

Decision No: [2011] NZREADT 01

Reference No: READT 025/10

**IN THE MATTER OF** s.91 of the Real Estate Agents Act 2008

**BETWEEN** **COMPLAINTS ASSESSMENT  
COMMITTEE (CAC 10026)**

**AND** **LINDSAY JAMES DODD**

Defendant

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Judge M F Hobbs - Chairman  
J Robson - Member  
J Gaukrodger - Member

**APPEARANCES**

M J Hodge, Counsel for the Committee  
W Hamilton, Counsel for the defendant

***Introduction***

[1] Following a complaint made by Maree Joan Brady (“the complainant”) the Complaints Assessment Committee (CAC 10026) has charged Lindsay Dodd (agent) with misconduct under s 73(a) of the Real Estate Agents Act 2008 in that his conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful.

***Particulars***

[2] Forgery by Lindsay Dodd of:-

- (a) The signature and initials of Maree Joan Brady on a National Bank loan document dated 23 May 2005.
- (b) The signature and initials of Maree Joan Brady on a National Bank loan document dated 6 April 2006.
- (c) The signature of Maree Joan Brady on a loan application form dated 6 April 2006.

- (d) The signature and initials of Maree Joan Brady by National Bank loan document dated 24 August 2006.
- (e) The signature and initials of Maree Joan Brady on a National Bank loan document dated 9 July 2007.

### **Background**

[3] The defendant is a licensed real estate agent under the 2008 Act. During the period spanning the conduct for which the defendant has been charged (2005-2007), the defendant was a real estate agent under the Real Estate Agents Act 1976 ("the 1976 Act").

[4] The complainant is the defendant's former wife; they were married in July 2004 and are now separated.

[5] The complainant and the defendant began looking for a house to buy together in Christchurch in 2002. In 2003 a section at 7 Applecross Lane, Harewood ("the property") was purchased jointly by the complainant and the Lindsay Dodd Family Trust ("the Trust") and a house was built on it for \$208,600. The Trust's purchase of its share in the property was primarily funded by way of a loan from the National Bank secured by a mortgage over the property.

[6] At all material times the complainant and the defendant were trustees of the Trust. The beneficiary of the Trust was the defendant's son.

[7] On a number of occasions between 2004 and 2008 the Trust borrowed additional amounts from the National Bank, all secured by way of the National Bank's mortgage over the property.

[8] The complainant alleges that during the period May 2005 to July 2007 the defendant forged her signature and/or initials on five separate documents without her knowledge in order to obtain four additional loans from the National Bank for the Trust. These alleged forgeries are particularised at paragraphs (a) to (e) of the charge set out in paragraph 1.

[9] The defendant denies forging the complainant's signature and/or initials as alleged at paragraphs (a) to (c) of the charge. The defendant however admits that he forged the complainant's signature and initials as alleged at paragraphs (d) and (e) of the charge. The defendant says in essence that he did so with the complainant's knowledge. He says that on these two occasions the complainant told him that she did not want to sign the documents and said "*you just do it*".

[10] The complainant says she became aware of the defendant's forgeries in the course of dealing with the property issues following the end of their marriage. The complainant subsequently complained to the Real Estate Agents Authority in January 2010.

***Evidence for the Committee***

[11] The complainant Maree Joan Brady told the Tribunal that she had met the defendant Lindsay Dodd in 2000 while he was working in real estate and about a year later they started a relationship. On 31 January 2003 the complainant and the defendant purchased a section at 7 Applecross Lane, Harewood (“the property”) and at the same time signed up with a building company called Peter Ray to build a house on the property moving into the house on 16 June 2003.

[12] In May 2003 the complainant Ms Brady told us that she became a trustee of the Lindsay Dodd Family Trust (“the Trust”) because the defendant wanted to use the Trust to obtain a mortgage to purchase his share of the property.

[13] Apparently in about April 2004 the defendant came to the complainant with an account of how much debt he was in and a written plan of how he thought he could get out of debt. This disclosure according to Ms Brady was a huge shock to her.

[14] The complainant told us the defendant explained to her what his debts were and he indicated that he was in debt with regard to a personal overdraft of \$25,000, that he owed his Visa card \$15,184, that he owed the American Express Company \$9,726 and the Inland Revenue Department \$550 a total of \$50,461. The complainant told us that the defendant suggested to her that in order to get out of this debt he would need to borrow further money on the mortgage on the property.

[15] The complainant told us that she eventually agreed to borrowing more on the mortgage on the basis that this would increase the defendant’s liability under the Trust. The complainant said that at this point she did not consider that she had any mortgage liability personally. The complainant told us that on 17 May 2004 a second loan for \$50,000 was obtained from the National Bank in the name of the defendant and herself as trustees for the Trust. She said she agreed to the loan, signed the loan documents and initialled every page.

[16] Mrs Brady she told us that she and the defendant were married in July 2004.

[17] The complainant then went on to give evidence in relation to each of the alleged forgeries set out in the particulars (a) to (e) in the charge. In each case the documents were produced in evidence. She dealt firstly with the May 2005 loan which was taken out with the National Bank in the name of the defendant and Ms Brady as trustees for the Trust for \$108,870 on 23 May 2005.

[18] The complainant was adamant that she neither saw nor authorised the documents in relation to this loan in May 2005. Her evidence was that she never signed any document associated with it. She told us that she had subsequently been provided with a copy of the May 2005 loan document by the National Bank and her evidence was that she believed the defendant Dodd has forged her signature and initials on this document. Ms Brady was cross examined by counsel for the

defendant Mr Hamilton at some length and particularly in relation to the May 2005 document. In cross examination Ms Brady conceded that she could not be certain that she did not sign this document but when re-examined by Mr Hodge she again confirmed that she was certain she did not sign it and that it had been forged by the defendant.

[19] The complainant Ms Brady then went on to refer to the April 2006 loan referred to in particulars (b) and (c) of the charge. She told us that on 6 April 2006 a loan was taken out with the National Bank in the name of the defendant and herself as trustees for the Trust for \$149,000. She said that she was not aware of this loan and did not sign any documents in connection with it. She went on to say that she was subsequently supplied with a copy of the loan documents for this April 2006 loan from the National Bank and she confirmed that she did not sign any of them. She told us that she believed that her signature and her initials had been forged. She told us that the defendant subsequently admitted to her that he had forged her signature and initials on these documents.

[20] A copy of the loan application form filled out for the 2006 loan was produced in evidence and the complainant Ms Brady swore that she had never signed this document. She said that she did not recall ever supplying any information to Dodd for the purposes of this loan.

[21] The complainant Ms Brady then gave evidence in relation to the loan of 24 August 2006 referred to in particular (c) of the charge. Her evidence was that she was not aware of this loan, nor did she sign it or have anything to do with it. She told us that she was subsequently supplied with a copy of the loan documentation for the August 2006 loan from the National Bank and she confirmed that she did not sign this document and that her signature and initials had been forged.

[22] The complainant Ms Brady then went on to tell us about the loan to the National Bank in relation to the document which is dated 9 July 2007 and referred to in particular (e) of the charge. Ms Brady told us that on 9 July this loan was taken out with the National Bank in the name of the defendant and herself as trustees for the sum of \$59,000. She said that she was not aware of this loan and did not sign any documentation in connection with it.

[23] She said that she was subsequently supplied with a copy of the loan documents from the bank and can confirm that she did not sign this document. She told us that her signature has been forged.

[24] The complainant went on to tell us that in the June 2008 she was going through some files at home when she came across a National Bank loan in the name of the defendant and herself as trustees for the Trust for \$69,000 dated 15 April 2008. She said that she did not have a copy of this document and has not been able to obtain a copy of it from the bank although the bank apparently has a record of the loan. She told us that her understanding was that this loan was able to be obtained without her signature.

[25] The complainant told us that she then asked the defendant how he had obtained this loan without her signature on it and her evidence was that the defendant informed her that he had always had a personal loan. The complainant said she suspected he was not telling the truth so she made an appointment to see the bank.

[26] On 15 June 2008 the complainant met with Olivia Keown at the National Bank in Papanui, Christchurch. The complainant told us that Ms Keown pulled out all of the loan documents from the history of her involvement with the Trust and the complainant said she immediately noticed that a number of the documents had forged signatures and were not signed by her.

[27] In conclusion the complainant said that she did not want to destroy the defendant but that she would not want anyone behaving in this way acting as a real estate agent and she told us that she believed the defendant should not be working in the real estate industry.

### ***Evidence of Linda Morrell***

[28] The only other witness called by the Committee was Linda Morrell, a forensic document examiner from Wellington. Ms Morrell is a highly qualified forensic document examiner with qualifications in biological chemistry and forensic science. Her expertise is not challenged by Mr Hamilton for the defendant. On 9 July 2010 Ms Morrell received instructions from the Complaints Assessment Committee in relation to the complainant's complaint against the defendant.

[29] In accordance with the Committee's instructions she prepared a report dated 21 July 2010 which was produced in evidence. Ms Morrell's report was in relation to five documents:

- A National Bank loan agreement dated 23 May 2005.
- A National Bank loan facility agreement dated 29 November 2005.
- A National Bank loan facility agreement dated 6 April 2006.
- A National Bank loan facility agreement dated 24 August 2006.
- A National Bank loan facility agreement dated 9 July 2007.

[30] Ms Morrell's findings in relation to the documents referred to were that from her examinations and comparisons she could find no evidence to associate Maree Brady with the signatures and associated initials in her name and in her opinion they had all been completed by another writer attempting to simulate or copy her genuine signature.

[31] On 27 January 2011 Ms Morrell received further instructions from the Committee in relation to Ms Brady's complaint against the defendant.

[32] This instruction was in relation to a copy of a loan top up application dated 6 April 2006 and she was asked to determine whether or not the signature at page 3 of this document in the name of Maree Brady had been completed by her.

[33] Upon completion of her examination of this document Ms Morrell prepared a further report which was dated 28 January 2011.

[34] Ms Morrell's findings in relation to this document were to the effect that the questioned signature on the top up loan document resembles the reference signatures to an extent she considered had not occurred by chance, therefore the signature is either genuine or is by another writer attempting to copy or simulate the natural signature style of Maree Brady. In Ms Morrell's opinion the questioned signature on the document had probably been completed by another writer. She did say that her opinion was slightly qualified owing to the copy nature of the questioned document and the limitations thus imposed on her examinations and comparisons.

[35] So in summary the evidence of Ms Morrell was to the effect that the signatures and initials referred to in the particulars in the charge (a), (b), (c), (d) and (e) had all been completed by another writer attempting to simulate and copy Ms Brady's genuine signatures and initials.

[36] This completed the evidence for the Committee.

### ***Evidence for the Defendant***

[37] The defendant Lindsay Dodd gave evidence and told the Tribunal that he had worked in the real estate industry since 1986 and that from September 2008 to the present he has worked as a freelance auctioneer, trainer and business consultant through his own company Auction Solutions Limited.

[38] He confirmed the evidence of the complainant Ms Brady that they met during 2000, were married in July 2004 and separated in early October 2008.

[39] He told us that from the commencement of their relationship the complainant and he kept separate bank accounts however their property was intermingled on a 50-50 basis. He said they signed a Section 21 Property (Relationships) Act Agreement which provided that they would share equally in the cost of living.

[40] The defendant confirmed the purchase of the section at 7 Applecross Lane, Harewood and the building of a house for \$208,600.

[41] The defendant referred to the Lindsay Dodd Family Trust which was set up in July 1998 with him as the settlor. He said the trustees at present are himself and his mother Elizabeth Dodd, the sole beneficiary being his son Matthew. His evidence was the only assets that had ever been held by the Trust were his former property at 73A Staveley Street, Avonhead and the half share he held in the Applecross Lane property.

[42] The defendant said that after he and the complainant moved into the Applecross Lane property his company Auction Services Limited suffered a significant downturn as a result of losing a contract which made up approximately 20% to 30% of his business. As a result he told us he was unable to maintain the income that he had previously enjoyed. He then took up employment with Harveys Real Estate, however cutbacks meant he subsequently lost that position. He told us that from there he moved onto L J Hooker in February 2006 but that position ended in similar circumstances in September 2008.

[43] He told us that the complainant was aware of the difficulties he was facing with respect to maintaining his employment and he told us that he made no attempt to hide anything from her regarding their financial position.

[44] The defendant said that as a result of his reduced income in 2004 the Trust was required to borrow against the Applecross Lane property in order for the complainant and him to maintain their lifestyle.

[45] His evidence was that the majority of the borrowing was in the nature of refinancing in order to reduce their exposure in respect of current account debt. He told us that he obtained these loans as extensions of the Trust's second mortgage to take advantage of the lower interest rates. He said that the majority of the money was obtained for the benefit of the complainant and himself and not for any personal liabilities of his as suggested by the complainant in her evidence.

### ***Response to Charges***

[46] The defendant referred to the five particulars set out in the charge (a), (b), (c), (d) and (e) and his evidence was that he denied particulars (a), (b) and (c) but admitted the particulars (d) and (e). With reference to the May 2005 loan particular (a) the defendant agreed that this loan was taken out with the National Bank on 23 May 2005, the borrowing being in the name of the Trust and was secured against the Applecross Lane property.

[47] The defendant said he did not accept the complainant's claim that she did not view or authorise this loan, he said his recollection was that she signed the loan documents while in the car with him as they were driving to an appointment and he was adamant he did not forge her signature or initials. With reference to the April 2006 loan that is referred to in particulars (b) and (c) the defendant said he recalled the borrowing by the Trust in 2006, and was positive the complainant was aware of this loan. He denied that he forged her signature or initials. He said that he believed that again this was a case where she signed the loan documents while travelling in the car which may have explained the apparent discrepancies in her handwriting as noted in the evidence of Ms Morrell.

[48] The defendant said he did not recall anything about the loan application document but he was adamant it was not signed by him.

[49] With reference to the August 2006 loan, particular (d), the defendant said that he did not accept that the complainant was not aware of this loan. He said that while their relationship was relatively settled at this stage the increased borrowing was causing some strain and he felt that Maree's attitude was that she didn't want to know about the increased borrowing provided our lifestyle could be maintained.

[50] He told the Tribunal that when he discussed this document with the complainant and requested her signature she told him that she did not want to sign it and said "*you just do it*". He said he accepted that he did sign this document in both his and her names. The defendant said he did so thinking that the complainant was happy for him to do it, that their marriage was sound and secure and that they would be together for a long time.

[51] The defendant did accept that doing so in this way was a serious error of judgement on his part. With reference to particular (e) the July 2007 loan the defendant again was adamant that the complainant was aware of this and that when he asked her to sign it she again told me to do so. He said he accepts that he signed the document with her signature which was again a serious mistake on his part.

[52] The defendant said that he was unable to offer any explanation for his actions other than to say that the reasons were essentially the same as for the August 2006 loan document. He went on to say that at the time of his borrowing he had some concerns as to their financial situation and the complainants' apparent lack of interest in contributing to the finances along with issues relating to her mental illness.

[53] The defendant said he could understand the complainant being upset with him for his actions but he felt that because of her anger and resentment towards him she had taken extreme steps to ruin his life. The defendant said the complainant had stated in the past that she would do everything in her power to destroy him and that this was the only explanation he could offer for her overstatement of the instances of forgery in her complaint.

[54] That concluded the evidence before the Tribunal.

### ***Findings of Fact***

[55] The Tribunal has carefully considered all the evidence that has been put before it from the complainant, the defendant and Ms Morrell the forensic document examiner. Having regard to the defendant's own admissions the Tribunal finds as a fact that particulars (d) and (e) in the charge against the defendant have been proved on a balance of probabilities.

[56] As far as the alleged forgeries referred to in the particulars (a), (b) and (c) are concerned we have obviously relied heavily on the uncontested evidence of Ms Morrell.

[57] Having done so we have no doubt the signatures on the loan documents and the initials thereon have been forged.

[58] Ms Morrell quite obviously is unable to say who it was who forged the signatures and initials of the complainant but in the circumstances outlined by the evidence before us there could be no conclusion other than that it was the defendant who forged the signatures and initials as alleged.

[59] We have considered the obviously unhappy relationship between the complainant and the defendant and the suggestion the complainant may have overstated her evidence in some specific particulars.

[60] We are not satisfied that is the case and we are satisfied that the evidence of the complainant Ms Brady should be accepted by us. We prefer her evidence to that of the defendant wherever they are in conflict.

[61] It necessarily follows that we reject the denials of the defendant in relation to the particulars referred to (a), (b) and (c).

[62] The end result is that we are satisfied beyond any doubt whatsoever that it was the defendant who forged the signatures and initials referred to in all of the particulars of the charge.

[63] That of course is not the end of the matter because the Tribunal needs then to decide whether or not the defendant's conduct in committing these forgeries would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful pursuant to s 73A of the Act.

### ***Relevant Law***

[64] The charge relates to the defendant's conduct prior to the commencement of the 2008 Act on 17 November 2009. Section 172 of the 2008 Act therefore applies and provides as follows:

#### **172 Allegations about conduct before commencement of this section**

- (1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,—
  - (a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and
  - (b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.

- (2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the **[Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred]**. (emphasis added).

[65] In cases where the licensee who has been charged was licensed or approved under the 1976 Act at the time of the conduct (which the defendant was), and has not been dealt with under the 1976 Act in respect of the conduct (which the defendant has not), s 172 creates a three step process:

**Step 1:** Could the defendant have been complained about or charged under the 1976 Act in respect of the conduct?

**Step 2:** If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?

**Step 3:** If so, only orders which could have been made against the defendant under the 1976 Act in respect of the conduct may be made by this Tribunal.

[66] Looked at in the round, a charge relating to pre-17 November 2009 conduct falls to be determined in accordance with the disciplinary standards set out in ss 72 and 73 of the 2008 Act in the same way as a charge about post-17 November 2009 conduct (**Step 2**). However, there are two requirements under s 172 which limit its retrospective effect:

- (a) complaints outside the jurisdiction of the 1976 Act are also outside the jurisdiction of s 172 (**Step 1**);
- (b) only orders which could be made under the 1976 Act may be made under s 172 (**Step 3**).

[67] Each of the three steps, as they apply to this case, will be addressed in turn.

[68] **Step 1 – Could have been complained about or charged under 1976 Act**

[69] Under rule 16.2 of the Rules of the Real Estate Institute of New Zealand Incorporated (“REINZ Rules”), made under s 70 of the 1976 Act, any person could complain to REINZ. Following investigation of a complaint, REINZ could take one of a number of steps, including referring a matter to the Real Estate Agents Licensing Board (rule 16.13.5).

[70] **94 Grounds on which licence may be cancelled by Board**

- (1) The Institute, the Disciplinary Committee, or any other person with leave of the Board, may at any time apply in the prescribed form to the Board for an order cancelling a real estate agent's licence, and the Board may cancel the licence, on any of the following grounds:

- (a) That a licensee or, in the case of a licensee company, any officer of the company, has been convicted of a crime involving dishonesty:
- (b) That a licensee or, in the case of a licensee company, any officer of the company, has been guilty of misconduct in the course of his [or her] or the company's business as a real estate agent, and that by reason of that misconduct it is in the interests of the public that the licence be cancelled:
- (c) That a licensee or, in the case of a licensee company, any officer of the company, has been shown to the satisfaction of the Board to be of such a character that it is in the interests of the public that the licence be cancelled:

**[71] 95 Board may suspend real estate agent**

- (1) On any application under section 94(1) of this Act, or on any other application made to the Board in that behalf in the prescribed form by the Institute, the Disciplinary Committee, or other person with the leave of the Board, the Board may, if it is satisfied that a ground exists for ordering the cancellation of a real estate agent's licence, instead of ordering the cancellation of that licence, suspend the licensee or, where the licensee is a company, the company or any officer of the company, from carrying on the business of a real estate agent for any period not exceeding 3 years as the Board thinks fit.

**[72] 99 Board may cancel certificate of approval or suspend salesman**

- (1) On application made to the Board in that behalf by the Institute, the Disciplinary Committee or by any other person with leave of the Board, the Board may cancel the certificate of approval issued in respect of any person or may suspend that person for such period not exceeding 3 years as the Board thinks fit on the ground—
  - (a) That since the issue of the certificate of approval the person has been convicted of any crime involving dishonesty; or
  - (b) That the person has been, or has been shown to the satisfaction of the Board to be, of such a character that it is, in the opinion of the Board, in the public interest that the certificate of approval be cancelled or that person be suspended.

[73] The breadth of the ground under s 94(1)(c) (the licensee's character) can be contrasted with the ground under s 94(1)(b).

[74] Unlike an application under s 94(1)(b), therefore, an application under s 94(1)(c) could relate to conduct other than the licensee's conduct in his or her business as a real estate agent.

[75] It follows that the defendant's conduct in this case, namely forgeries outside his business as a real estate agent, could have been the subject of a complaint, and subsequently a referral to the Licensing Board, under the 1976 Act. **Step 1** under s 172 of the 2008 Act is satisfied.

**[76] Step 2 – Misconduct (Section 73 of the 2008 Act)**

[77] The question under **Step 2** is whether misconduct (or failing that, unsatisfactory conduct) is proved under the 2008 Act.

[78] In the present case the conduct for which the defendant was charged was not real estate work. Section 73(a) is not limited to a defendant's conduct in carrying out real estate agency work, and provides as follows:

"... a licensee is guilty of misconduct if the licensee's conduct –

- (a) would reasonably be regarded by agents of a good standing, or reasonable members of the public, as disgraceful".

[79] It is accepted by the Committee that, because the defendant's alleged conduct did not involve real estate agency work, alternative findings of misconduct under ss 73(b) or (c) or of unsatisfactory conduct under s 72, are not available, and nor is a finding under s 73(d).

[80] In *CAC v Downtown Apartments Limited and Anor* [2010] NZ READT 06 this Tribunal held as follows in relation to s 73 of the Act, and s 73(a) in particular:

"49 There are now two disciplinary levels under the 2008 Act:

- a. Unsatisfactory conduct – Complaints Assessment Committees and the Disciplinary Tribunal;
- b. Misconduct – Disciplinary Tribunal only.

Leaving s 73(d) (criminal convictions) to one side, there is a clear progression from unsatisfactory conduct under s 72 to misconduct under s 73 of the 2008 Act:

- (a) Unacceptable conduct (as regarded by agents of good standing) s 72(d) → disgraceful conduct (as regarded by agents of good standing or reasonable members of the public) (s 73(a));
- (b) Negligence/incompetence (s 72(a) and (c)) → serious negligence/ Incompetence (s 73(b));
- (c) Contravention of the Act/Regulations/Rules (s 72(b)) → wilful or reckless contravention of the Act/Regulations/Rules/other Acts (s 73(c)).

50 At a high level of generality, therefore, it may be said that s 72 requires proof of a departure from acceptable standards and s 73 requires something more – a marked or serious departure from acceptable standards.

55 The word disgraceful is in no sense a term of art. In accordance with the usual rules it is to be given its natural and popular meaning in the ordinary sense of the word. But s 73(a) qualifies the ordinary meaning by reference to the reasonable regard of "*agents of good standing*" or "*reasonable members of the public*" (emphasis added).

56 The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess (see *Blake v Preliminary Proceedings Committee of the Medical Council of New Zealand*, 1997, 1 NZLR 71).

57 The "*reasonable person*" is a legal fiction of the common law representing an objective standard against which individual conduct can be measured but in s 73(a) that reasonable person is qualified to mean an agent of good standing or a member of the public.

- 58 So while the reasonable person is a mythical ideal person the Tribunal can consider *inter alia* the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the first defendant.
- 59 So in summary the Tribunal must find on a balance of probabilities that the conduct of the first defendant represented a marked and serious departure from the standards of an agent of good standing or a reasonable member of the public.”

[81] The defendant has been found to have committed five acts of forgery which represents a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public. By the defendant’s actions the National Bank loaned money to the Trust on the basis that the trustees had signed the applicable loan documents when in fact they had not.

[82] In *Smith v CAC* and *Brankin* [2010] NZREAD13 the Tribunal held, at paragraph [19]:

“... the conduct of a licensee can be properly described as ‘disgraceful’ under s 73(a) of the Act so long as there is a sufficient nexus between the alleged conduct and the fitness or propriety of the licensee to carry out real estate work”.

[83] There is a sufficient nexus in this case between the defendant’s conduct and his fitness or propriety to carry out real estate work. A real estate agent must be able to be trusted to deal with legal documents honestly and with the utmost integrity. The defendant has demonstrated a willingness to deal dishonestly with documents in order to obtain a financial benefit.

[84] **Step 3 – Orders under the 1976 Act**

[85] The Licensing Board had the power to make three types of orders in the event it found that the ground under s 94(1)(c) of the 1976 Act had been proved:

- (a) An order cancelling the agent’s license (s 94(1)(c));
- (b) An order suspending the agent’s license for a period not exceeding three years (s 95(1));
- (c) An order imposing a monetary penalty not exceeding \$5,000 (s 96).

[86] The leading authority on the application of the “*character*” test under s 99(1)(b) of the 1976 Act, identical to the test under s 94(1)(c) of the 1976 Act, is *Sime v REINZ* (High Court, Auckland, M73/86, 19 August 1986, Tompkins J:

“So it is clearly intended that the type of character required to be established under s 99(1)(b) is something of a more serious kind than professional misconduct, or breach of the duties imposed under the Act, although conduct that reflect adversely on a person’s character might also amount to professional misconduct or a breach of those duties.

...

So what the Board is required to inquire into is that person's character in the sense of his personal qualities, his individual traits, his reputation **and aspects of his behaviour that reflect on his honesty and integrity.**

...

**The adverse qualities in his character relied on must be measured against the public interest in his continuing or not continuing as a salesman. Traits such as dishonesty or gross incompetence may be within this category. Less culpable characteristics may well not.**" (emphasis added)

[87] In *Niall v REINZ*, High Court Auckland, 9 July 2009 Allan J was considering an appeal from an order cancelling the appellant's salespersons licence. Allan J referred to *Sime v REINZ* (supra) with approval and said:

"The Board does not appear to have considered Mr Niall's character as such. Rather it seems to have decided to make an example of him. ... In doing so it has fettered its future discretion by determining that cancellations will follow in any case where there has been falsification of documents used in the transfer of land and in the borrowing of money on the security of land."

[88] Mr Hodge suggests that in this case the Tribunal must find the "*character test*" under s 94(1)(c) and s 99(1)(b) satisfied before it can cancel or suspend the defendant's licence.

[89] In this case however there has been no "*general enquiry into the agent's character*" as Hardie Boys J said was required in *Dumergue v Real Estate Agents Licensing Board*, High Court, Christchurch, 15 July 1987.

[90] Without expressly deciding this issue the Tribunal prefers a different interpretation and considers that it could make an order for cancellation or suspension in the present case so long as it is satisfied the defendant could have been complained about or charged under the 1976 Act as is clearly the case here as explained above.

[91] However in the present case the facts make the difference in interpretation immaterial in the Tribunal's view. The fact that the defendant has been found to have committed forgery on five separate occasions is clear evidence of bad character on his part and the public interest test is satisfied.

[92] We do not consider it necessary to consider two separate issues, the defendant's conduct as disclosed by the evidence and evidence generally as to his character. In the present case the defendant's conduct and character are sufficiently closely connected to be considered as one.

[93] The Tribunal has of course noted the 15 references as to the defendant's character that he produced in evidence. It is almost trite to say that evidence of good character cannot be a defence but may show that the character of the person charged is such that he is not the kind of person to commit the offence charged.

## **Conclusions**

[94] As already stated in para [63] the Tribunal is satisfied beyond any doubt that the defendant is guilty of the five particulars set out in the charge against him.

[95] The fact of these forgeries and the circumstances under which they were committed reflect adversely on the defendant's character, integrity and honesty.

[96] The defendant's conduct in committing these forgeries can only be regarded as disgraceful as regarded by agents of good standing or reasonable members of the public.

## **Penalty**

[97] Pursuant to the provisions of the 1976 Act (see Step 3) above the Tribunal can make three orders against the defendant:

- (a) Cancellation of his licence (s 94(1)(c).
- (b) Suspension of his licence for a period not exceeding three years (s 95(i).
- (c) Impose a fine not exceeding \$5,000 (s 96).

[98] In considering the penalty to be imposed the Tribunal adopts the observations of Allan J in *Niall v REINZ* (supra):

"The Board's powers are extensive. It has jurisdiction to deprive those involved in the industry of their livelihood. It must exercise its jurisdiction in accordance with the principles of natural justice, among which is a requirement that a sanction imposed in a given case must bear some proper relationship to penalties imposed in past similar cases: *Aitken v Real Estate Agents Licensing Board* HC CHCH AP130/96 6 September 1996 at 12.

[99] In doing so the Tribunal has considered the past cases decided by the Licensing Board and referred to by Allan J.

[100] The defendant's financial circumstances make the imposition of a fine inappropriate.

[101] The Tribunal is satisfied that the defendant's conduct is a serious breach of s 73(a) particularly if one has regard to s256 of the Crimes Act and the maximum sentences contained therein.

[102] The Tribunal is satisfied that the conduct warrants consideration of cancellation or suspension of the defendant's licence.

***Mitigating Factors***

[103] Accepting that the necessary nexus between the defendant's conduct and his fitness to carry out real estate work is established it is a mitigating factor that the forgeries were not directly connected to real estate work.

[104] The Tribunal takes into account the context of the offending namely a bitter and private matrimonial dispute.

[105] The Tribunal takes into account the defendant's previous good character.

[106] The Tribunal is satisfied the defendant is unlikely to re-offend in this way.

[107] Taking all the mitigating factors into account the Tribunal orders that the defendant's licence be suspended for 12 months commencing one month from the date of delivery of this decision.

[108] In accordance with s 113 of the Act the Tribunal advises the parties of the right to appeal this decision to the High Court pursuant to s 116 of the Act.

**DATED** at WELLINGTON this 15<sup>th</sup> day of February 2011

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Judge M F Hobbs  
Chairman

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J Robson  
Member

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J Gaukrodger  
Member