

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2011] NZREADT 41

READT 070/11

IN THE MATTER OF

an application for review under
s.112 of the Real Estate Agents
Act 2008

BETWEEN

ROBERT WILLIAM REVILL

Applicant

AND

**REGISTRAR OF THE REAL
ESTATE AGENTS AUTHORITY**

Respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr G Denley - Member

HEARD at WELLINGTON on 8 December 2011

DATE OF THIS DECISION: 22 December 2011

COUNSEL

The applicant on his own behalf
Mr M J Hodge, counsel for respondent

RESERVED DECISION OF THE TRIBUNAL

The Issue

[1] Should the applicant be granted a salesperson's licence under the Real Estate Agents Act 2008?

[2] The applicant applied to the Authority for such a licence on 16 June 2011. However, on 6 July 2011 the Registrar declined the application on the basis that she was not satisfied that the applicant was a fit and proper person to hold a salesperson's licence because the applicant has a number of criminal convictions (referred to below). This has led the applicant to apply to us to review the declinature of the Registrar and he sought a formal hearing which we have held.

[3] We emphasise that we have had the benefit of a full hearing of the application with much more extensive evidence than was adduced to the Registrar.

Basic Facts

[4] The applicant had attained the national certificate in real estate from the Open Polytechnic on 8 June 2011. His application for a licence was made on the basis that he would work for the Professionals Hutt City Ltd (John Ross licensee).

[5] The Registrar undertook a check of the applicant's criminal history as part of routine checks relevant to the prohibitions on holding a licence which apply under s.36(2)(b) and the "*fit and proper person*" criterion under s.36(2)(c).

[6] The applicant has 25 convictions dating from 1969 through to 2002 inclusive. These include:

- [a] Sexual offences – indecent assault (2002) and sexual intercourse with a girl aged 12 to 16 (1985);
- [b] Drug offences – cannabis possession and cultivation (1996-2000);
- [c] Violence and firearms offences (1976, 1978, 1984 and 1986);
- [d] Driving offences – careless driving (1992), excess blood alcohol (1983), driving while disqualified (1971).

[7] We refer further to those issues below.

The Relevant Provisions of the Act and Relevant Law

"36 Entitlement to 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 section 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 of a crime that, if committed in New Zealand, would be a crime involving dishonesty) within the 10 years preceding the application for a licence. ..."*

[8] A person to whom s.37 applies is absolutely prohibited from holding a licence (*Little v Registrar of the Real Estate Agents Authority*) [2010] NZREADT 04

[9] The "*fit and proper person*" criterion applies in addition to the prohibitions which apply under s.37. In other words, a person may not be prohibited from holding a licence under s.37 but may nevertheless not satisfy the Registrar that he or she is a fit and proper person.

[10] The applicant's last dishonesty offence was for theft in 1977. This falls outside of the 10 year period in s.37. The applicant has not been convicted under the Fair Trading Act 1986, nor do any of the other prohibitions in s.37 apply to him.

[11] The issue before the Registrar, and under review in this Tribunal, is therefore whether the applicant satisfied the Registrar that he is a fit and proper person to hold a licence. This review proceeds under s.112 of the Act.

“Satisfies”

[12] The onus is on the applicant for a licence to satisfy the Registrar that he or she is a fit and proper person to hold a licence. This is clear from the language of s.36(2) providing that:

“An individual may be licensed as a salesperson if the individual satisfies the Registrar that he or she –

...

(c) is a fit and proper person to hold a licence.”

[13] The standard of proof is the ordinary civil standard of *“on the balance of probabilities”*. However, sufficient and adequate information must be provided in order to meet this standard. This point was made by the Supreme Court in *Westfield (New Zealand) Ltd & Anor v North Shore City Council & Anor* [2005] 2 NZLR 597.

[14] In *Marie-Ann Nixon v Real Estate Licensing Board of NZ* (HC, Auckland 22/93, 23 August 1994), the High Court held that the starting point in any determination is that good character is presumed unless a real question-mark is raised by the evidence. If a question mark has been raised then, as was held in *L v Canterbury District Law Society* [1999] 1 NZLR 467 at 474:

“... the [applicant] must establish affirmatively that he is a person of unquestionable integrity, probity and trustworthiness and that since the [offending] he has “so far amended his ways and character that he is now a fit and proper person to practise on his own account”.

“Fit and Proper”

[15] In *Re T* [2005] NZLR 544, at 547, the High court highlighted four features relevant to the required assessment under the Law Practitioners Act 1982, namely:

- [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 an 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.

[16] The cases affirm it must be borne in mind that it is a significant step to deprive a person of a licence or status. However, the primary consideration is the principle that the Court must be satisfied objectively that the candidate is a fit and proper person. The judgment of the Court is to be made in the interests of the community having regard for the legal profession.

[17] We accept that this principle is equally applicable to licensing decisions under the Act which is a piece of consumer legislation and s.3 puts its purposes as: *“to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.”*

[18] It has been put that the number and range of the applicant’s criminal convictions call into question his honesty, integrity, and the likelihood of him complying with his obligations as a licensee, with significant potential adverse consequences for consumers. We accept that the conclusion was open to the Registrar that the applicant had not satisfied the Registrar that he is a fit and proper person to hold a licence.

[19] In *New Zealand Law Society v Mitchell* (CIV 2003-409-1878,26 August 2004), the issue was whether Mr Mitchell should be struck off the roll of barristers and solicitors. Contrary to the contents of declarations made by Mr Mitchell that he had not been convicted of an offence and that there were no matters relevant to whether he was a fit and proper person, he had been convicted of 39 criminal offences including theft, burglary and possession of marijuana between 1989 and 1994. Mr Mitchell argued he had turned his life around between 1994 and 1996, moving away from his home town and successfully completing an alcohol and drug treatment programme. The Court noted his completion of a Bachelor of Arts degree in 1997 and a Bachelor of Laws degree in 2001. Apart from an incident in 2001, Mr Mitchell had stayed out of the Courts since 1994.

[20] The Court concluded that Mr Mitchell’s previous offending and lack of disclosure meant that he should be struck off: *“... on the evidence before us we find that his conduct falls short of the required standard of honesty and integrity. We are not satisfied that he is a fit and proper person ...”*.

[21] We accept that, to a certain degree, there are similarities between the number and range of Mr Mitchell’s convictions and those of the applicant in this case. The repeated lack of disclosure which featured in *Mitchell* is not present in this case, although, like Mr Mitchell, the applicant failed to disclose his convictions to the Registrar in declaring that: *“There are no other circumstances that would or might make me not a fit and proper person to hold a licence.”* We deal further with that aspect below.

[22] Convictions for sexual offending have been held to be particularly relevant where consumers may be placed in a vulnerable position, such as with taxi drivers. Real estate salespersons typically operate in the privacy of their clients’ homes. Indeed they are required to, for example in providing appraisals. This requires consumers to place a high degree of trust in licensees and could leave consumers in a vulnerable position. The Registrar concluded that the applicant had not satisfied the fit and proper person test in light of his convictions, particularly his convictions for sexual offences. It is put that the applicant committed an assault a year later than the 1985 sexual offence and then five drug offences when well over the age of 40.

We agree with Mr Hodge that it cannot be said that these were offences committed as an immature youth.

Oral Evidence to this Tribunal

[23] The applicant gave evidence before us and was carefully cross-examined by Mr Hodge as were a number of witnesses called in support of the applicant. All that evidence can be summarised in the following manner.

[24] From about three years ago, the applicant has been in a relationship with his female partner who has been involved in real estate for the past 20 years, holds a Branch Manager's Certificate and is highly regarded in the industry. For about the past 18 months the appellant has been assisting her and seems to have fitted in very well to the systems and support processes of Professional Hutt City Ltd where the applicant is well regarded and well supervised. The applicant and his partner have been offered a joint contract from Professional Hutt City Ltd.

[25] When the applicant completed his exams at the Open Polytechnic, he was invited to join that company as a sales person. While waiting for his licence to come through (as he puts it), he has attended several sales courses and attended the Professionals' National Sales Conference in Masterton. It is clear that he has the total support of his partner, and the benefit of all her experience, and of the principal and owner of Professionals Hutt City Ltd, and of its branch manager and sales-person-trainer, and of its sales manager and other staff. The trigger for the applicant seeking to become a real estate agent was his nearly losing an eye in a work accident.

[26] We note that in 1994 the applicant was selected by the Justice Department (or the Corrections Department as it may have then been) to become a prison officer, despite having a criminal record disclosed. However, he subsequently felt obliged to resign that job as a corrections officer due to the attitude of a person at the departmental training college towards his criminal record. A particular instructor at the Department's training college managed to have the applicant technically dismissed on the basis of his criminal record, which had been disclosed at the outset, and although the applicant succeeded in a case for wrongful dismissal, he could not regain the job.

[27] A careful analysis of the applicant's criminal record leads us to conclude that, at this point in time, it is not particularly concerning and, to quite a degree, is somewhat historic. The indecent assault conviction of 13 July 2002 seems to have come about as a result of the applicant mistaking a woman in a bar for a similar looking friend and patting her on the bottom. The applicant apologised the moment he realised his mistake of the victim's identity. He was told at sentencing by the Judge that the offending was at the very low end of severity and that led him to change his plea to guilty.

[28] The 1985 conviction for sexual intercourse with a girl aged 15 seemed to come about through that girl being employed as a stripper by an acquaintance of the applicant who was then age 33. The victim had "*proved*" to the employer that she was aged 19 by using her sister's driving licence.

[29] The assault convictions go back to 1976, 1978, 1984 and 1986. With regard to these assaults of some time ago, the applicant recalls that because he was then a

professional boxer with quite a high profile there were times when he was jostled in public or goaded and he felt he needed to respond to some extent.

[30] The 1969 conviction for theft was dealt with in the Youth Court and the applicant can only remember that it was a very minor matter. However, in 1977 he was with the military at Waiouru Military Camp when he and a friend espied an old land-rover seemingly abandoned. Their enquiries around the camp confirmed that; so they took a few small parts from it for a similar land rover. However, it transpired that the vehicle was not abandoned and its owner had been posted to Duntroon in Canberra, Australia. By the time they were brought to Court over the matter, as engineering apprentices they had replaced the parts in the seemingly abandoned vehicle and got the motor running again.

[31] We accept that, in the intervening years, the appellant has set about changing his approach to life and, seemingly, has been rather successful at that. He is very much involved in community groups such as the Wellington Boxing Association, the NZ Professional Boxing Association, and the Wellington Muay Thai Association as a referee and a Judge. He coaches and motivates students (and especially troubled youths) into sport. He has five sons.

[32] The applicant described how over the past 15 years he has concentrated on *“totally turning my life around”*. He started by enrolling himself into support groups such as Adult Children of Alcoholics. He began to remove undesirable people from his circle of friends. He became more involved in community groups including being a volunteer for the Women’s Refuge in Upper Hutt as well as being involved in several sports clubs. He has been involved with charities such as Children’s Cancer because he experienced a year of chemotherapy himself and got to know several children during that time and saw how brave they could be. He has served as a trustee of school boards and has coached many school sports teams over the years. Recently, he has been elected to the Board of the NZ Professional Boxing Association and the Wellington Boxing Association and the Wellington Muay Thai Association. He is actively involved as a referee and a judge for boxing and at kick boxing (Muay Thai) and seems likely to be an international judge at the next World Olympics.

[33] The applicant explained that his cannabis conviction of 1994 went back to a nurse at Wellington Hospital having advised him to smoke cannabis for pain relief while he was undergoing his chemotherapy for cancer.

[34] We assess the applicant as an intelligent and fluent person who appears very motivated in terms of the real estate industry. By trade he is a fitter and turner. Currently, he is a road transport driver i.e. he is now a driver for a removal company.

[35] We had the benefit of observing the applicant carefully cross-examined by Mr Hodge. The applicant is aged 60. He is involved in various forms of sporting management and feels he is currently on track to go to the next Olympics as a boxing coach and referee. His involvement with boxing is mainly at the amateur level. He also holds a black belt in martial arts.

[36] At one point, something seemed to be made of the fact that when the appellant applied to the Authority he did not disclose his previous convictions. However, he signed a document consenting to that information being made available to the Authority from the Police and he states that he assumed he would be fully checked

out by that process. He now realises that he ought to have been more up front with the Registrar but we believe that he always expected to have the Registrar fully advised of and analysing the previous convictions.

[37] We also heard evidence from various supporters of the applicant who had previously provided written testimonials. His partner gave supportive evidence. Interestingly, the appellant's former wife attended the hearing and gave evidence in support of the applicant and she had previously filed a written testimonial. She has known the applicant for 30 years and was his wife for 23 of those years but remains his friend. She described him as a very motivated person and, inter alia, stated "*he has always been into some sort of physical activity, the most recent being kick boxing and previous to that boxing. He is a strong advocate for young people being involved in sports. This he has shown not only by being actively involved with his four sons during early school years and now later in the lives in any and all sporting activities they participated in. Also in the boxing fraternity and school participation. He is and always has been a people person, with many friends from a diverse range of professions and interests and is a loyal friend to them all ...*" The applicant's former wife felt that he had grown and matured since their relationship terminated.

[38] Mr T G Belcher, the branch manager of the Professionals at Lower Hutt, also provided a testimonial and gave evidence at the hearing. He had been a policeman for 27 years prior to becoming involved in the real estate industry. Due to his position as branch manager at Lower Hutt and Wainuiomata, he not only sells real estate but focuses on training and coaching the company's sales people. Over the years he has worked closely with the applicant's partner and over the past year or so has mentored the applicant. He has been aware of the applicant's previous criminal convictions and considers them to be "*well in the past*". He also commented that "*Rob's explanation for them would suggest that they are more severe than reality*".

[39] Mr Belcher is in no doubt that the applicant's past would not compromise a career in real estate and he totally supports the applicant's application to be a real estate agent. He also mixes socially with the applicant and is thoroughly confident that he has reformed and is an earnest and sincere person.

Conclusion

[40] It seems to us that Professionals Hutt City Ltd are particularly conscious of s.50 of the Real Estate Agents Act 2008 which requires that sales persons be supervised. That company seems to have a very supportive and educational ongoing process for its agents, and the applicant has already greatly benefited from that.

[41] Towards the end of his very helpful submissions, Mr Hodge emphasised that this Tribunal has a different body of information from the applicant to consider than did the Registrar; that each case is fact specific; and the issue of whether or not the applicant is a fit and proper person is a judgement call for us. We agree.

[42] When we stand back and consider the totality of the evidence adduced to us, we conclude that the applicant is a fit and proper person to hold a licence as a sales person under the Act. Having said that, we are comforted that our granting of the application will facilitate the applicant continuing to work within the setting provided by the Professionals at Lower Hutt with seemingly excellent supervision and mentoring of agents. If the applicant were to leave that work setting or structure,

then there may be a case for further thought upon his next annual licence renewal point.

[43] Accordingly this application is granted. No question of costs or disbursements seems to arise but we reserve leave to apply should there be any consequential matters.

Judge P F Barber
Chairperson

Ms J Robson
Member

Mr G Denley
Member