved.⁷ In each case these processes were a significant factor in granting the application for review of the Registrar's decision. In the present case, the measures taken by the Agency, and their commitment to ongoing monitoring and

⁷ See *Revill* at [40]–[42] and *Foot* at [73] and [74].

support of the applicant, together with the steps she has taken, allow the Tribunal to conclude that her application to renew her licence should now be allowed.

[41] While in *Foot* the Tribunal imposed conditions on the renewal of Ms Foot's licence, our conclusion that the applicant's licence should be renewed is on the basis of the assurance from the Agency that all of the measures put in place, together with its support and monitoring of the applicant, will continue, and the applicant's assurance that she will do all that the Agency requires of her, and will continue with the steps she is taking with regard to her addiction, monitoring of her bank account, and disclosure of convictions, and that she will make the reparation payments ordered by the District Court.

[42] The Tribunal has reached this conclusion having considered the facts of the case in the round, and looking forward rather than backwards. The Tribunal expects that if the applicant's position should change in any respect the Agency will promptly advise the Authority. The Tribunal also expects that the Registrar will seek confirmation of those matters when the applicant next applies for renewal of her licence.

Outcome

[43] The applicant's application for review of the Registrar's decision to decline her application for renewal of her licence is granted. Her licence is to be renewed.

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

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member