

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 64

READT 025/17

IN THE MATTER OF

An Application for Review under Section
112 of the Real Estate Agents Act 2008

BETWEEN

DUNCAN JOHN NAPIER
Applicant

AND

THE REGISTRAR OF THE REAL
ESTATE AGENTS AUTHORITY
Respondent

Hearing:

10 October 2017, at Auckland

Tribunal:

Hon P J Andrews (Chairperson)
Ms N Dangen (Member)
Ms C Sandelin (Member)

Appearances:

Mr S McAnally and Ms B Hojabri, on
behalf of the Applicant
Ms K Feltham, on behalf of the Registrar

Date of Decision:

24 October 2017

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Napier became registered as a licensed salesperson in 2013. He has since then been engaged by Mackys Real Estate Ltd (“the Agency”). On 3 May 2016, he applied for renewal of his salesperson’s licence. In a letter dated 21 September 2016, the Registrar gave Mr Napier notice that she intended to decline his application for renewal. Following correspondence between Mr Napier’s solicitors and the Registrar, the Registrar confirmed in a letter to the solicitors dated 17 July 2017 that Mr Napier’s licence would be declined as from 24 July 2017 (“the Registrar’s decision”).

[2] The Registrar stated as grounds for her decision that she was not satisfied that Mr Napier is a fit and proper person to hold a licence.

[3] On 1 August 2017, Mr Napier filed an application to the Tribunal for review of the Registrar’s decision, pursuant to s 112 of the Real Estate Agents Act 2008 (“the Act”).

High Court civil proceedings

[4] The Registrar’s decision was founded on her assessment of the impact on Mr Napier’s fitness to hold a licence, of findings made against him in a judgment of his Honour Woolford J in the High Court at Auckland (“the High Court judgment”)¹. As the judgment is central to the Registrar’s decision and the application for review, the findings, and the background to those findings, must be set out in some detail.

[5] In 2001, Mr Napier and a friend, Mr Single, incorporated Torbay Holdings Ltd, which purchased a rest home business. Torbay Holdings was the owner of the land and buildings, and the rest home business was run by an associated company, Torbay Rest Home Ltd.² Mr Napier was appointed Administration Manager of the rest home in 2001, and remained so until April 2012. Mr Napier became a director of the Torbay companies in August 2008.

¹ *Torbay Holdings Ltd v Napier* [2015] NZHC 2477

² The two companies will be referred to as “the Torbay companies”.

[6] Mr Napier was responsible for financial management of the rest home, dealing with all expenses, wages, PAYE returns, and GST returns. He was also responsible for keeping the Torbay companies' primary accounts, for which he used a Mind Your Own Business accounting software package. Mr Napier provided the companies' accountant with information required to complete annual accounts. The accountant did not audit the accounts or, except occasionally, examine source documents.

[7] In September 2011, the accountant advised Mr Single that two payments due to the Inland Revenue Department ("IRD") had not been made in the preceding financial year. Mr Single met with Mr Napier in November 2011 to discuss the issue. Mr Napier gave Mr Single evidence that the payment had by then been made.

[8] In April 2012, Mr Napier advised Mr Single that he had not filed required IRD returns, and that there was unpaid PAYE and GST. On the same day that this occurred, the IRD advised Mr Single that various payments, contributions, and deductions had not been made. IRD claimed approximately \$196,000 as core tax, together with approximately \$79,000 as penalties. An investigation was begun of the rest home finances. Part of the debt to the IRD was paid by way of a transfer of shares to Mr Single. Mr Napier ceased his employment as Administration Manager shortly thereafter.

[9] Following an investigation by Mr Single, the Torbay companies and others issued a proceeding against Mr Napier and others in the High Court at Auckland ("the High Court proceeding").³ It was alleged that over the period from 1 April 2005 to 30 April 2012, Mr Napier used more than \$1.9 million of the companies' funds for his own purposes, without authorisation. Mr Napier denied the allegations and said that all payments were either for rest home expenses, or legitimate reimbursement for payments made on behalf of the rest home.

[10] The proceeding was heard over a period of three weeks, in which Mr Napier represented himself. The Torbay companies were represented by senior counsel. Woolford J subsequently gave judgment in favour of the Torbay companies. Judgment was entered against Mr Napier on a cause of action for "money had and received", for

³ The Tribunal is concerned with the proceeding against Mr Napier, only.

approximately \$1.4 million. The Judge also found Mr Napier liable for breach of his director's duties and associated fiduciary duties, knowing receipt of monies misappropriated from the Torbay companies, and on a cause of action in negligence (on which judgment was entered for \$18,000). The orders against Mr Napier were, in total, \$1,418m ("the judgment debts").⁴

[11] Mr Napier appealed to the Court of Appeal. His appeal was dismissed. He applied for leave to appeal to the Supreme Court, but that application was abandoned after an agreement was reached between Mr Napier and the Torbay companies in early 2017, in full and final settlement of all outstanding proceedings, claims, demands, debts, and disputes between the parties.

[12] The settlement deed provided that the judgment debts had been satisfied.

The Registrar's decision

[13] In his application to renew his salesperson's licence Mr Napier was asked:

Since 16/05/2015, have there been any unsatisfied judgments against you in any court?

to which Mr Napier responded:

I have had a judgment against me on a civil matter relating to a business that I was a director and shareholder trustee in for the period 2005 to 2012 prior to my real estate career. I am appealing the judgment with a reference CA647/2015 which will be heard at the end of this year. It is a civil matter and no police involvement has occurred.

[14] The Registrar obtained a copy of the High Court judgment. In her letter to Mr Napier dated 21 September 2016, the Registrar referred to the Judge's statements that:

... I have no doubt that Mr Napier misappropriated company funds to which he was not entitled.

and:

Although this judgment is given on the claim for money had and received, Mr Napier is also liable for breach of his director's duties and associated fiduciary

⁴ A further order, as to costs, was subsequently made against Mr Napier.

duties as well as knowing receipt of monies misappropriated from [the Torbay companies].

[15] The Registrar said that while civil judgments against a licensee are not covered by section 37 of the Act,⁵ they were relevant to her consideration of an applicant's fitness to hold a licence. She considered that:

The [High Court judgment] brings in to question whether you have the requisite level of honesty and integrity to remain in the industry and, therefore, your fitness to hold a licence. Licensees under the Act are in a position of trust with their clients and are required to comply with their fiduciary obligations towards their clients. Additionally, it is essential that consumers are able to rely on the honesty and integrity of real estate agents in respect of real estate transactions.

[16] The Registrar also referred to the observation of his Honour Justice Woodhouse in his judgment in *Morton-Jones v Real Estate Agents Authority*, that:⁶

... proven dishonesty will almost invariably result in disqualification whether or not that dishonesty led to criminal proceedings and criminal penalties.

[17] The Registrar gave Mr Napier ten working days in which to make representations as to why his application to renew his licence should not be declined. Mr Napier's solicitors made submissions on his behalf. The Registrar's final decision was set out in her letter to Mr Napier's solicitors on 17 July 2017.

[18] The Registrar rejected Mr Napier's submission that she had inappropriately compared the findings in the HC judgment to criminal convictions, and that to decline his application for renewal would be to impose a longer period of ineligibility than that prescribed in the Act in respect of convictions under the Fair Trading Act.

[19] The Registrar then referred to cases where conduct outside the scope of real estate agency work was considered in relation to the decision whether a person was a fit and proper person to be licensed: *Revill v Registrar of the Real Estate Agents*

⁵ Section 37 of the Act sets out the categories of persons who are not eligible to hold a licence, and provides in s 37(1) that a person who has been convicted of a crime involving dishonesty within the preceding ten years is not eligible to hold a licence; and in s 37(2) that a person who has been convicted of an offence under certain sections of the Fair Trading Act 1986 within the preceding five years is not eligible to hold a licence.

⁶ *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804, at [98], citing *Bolton v Law Society* [1994] 1 WLR 512, at 518 (per Lord Bingham MR).

*Authority*⁷ *Zaheed v Real Estate Agents Authority*,⁸ *Parlane v Registrar of the Real Estate Agents Authority*,⁹ *Foot v The Registrar of the Real Estate Agents Authority*,¹⁰ and *Applicant C v The Registrar of the Real Estate Agents Authority*.¹¹ She considered that Mr Napier's conduct was more egregious than the conduct considered in those cases and justified declining his application for renewal. As stated in her earlier letter, the Registrar considered that the findings against Mr Napier in the High Court judgment demonstrated that he had engaged in a sustained course of dishonest conduct over the period of seven years, which brought into question whether he had the requisite level of honesty and integrity to remain in the real estate business.

[20] The Registrar referred to letters of support from clients and Mr Napier's employer. She said that in light of the seriousness of Mr Napier's breach of fiduciary duty, she was not satisfied that those letters adequately addressed concerns as to his fitness to be licensed under the Act.

Mr Napier's application for review

[21] The grounds for Mr Napier's application for review were that:

- [a] The Registrar overlooked that allegations in civil proceedings required proof only to the balance of probabilities, and (in Mr Napier's case) were determined in the context of a complex proceeding, over a four-week hearing, in which he was unrepresented and the other parties were represented by Queens Counsel;
- [b] The factual findings in the High Court judgment are not admissible as proof of facts in another proceeding. For that reason, there is no "proven dishonesty" to be considered in relation to Mr Napier's application renew his licence.

⁷ *Revill v Registrar of the Real Estate Agents Authority* [2011] NZREADT 41.

⁸ *Zaheed v Registrar of the Real Estate Agents Authority* [2013] NZREADT 107.

⁹ *Parlane v Registrar of the Real Estate Agents Authority* [2013] NZREADT 94.

¹⁰ *Foot v The Registrar of the Real Estate Agents Authority* [2015] NZREADT 24.

¹¹ *Applicant C v The Registrar of the Real Estate Agents Authority* [2017] NZREADT 10.

- [c] The Registrar was required to “look forward” when considering Mr Napier’s application, and there is no presumption to be applied that an applicant is not eligible to hold a licence.
- [d] The conduct Mr Napier was alleged to have engaged in had occurred five years before his application for a salesperson’s licence, was not related to real estate agency work, and Mr Napier had, since 2013, carried out his real estate agency work with an unblemished record and to high standards of competence and integrity.
- [e] Mr Napier had compromised all outstanding disputes and proceedings with the other parties, including satisfying the judgment debts.

[22] It was submitted that the evidence relating to Mr Napier, and the manner in which he has conducted himself, demonstrate that he is a fit and proper person, and his salesperson’s licence should be renewed.

Relevant principles

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

- [a] The Tribunal will make its own assessment of whether Mr Napier is a fit and proper person to hold a licence.
- [b] The onus is on Mr Napier to satisfy the Tribunal that he is a fit and proper person to hold a licence. In his case, given that the conduct causing concern occurred before he was a licensee, the onus may be lighter than that on a person who has erred in a professional sense following admission to the industry.
- [c] The factors relevant to assessment of whether Mr Napier is a fit and proper person to hold a salesperson’s licence are:

- [i] The focus is necessarily forward-looking. The function of the Registrar, and the Tribunal on review, is not to punish Mr Napier for his past conduct, but to assess his worthiness and reliability for the future.
- [ii] 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”.

Admissibility of the findings and reasoning set out in the High Court judgment

[24] It will be obvious that the central issue in determining Mr Napier’s application for review is whether the Tribunal can take Woolford J’s reasoning and findings into account.

[25] Section 109(1) of the Act provides:

109 Evidence

- (1) Subject to s 105 [which provides that the Tribunal may regulate its procedures as it thinks fit (subject to the rules of natural justice)] the [Tribunal] may receive as evidence any statement, document, information, or matter that may, in its opinion, assist it to deal effectively with the matters before it, whether or not that statement, document, or matter would be admissible in a court of law.

[26] Despite submitting that, pursuant to s 50 of the Evidence Act 2006, the reasoning and findings in the High Court judgment could not be relied on (except as to the fact that judgment was entered against him for certain amounts), Mr McAnally acknowledged in his submissions for Mr Napier that it would be unrealistic to submit that the Judge’s written reasons should not be admitted under s 109 of the Act, in order to assist the Tribunal to deal with the application. However, he submitted, the Tribunal’s use of those reasons is subject to the rules of natural justice. He also submitted that while the Tribunal may have regard to the Judge’s reasons, they are not binding on the Tribunal, or conclusive. He further submitted that the weight to be given to the reasons, when they are considered with the totality of the evidence, will depend on the relevant circumstances.

[27] Ms Feltham submitted for the Registrar that pursuant to s 109(1) of the Act, the Tribunal can receive the High Court judgment (including the Judge’s reasoning and findings) as evidence, if it considers it will assist us to deal effectively with Mr Napier’s application for review, regardless of any issue under s 50 of Evidence Act.

[28] Ms Feltham accepted that the High Court judgment is not binding on the Tribunal, but submitted that it may be considered in evidence, and the weight to be given to it is a matter for Tribunal.¹² She submitted that the Tribunal can give the Judge’s findings significant weight. She further submitted that the Tribunal can weigh his clear liability findings, and the unsuccessful appeal to the Court of Appeal, against Mr Napier’s denial of liability.

[29] We have concluded that the Tribunal can take the findings and reasoning set out in the High Court judgment as evidence. Those findings, and the Judge’s reasoning, will assist us to determine Mr Napier’s application for review. It is for the Tribunal to decide what weight we give the findings and reasoning.

[30] We have also concluded that the findings and reasoning are relevant to our consideration as to whether Mr Napier is a fit and proper person to hold a salesperson’s licence. His Honour set out evidence on which he found that Mr Napier had misappropriated money, and made orders for payment of significant sums to the Torbay companies. We consider the Judge’s findings together with Mr Napier’s denial of liability, and his other submissions in respect of the High Court judgment.

Submissions

[31] Mr McAnally accepted that Woolford J’s reasoning and his findings in the High Court judgment raise a very serious question mark and concern as to Mr Napier’s fitness to hold a licence. However, Mr McAnally submitted that the allegations against Mr Napier are “increasingly historic”, and for that reason should be given less weight

¹² Citing *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal* HC Auckland CIV 2009-404-7381, 11 May 2011, at [21] and [38]; *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987, at [80] (FC); and *Deliu v National Standards Committee of the New Zealand Law Society* [2015] NZCA 399, at [34].

than evidence relating to Mr Napier's conduct since he has held a salesperson's licence.

[32] He submitted that the Registrar was obliged to approach Mr Napier's application to renew his licence on the basis that the circumstances of the High Court judgment, and his unsuccessful appeal to the Court of Appeal, raised a question mark, but nothing more than that. He submitted that rather than taking this approach, the Registrar had treated Mr Napier as if he had been convicted of an offence of dishonesty which would dictate, pursuant to s 37(1)(a) of the Act, that he could not hold a salesperson's licence for ten years following the High Court judgment.

[33] Mr McAnally submitted that when considering the High Court judgment, the Tribunal should take into account the standard of proof applied in the High Court proceeding, that is, the balance of probabilities, rather than the criminal standard of beyond reasonable doubt. He also submitted that the Tribunal should take into account the complexity of the issues raised in the High Court proceeding, and the "inequality of arms" in the four-week hearing in the High Court between Mr Napier's self-representation and the fact that the Torbay companies were represented by senior counsel and a junior.

[34] Mr McAnally further submitted that a focus on the High Court judgment is a "backwards-looking" consideration, and it is outweighed by "forward-looking" considerations. These were, he submitted:

[a] The judgment debts have been satisfied.

[b] Mr Napier's exemplary behaviour since becoming licensed.

[c] Mr Napier's evidence that he has disclosed the High Court judgment to anyone who does not know about it, and provided such people with copies of news media articles published at the time of the High Court judgment and subsequent judgments as to costs and an application for stay of the judgment, the Court of Appeal judgment, and the application for leave to appeal to the Supreme Court.

[d] The evidence of support from clients and information as to supervision offered by the Agency (including Mr Napier not being permitted to handle clients' money).

[35] Ms Feltham submitted that there is nothing before the Tribunal to justify the Tribunal taking a different approach from that taken by the Registrar. She submitted that Mr Napier's conduct before entering the real estate industry has a bearing on the assessment whether he is a fit and proper person to hold a licence. She also submitted that Mr Napier has not established that he is a "person of unquestionable integrity, probity, and trustworthiness".¹³

[36] Ms Feltham further submitted that Mr Napier has not accepted and addressed the Judge's findings, and that his ongoing denial of wrongdoing shows that he lacks insight into what he did. She submitted that Mr Napier's evidence of disclosing the High Court judgment carries little weight when he continues to deny the conduct that led to the findings against him.

Further material available to the Tribunal

[37] In his evidence to the Tribunal, Mr Napier submitted copies of the news media articles referred to in paragraph [34][c], above. He said that he provided copies of these to clients or prospective clients who were not already aware of the High Court proceedings.

[38] He confirmed to the Tribunal that the judgment debts had been satisfied. He also provided the Tribunal with further statements of support and character references than were provided to the Registrar. He acknowledged that he had maintained poor documentation, and that his recording of financial transactions was poor.

[39] Mr Napier stated in answer to questions put to him by Ms Feltham that he has no plans to own a business, and does not want to supervise other salespersons. He further said that he had been, and would continue to be, involved in commercial,

¹³ Citing *L v Canterbury District Law Society* [1999] 1 NZLR 467, at 474, and *L v Registrar, Real Estate Agents Authority* [2013] NZREADT 47, at [33].

industrial, and development real estate transactions only, and would be involved with a residential sale only if it was a sale of a “superlot” to a housing company (that is, a purchase by a developer for a residential development). He said that he had never sold a “single” residential lot without a residential agent beside him.

[40] Finally, despite saying in a statement of evidence provided to the Tribunal that “to this day I steadfastly deny any wrongdoing and believe I acted honestly”, Mr Napier said in answer to a question from the Tribunal: “I accept I made mistakes. I accept the finding of “money had and received”, and the basis of that”.

Material submitted after the hearing

[41] In the course of the hearing the Tribunal asked for clarification of the assurances the Agency would provide as to the continuing supervision, management, and mentoring measures that would apply, in the event that the Tribunal granted Mr Napier’s application for review and his licence was renewed. The Tribunal has received an extremely detailed statement from the Agency, which we summarise as follows:

- [a] It is acutely aware that if Mr Napier were to be the subject of disciplinary action, the Agency’s supervision could be reviewed. The Agency takes its supervision policies seriously.
- [b] In addition to the Agency’s standard supervision practices (a written supervision plan for all licensees, review of every agency agreement and sale and purchase agreement for any licensee with less than six months’ experience, continued review if draft agreements do not meet required standards, and an extensive and regular training programme for all licensees covering technical, legal, and compliance issues), further measures will be put in place.

[c] The further measures require:

- [i] Full disclosure to all prospective clients of Mr Napier's legal history: that is, that legal proceedings were brought against him in 2012 alleging misappropriation of companies' funds; that in 2015 he was ordered to repay the companies a significant amount of money; that the litigation has been concluded; and that the judgment has been satisfied.
- [ii] Mr Napier will report directly to the director of the Agency, who will be his designated supervisor. This includes twice-weekly sales meetings, and the supervisor meeting with Mr Napier's clients. There will also be a contingency reporting line to a senior licensed agent. Further, Mr Napier's desk will be next to that of a further senior licensed agent. Every sale and purchase agreement will be drafted by a personal assistant or administrator and reviewed by Mr Napier's supervisor or one of the other senior licensed agents before being presented to a client.
- [iii] Mr Napier will be allocated a full-time personal assistant, employed by the Agency, who will report directly to Mr Napier's supervisor. The personal assistant will deal with all Mr Napier's ingoing and outgoing communications, and send out any marketing invoices for payment of marketing campaigns.
- [iv] All of Mr Napier's listings and files will be audited, over and above the Agency's standard reviews, by Mr Napier's supervisor or one of the other senior licensed agents on a random but frequent basis (intended to be at least twice during the currency of the listing and file).
- [v] Mr Napier will specialise in commercial, industrial, and development property. He will not be permitted to sell residential property to end-users, and any involvement in selling "live/work"

(mixed use) property would require him to work in conjunction with a residential specialist.

[vi] All business-related files will be required to be kept on the Agency's "cloud-based" server, and the agency will have access to emails and files, including deleted ones.

[vii] Mr Napier's engagement will be as a licensed salesperson, only. Should he decide to study toward an agent's qualification, his engagement will be discontinued.

[42] The Agency recorded that, as is standard practice in the real estate industry, none of the Agency's licensees have the ability to handle any marketing or trust account money.

[43] The Agency stated that the obligation as to disclosure ([c][i], above) will be maintained for two years (that is, seven years since the issues that brought about the High Court proceedings came to light) and then reviewed. The remaining measures will remain in place indefinitely while Mr Napier is engaged by the Agency, subject to a periodic (not less than two-yearly intervals) review of the frequency of the audits of Mr Napier's current listings and files.

[44] The Agency also stated that most of the proposed further measures were implemented as soon as the Agency became aware of the High Court proceedings. The Agency further notes that it is in part due to the close supervision over an extended period of time, Mr Napier's response to it by following instructions and directions and acting professionally, and the manner in which Mr Napier has conducted himself, that the Agency has supported him through the legal proceedings and his application for review.

Discussion

[45] It is helpful to refer to the Tribunal's decision in *L v Registrar Real Estate Agents Authority*, in which the Tribunal said (in relation to an application for review of a

Registrar's decision not to renew a salesperson's licence in a different factual context):¹⁴

We are extremely conscious of the need to confine the issue of real estate licences to persons who are clearly fit and proper, and it is appropriate that the Registrar of the Authority deals strictly with applications. However, ... [the applicant] deserves a second chance at her career. The case law covered above endorses, inter alia, a forward looking approach, rather than punishment for past conduct, and a consideration of the facts of the case in the round rather than a focus on Court convictions.

Accordingly, we grant the application. We are comforted by the fact that, in the usual way, the applicant will need to apply for her annual renewal of licence so that any failures on her part (and we do not anticipate any) could be fatal to her career in the light of events to date.

[46] In that case, the fact that the applicant had been convicted of offences under the Misuse of Drugs Act 1975 was not determinative of the issue whether she was a fit and proper person to hold a salesperson's licence.

[47] We are not persuaded that, on the information before her, the Registrar was wrong to place the emphasis she did on the High Court judgment, and to regard it as a significant factor in her assessment of whether Mr Napier is a fit and proper person to hold a licence. While the standard of proof applied was to the balance of probabilities, we note that following a detailed analysis of relevant financial transactions, Woolford J concluded that he had "no doubt" that Mr Napier has misappropriated company funds to which he was not entitled. This conclusion was followed by a narration of ten factors that had contributed to this conclusion. The Judge later recorded that because of the nature of the allegations made against Mr Napier, he required "stronger evidence" to prove those allegations on the balance of probabilities. It is clear that the Judge was satisfied that Mr Napier had misappropriated funds to a standard well above the balance of probabilities.

[48] Given the Judge's finding to that standard, reference to his Honour Justice Woodhouse's comments in *Morton-Jones*¹⁵ was appropriate. That is, there was a finding of "proven dishonesty", in respect of which cancellation (or, as in this case,

¹⁴ *L v Registrar Real Estate Agents Authority* [2013] NZREADT 47, at [59] and [60].

¹⁵ See paragraph [16], above and footnote 5.

refusal to renew) of a licence follows whether or not the finding leads to criminal proceedings and criminal penalties.

[49] Even if Woolford J had not stated that he had “no doubt” as to his findings, the reference to “whether or not” there are criminal proceedings can only mean that dishonesty can be “proven” in other than criminal proceedings. It contemplates civil proceedings, which are determined on the balance of probabilities.

[50] We accept Mr McAnally’s submission that the Registrar’s decision contained little “forward-looking” analysis, other than to say the character references provided to her did not adequately mitigate her concerns as to Mr Napier’s fitness to hold a licence. However, the Tribunal is in a position to consider the relevant factors, both “backward-looking” and “forward-looking”.

[51] The findings of misappropriation, breach of fiduciary duties, and negligence must give rise to a very serious concern as to Mr Napier’s fitness to hold a licence. Conduct in respect of which such findings are made will be conduct that is in breach of fundamental provisions of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.¹⁶ The judgment debts were for a significant sum of money.

[52] It is also of concern that Mr Napier continued to “steadfastly” deny any wrongdoing to the Registrar, and in his statement of evidence to the Tribunal. That continued in his viva voce evidence, up to the point where, as recorded earlier, he accepted the finding of “money had and received”, and the basis for that finding. There is force in Ms Feltham’s submission that Mr Napier’s steadfast denial indicates a lack of insight into his wrongdoing.

[53] It is also of concern that Mr Napier did not appear to be able to give a clear expression of the wording he used to advise clients or prospective clients of the judgments of the High Court and Court of Appeal. Mr Napier’s evidence as to what

¹⁶ See r 5.1 (duty to exercise skill, care, competence, and diligence when carrying out real estate agency work); 6.1 (duty to comply with fiduciary obligations to the licensee’s client); r 6.2 (duty to act in good faith and deal fairly with all parties); r 6.3 (duty not to engage in any conduct likely to bring the industry into disrepute); and r 9.1 (duty to act in the best interests of a client).

he said to prospective clients when providing these documents was unclear, and variable. The indication that Mr Napier's advice is, or may be, accompanied by a statement that he does not accept those findings is of further concern.

[54] We note Mr McAnally's submission as to the complexity of the issues traversed in the High Court hearing, and the "inequality of arms" between Mr Napier's self-representation, and the Torbay companies' representation by senior counsel, but we do not consider any "inequality of arms" to be to such an extent as to reduce the significance of the High Court judgment. We note that the Court of Appeal did not accept that the Judge had adopted the wrong approach, and found that his factual findings were amply justified on the facts. There was no finding that the trial process was unfair.

[55] Against those factors, there are other factors to take into account. We accept that the conduct that led to the High Court proceedings occurred at least five years ago (and before Mr Napier entered the real estate industry), that the parties have reached a settlement agreement, and that the judgment debts have been satisfied.

[56] We also accept that Mr Napier has carried out all of his real estate agency work without any complaint having been made against him, and that he has the support of clients, the Agency, and people in his locality. All of these are aware of the proceedings brought against him. It is also relevant to note the news media reports that have been published at every stage of the proceedings.

[57] The Agency's response to the request for additional comment as to the measures that may be taken to ensure supervision and monitoring of Mr Napier's real estate agency work is particularly important. It is, of course, information that was not available to the Registrar. The measures being taken, and to be taken by the Agency are comprehensive, and assure the Tribunal that, if he is permitted to hold a licence, Mr Napier will be closely supervised, managed, and mentored. The assurances given by the Agency are a significant factor in the Tribunal's determination.

[58] We have concluded that Mr Napier's application for review should be granted, and that his salesperson's license should be renewed.

[59] The licensing regime set out in the Act (and in particular the requirements that persons engaged in real estate agency work are licensed under the Act, and that only persons who are fit and proper to hold a licence may be licensed), reflects the purpose of the Act, as set out in s 3 of the Act:

3 Purpose of the Act

- (1) The purpose of the Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate agency work 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.

[60] In the Tribunal’s decisions in *Revill*,¹⁷ *Foot*,¹⁸ and *Re Applicant C*,¹⁹ assurances provided by the agencies where the applicants were engaged as to measures they would take to ensure continuing supervision, managing, and mentoring of the applicant were significant factors in the Tribunal’s granting the applicants’ applications to review Registrar’s decisions not to grant or renew their salesperson’s licences:

[a] In *Revill*:²⁰

... we are comforted that our granting of the application will facilitate the applicant continuing to work within the setting provided by [the agency concerned] 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.

[b] In *Foot*:²¹

We are conscious that if we grant Ms Foot’s application ... the applicant has a job available at [the agency concerned] as a real estate agent under the auspices of ... a very experienced real estate agent, as supervisor and in a firm with well-regulated procedures and business management, and she has the support of a number of experienced persons in the industry. Also, if she steps out of line in any way, we would not expect her licence

¹⁷ *Revill v Registrar of the Real Estate Agents Authority*, above, footnote 7.

¹⁸ *Foot v the registrar of the Real Estate Agents Authority*, above, footnote 10.

¹⁹ *Applicant C v the Registrar of the Real Estate Agents Authority*, above, footnote 11.

²⁰ *Revill*, at [[42].

²¹ *Foot*, at [80].

to be renewed in terms of the statutory annual reviews; and, as covered below, she is to be subject to quite stringent conditions of her operation as a real estate agent.

[c] In *Re Applicant C*:²²

... We take into account that the applicant's offending did not relate to her work as a real estate 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 concerned]. ...

...

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

[61] In the present case, the "forward-looking" factors are in favour of Mr Napier being granted a salesperson's licence. As is evident from his answer to a question from the Tribunal, he has accepted the finding of "money had and received", and the basis of that finding. Since he was first registered he has carried out his real estate agency work without any blemish on his record, and he has earned the respect and support of clients, and the Agency.

[62] We have concluded that the detailed and comprehensive measures for supervision, management, and mentoring of Mr Napier outlined by the Agency provide the Tribunal with assurance that the Act's purposes of protecting consumers, and promoting public confidence in the industry will not be compromised. We are particularly comforted by the fact that the measures set out by the Agency go above and beyond those which are considered best practice for all agencies, and by the Agency's acute awareness of its own obligations as to supervision. The Agency will be aware that the measures it has set out will be, in effect, conditions on Mr Napier's continuing ability to hold a salesperson's licence, and any failure to comply with the Agency's requirements should be reported to the Real Estate Agents Authority.

²² *Re Applicant C*, at [35] and [38].

[63] As has been said in the decisions referred to above, we also note that Mr Napier will be subject to continuing review by way of the annual consideration of his fitness to hold a licence, when he applies for renewal.

[64] Finally, we repeat the Tribunal's comment in *Foot* which applies (in general terms) as well to the present case:²³

We observe that, prima facie, the public might wonder that a person who has committed a significant fraud against our revenue laws can operate as a real estate salesperson in terms of the need for complete integrity and honesty in the real estate industry. As we have covered above, the applicant has strong support, substantially from experienced people of integrity in the industry, and has a very sound record in her past as a real estate salesperson. She is highly regarded by her peers and we have imposed what we regard as strong supervisory conditions which should be effective. Also, we accept that, within reason, the better approach in such a situation as the applicant's is that we look forward rather than backward.

Outcome

[65] Mr Napier's application for review of the Registrar's decision to decline to renew his salesperson's licence is granted. His licence is to be renewed.

[66] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, 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

Ms N Dangen
Member

Ms C Sandelin
Member

²³ *Foot*, above n 10, at [82].