

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 28

READT 016/18

IN THE MATTER OF a charge laid under s 91 of the Real Estate Agents Act 2008

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE 413

AGAINST BERNADETTE MAKUINI MARR
Defendant

Hearing: 5 June 2018, at Auckland

Tribunal: Hon P J Andrews, Chairperson
Mr G Denley, Member
Mr N O'Connor, Member

Appearances: Ms N Copeland, on behalf of the Committee
Mr J Wain, on behalf of Ms Marr

Date of Decision: 1 July 2019

**DECISION OF THE TRIBUNAL
(PENALTY)**

Introduction

[1] In its decision issued on 27 February 2019 the Tribunal found a charge of misconduct under s 73(a) of the Real Estate Agents Act 2008 proved against Ms Marr.¹ The Tribunal has now heard submissions from counsel as to penalty.

Facts

[2] A full narration of the relevant facts is set out in the Tribunal's decision, at paragraphs [3] to [37]. The following is a brief summary.

[3] At the time of the events which led to the charge being laid (July-August 2013), Ms Marr was a licensed salesperson engaged by Bayleys Real Estate Limited ("the Agency"). She was facing a mortgagee sale of her family home at auction. Following an introduction from a mortgage broker, she accepted an offer of "mortgagee rescue" assistance from Mr David Barton.² This involved the property being purchased by a colleague, Ms Guttenbeil, on her behalf, for \$435,000, with the deposit being provided by a funder, Mr Parkin. On Ms Marr's and Mr Parkin's instructions, Ms Guttenbeil inserted, signed, and initialled a nomination provision in favour of Mr Parkin into the auction sale agreement. Mr Parkin insisted on this as a protection in the event that Ms Marr could not obtain finance to complete the purchase.

[4] Ms Marr intended that the property would be owned by two of her children. She arranged for two Agency-branded agreements for sale and purchase to be prepared ("the 2 August agreement"), for a sale from Ms Guttenbeil to the Marr children, for \$435,000. She did not have Agency permission to use an Agency-branded agreement for a private sale.

[5] Ms Marr gave evidence to the Tribunal that Ms Guttenbeil signed the two 2 August agreements, in her presence. However, the Tribunal accepted the evidence given by experts called by both the Committee and Ms Marr that the purported

¹ *Complaints Assessment Committee 413 v Marr* [2019] NZREADT 8.

² The Tribunal recorded in the substantive decision that neither the mortgage broker nor Ms Marr was aware at that time that Mr Barton had previously been convicted, and served terms of imprisonment, on charges of fraud.

signature of Ms Guttenbeil on the agreement was not (on the evidence of the expert called by the Committee), or was probably not (on the evidence called by Ms Marr) a genuine signature.

[6] Ms Marr was not able to raise finance. At the suggestion of a second mortgage broker, she prepared two further agreements for sale and purchase (“the 9 August agreement”). She did this by removing the front pages of the two 2 August agreements and replacing them with blank Agency agreement pages on which she had handwritten the names of Ms Guttenbeil as vendor and her children as purchasers, showing a purchase price of \$560,000, and deposit of \$125,000. She had one copy signed by Ms Guttenbeil. On the advice of the solicitor then acting for both Ms Marr and Ms Guttenbeil, this agreement was not pursued.

[7] Ms Marr then removed and discarded the handwritten pages of the two 9 August agreements and replaced them with the corresponding pages of the 2 August agreements. She subsequently added a settlement date of “10 working days after the date of service of the settlement notice (excluding day of service)” and a typed “contemporaneous settlement” clause as a further term of the agreements.

[8] Ms Marr continued to seek mortgage finance, investigating around six possible sources, including Mr Barton. The specified settlement date of 15 August passed without settlement occurring. Ms Guttenbeil was then in breach of the auction sale contract, and increasingly concerned as to her position. Mr Parkin was also concerned as to his position.

[9] On 26 August, Ms Guttenbeil signed a deed of nomination of the auction sale contract in favour of Mr Parkin. She did so at Mr Parkin’s invitation and on her solicitor’s advice, as she had lost faith in Ms Marr or her children being able to come up with the money to settle the purchase. She advised Ms Marr of this the same day.

[10] On 28 August, a new solicitor acting for Ms Marr emailed Ms Guttenbeil’s solicitor a copy of one of the 2 August agreements, anticipating settling on “Friday”. Ms Guttenbeil’s solicitor responded that Ms Guttenbeil had not signed that agreement. Ms Marr’s solicitor then lodged a caveat on the title to the property, claiming an

interest in the land pursuant to the 2 August agreement to sell the property to the two Marr children.

[11] The Marr children were then required to apply to the High Court to sustain the caveat. Their claim was advanced on four causes of action, all of which were dismissed in a judgment given by his Honour Justice Faire.³ Of particular relevance to the charge against Ms Marr was his Honour's finding that the 2 August agreement "was not a genuine document and it was certainly not signed by Ms Guttenbeil on 2 August 2013".⁴

[12] Ms Marr's appeal to the Court of Appeal was dismissed.⁵ We note that she did not appeal the finding that the 2 August agreement was not a genuine document, and was not signed by Ms Guttenbeil on 2 August.

[13] For the purposes of penalty, we record that we found that the Committee had proved that Ms Marr:

- [a] engaged Ms Guttenbeil as a front to hide the fact that she was purchasing her own family home at the mortgagee sale;
- [b] instructed Ms Guttenbeil to insert "+/or nominee Barry Ian Parkins" into the completed auction sale contract without advising the mortgagee;
- [c] used an Agency sale and purchase agreement to create the 2 August agreement, in breach of the Agency's internal protocol;
- [d] was involved in the forgery of Ms Guttenbeil's signature on the 2 August agreement;
- [e] unilaterally inserted a "contemporaneous settlement" clause into the 2 August agreement;

³ *Marr v Parkin* [2014] NZHC 3269.

⁴ At [71].

⁵ *Marr v Parkin* [2015] NZCA 371.

- [f] created a false sale and purchase agreement (the 9 August agreement), stating a purchase price of \$560,000 and a deposit of \$125,000; and
- [g] used the 2 August agreement containing the forged signature of Ms Guttenbeil to lodge a caveat on the title to the property.

Sentencing principles

[14] The principal purpose of the Act is 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.”⁶ The Act achieves these purposes by regulating agents, branch managers, and salespersons, raising industry standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.⁷

[15] Penalties for misconduct and unsatisfactory conduct are determined bearing in mind the need to maintain a high standard of conduct in the industry, the need for consumer protection, the maintenance of confidence in the industry, and the need for deterrence. A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The Tribunal should impose the least punitive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.⁸

[16] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As relevant to the present case the Tribunal may:

- [a] Make any of the orders that a Complaints Assessment Committee may impose under s 93 of the Act (these include censuring or reprimanding the licensee, and ordering the licensee to undergo training or education);
- [b] Impose a fine of up to \$15,000;

⁶ Section 3(1) of the Act.

⁷ Section 3(2).

⁸ See *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30, *Morton-Jones v The Real Estate Agents Authority* [2016] NZHC 1804, at [128] and *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, at [97].

[c] Order cancellation or suspension of the licensee's licence;

[17] In determining the appropriate penalty for misconduct, the nature of the misconduct will be considered along with other factors. In *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* (in relation to a lawyer), the High Court noted that the “ultimate issue” is as to the practitioner’s fitness to practise, and factors which will inform this decision include the nature and gravity of the charges, the manner in which the practitioner has responded to the charges (such as the practitioner’s willingness to co-operate in the investigation, to acknowledge error or wrongdoing, and to accept responsibility for the conduct), and the practitioner’s previous disciplinary history.⁹

Submissions

The Committee

[18] Ms Copeland submitted that the findings against Ms Marr are serious, with a high degree of dishonesty. She submitted that Ms Marr had designed, or was at least a significant player in, two dishonest schemes to improve her prospects of raising funds: the forged 2 August agreement, which was used to lodge a caveat, and (notwithstanding that it had not been used) the 9 August agreement, which misrepresented the purchase price and deposit.

[19] Ms Copeland submitted that the seriousness of Ms Marr’s conduct would be much greater if it had been found that she forged Ms Guttenbeil’s signature on the 2 August agreement. The Committee does not contend that she forged the signature, or that the Tribunal has made such a finding. However, Ms Copeland submitted that in the light of the expert evidence, and the findings of the High Court and the Tribunal that the signature was forged and the 2 August agreement is not a genuine document, Ms Marr’s evidence that she saw Ms Guttenbeil sign the 2 August agreement cannot be true. She submitted that put at its lowest, Ms Marr knew that the signature was

⁹ *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* [2013] NZHC 83; [2013] 3 NZLR 103, at [185]–[189].

forged, and presented it to her solicitor and subsequently to the High Court to support the caveat.

[20] She submitted that Ms Marr shows no insight into her offending. She gave as an example Ms Marr's use of Agency-branded agreements. She submitted that Ms Marr acknowledged she was mistaken in doing so, but then presented excuses, and reasons for saying it was "not as bad as it looks". She submitted that Ms Marr continued to shift blame onto Mr Barton, and to submit that she was the victim of fraudsters. She submitted that in the present case, for whatever reason, Ms Marr had engaged in a course of conduct involving a dishonest scheme to secure her home. She submitted that this could not be seen as a one-off lapse of judgment: Ms Marr had retained the 2 August agreement with Ms Guttenbeil's forged signature, had used it to create the 9 August agreement, and had used it to lodge a caveat.

[21] Ms Copeland submitted that dishonesty in any form is antithetical to the real estate industry, and Ms Marr had engaged in dishonesty on a number of fronts. She submitted that Ms Marr's conduct warrants the penalty of cancellation of her licence.

Ms Marr

[22] Mr Wain made a number of submissions regarding the Tribunal's findings. We are aware that Ms Marr has filed an appeal. In the circumstances, it is not appropriate that we set out or comment on this part of Mr Wain's submissions.

[23] Mr Wain submitted that the context of the charges must be taken into account in determining the seriousness of Ms Marr's offending. He submitted that any poor decisions by her ought to be considered in the light of the great commercial and personal pressure she was under at the time. He submitted that she was directed by Mr Barton as to what to do at the auction, she paid fees to Mr Barton and dealt with his numerous requests to take various steps (including to sign a tenancy agreement, have her son sign over his wages, and sign over future commissions), while continuing working and attempting to earn money.

[24] He submitted that other factors relevant to the determination of the seriousness of Ms Marr's conduct are:

- [a] Ms Marr's conduct was not in the performance of real estate agency work, she was not involved with any members of the public, not acting in the capacity of a real estate agent, and not earning commission.
- [b] Ms Marr was concerned with purchasing her family home, she was not dealing with property owned by anyone other than a family member, and there was no unlawful non-disclosure by her. Further, up to the time the property was sold by the mortgagee, her son (a co-owner) had a right to redeem the property by paying off the mortgage debt.
- [c] Neither the 2 August nor the 9 August agreement was necessary for Ms Marr to raise finance. Mr Wain submitted that in the end, Ms Marr was able to raise sufficient finance without them.
- [d] There had been no loss to any other party, no act which was contrary to the interests of consumers. Mr Wain submitted that Mr Parkin had gained a benefit from purchasing the property after Ms Guttenbeil's nomination, as it had increased in value.
- [e] The 9 August agreement was prepared at the suggestion of a mortgage broker, and was subject to legal advice. It was abandoned when Ms Marr's solicitor advised it should not be used. He submitted that no fraudulent loan applications had been made.

[25] Mr Wain submitted that Ms Marr had been a licensed salesperson for 25 years, without any disciplinary findings against her. He submitted that Mr Barton's and Mr Parkin's "mortgagee sale rescue" had been a disaster for Ms Marr, and as a result she now has no money and no work. He submitted a number of positive character references.

Discussion

[26] We do not accept Mr Wain's submission that Ms Marr was not performing real estate agency work. Her conduct involved the creation and use of agreements for sale and purchase. This is fundamental to real estate agency work, and Ms Marr was able to create and use the 2 August and 9 August agreements by virtue of her training and position as a real estate salesperson. Further, Ms Marr and her family comprised only one facet of the agreements. Others – Ms Guttenbeil, Mr Parkin, potential lenders, and solicitors – were all affected by her conduct. There is little mitigation available to Ms Marr from the fact that the transaction involved was for her own family home.

[27] We do not accept Mr Wain's submission that there was no loss to any other party. Mr Parkin incurred costs in the course of the High Court and Court of Appeal caveat proceedings, and there was no dispute that Ms Marr did not comply with an order that she pay costs. We have noted Mr Wain's submission, based on the sale prices of neighbouring properties in August 2013, June 2017, and October 2018, that Mr Parkin has gained a benefit from a substantial increase in the value of the property. This submission is speculative, and cannot be given any weight.

[28] Mr Wain submitted as a mitigating factor that the 9 August agreement was prepared at the suggestion of a mortgage broker, and was subject to legal advice. We accept that (having received legal advice that it should not be used) Ms Marr did not use this agreement to support an application for finance. We also accept that Ms Marr was in an extremely difficult personal situation, faced with the loss of the family home. However, given her long experience in the industry, she should have been able to deal with the situation better.

[29] The most serious aspect of Ms Marr's conduct was that she used the 2 August agreement to support a caveat on the title to the property, and in subsequent legal proceedings against Mr Parkin. As Ms Copeland submitted, in the face of the experts' evidence that Ms Guttenbeil's signature was forged, Ms Marr's evidence that she saw Ms Guttenbeil sign the agreement cannot be true. We accept Ms Copeland's submission that put at its lowest, Ms Marr knew that the signature was forged, but used the document for the purpose of endeavouring to retain her home.

[30] As well, Ms Marr used the 2 August agreement (on her evidence, a genuine, completed agreement for sale and purchase) to create the 9 August agreement by cutting and pasting parts of the 2 August agreement into blank Agency-branded agreements. She later unilaterally amended the supposedly genuine, completed, 2 August agreement by adding a settlement date, and inserting a “contemporaneous settlement” clause. As a licensee of long-standing, she should have known all of these actions were inappropriate.

[31] Ms Copeland referred the Tribunal to the judgment of his Honour Justice Woodhouse in *Morton-Jones v Real Estate Agents Authority*, as to the seriousness with which dishonesty is to be treated in the real estate context:¹⁰

[92] In *Bolton v Law Society*, Sir Thomas Bingham MR discussed penalties for breach of professional duties by solicitors, including those almost always imposed for dishonesty. He said:

Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. *The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the Tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors.*

[93] *Bolton* has been applied in lawyers’ disciplinary proceedings in New Zealand. I am satisfied that the general tenor of Lord Bingham’s observations are applicable to dishonesty by a licensee under the Act when handling clients’ money. And I again emphasise that this applies to misconduct of that nature whether arising when carrying out real estate agency work or other work.

[32] Mr Morton-Jones was found guilty of misconduct (disgraceful conduct) for having received rental payments on three properties in respect of which he was engaged as property manager, but failed to pass those payments on to the landlords of the properties concerned. The Tribunal had suspended his licence, and ordered him to pay a fine and to complete educational training. His appeal against the finding of misconduct was dismissed, but the Committee’s appeal against the penalty orders was

¹⁰ *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804, at [92]–[93] (citing *Bolton v Law Society* [1994] 1 WLR 512 (UKCA), at 518 (emphasis as in original)).

allowed. The order for suspension was quashed and replaced by an order for cancellation of his licence.

[33] Ms Marr's conduct did not involve handling clients' money. However, her use of the forged 2 August agreement to support a caveat was dishonest. That, together with her conduct in using the 2 August agreement to create the 9 August agreement, and her amendments to the 2 August agreement, cannot be regarded as anything less than as being at a high level of seriousness.

[34] Ms Copeland also referred the Tribunal to its decision in *Real Estate Agents Authority (CAC 20006 v Azimi)*, in which the Tribunal ordered cancellation of a salesperson's licence, where the licensee had allowed a fraudulent loan application to be made in her name for the purchase of a property, and had listed and sold three properties knowing that she was doing so to facilitate a dishonest mortgage-ramping scheme.¹¹ The Tribunal accepted that the conduct was concerning and at a serious level, and considered that the public had to be protected from the type of dishonest conduct the salesperson was involved in.¹²

[35] Ms Copeland also referred the Tribunal to its decisions in *Complaints Assessment Committee 409 v Ganesh*,¹³ *Real Estate Agents Authority (CAC 413) v Taylor*,¹⁴ and *Complaints Assessment Committee 416 v Prasad*.¹⁵

[36] Mr Ganesh was found guilty of misconduct for failing to disclose his connection to a transaction, and of disgraceful conduct for lying to an Authority investigator. Ms Taylor was found guilty of disgraceful conduct for preparing agreements for sale and purchase for four real estate transactions, which had all the hallmarks of being mortgage-ramping schemes. Ms Prasad was found guilty of misconduct for failing to disclose that a property would be affected by a road-widening proposal, and of disgraceful conduct in respect of entries related to marketing the property in her diary,

¹¹ *Real Estate Agents Authority (CAC 20006 v Azimi)* [2014] NZREADT 97.

¹² At [21].

¹³ *Complaints Assessment Committee 409 v Ganesh* [2018] NZREADT 27.

¹⁴ *Real Estate Agents Authority (CAC 413) v Taylor* [2018] NZREADT 59.

¹⁵ *Complaints Assessment Committee 416 v Prasad* [2019] NZREADT 17.

and in an agency transaction report. Cancellation of licence was not ordered in any of these cases.

[37] Ms Copeland submitted that each of *Ganesh*, *Taylor*, and *Prasad* was distinguishable from the present case. She submitted that in contrast to Ms Taylor (who was an assistant to a fraudulent scheme) Ms Marr was the, or one of the, architects of a dishonest scheme carried out for her own benefit. She further submitted that Ms Marr's dishonesty was of a much higher degree than that of Ms Taylor, Mr Ganesh, and Ms Prasad.

[38] Ms Marr's case is not on all fours with any of those referred to us by Ms Copeland. However, it involved dishonesty in relation to a fundamental aspect of real estate agency work: the preparation and use of agreements for sale and purchase. As we said earlier, it was as a result of Ms Marr's many years of experience in the industry that she was able to create and use the forged 2 August agreement to create the 9 August agreement, and then to support the caveat against the title to the property in an attempt to prevent Mr Parkin from buying it.

[39] We are conscious of the need to consider the particular facts and circumstances of Ms Marr's conduct carefully, and that we should impose the least punitive penalty that is appropriate. We have stood back and considered Ms Marr's conduct, having regard to, in particular, Mr Wain's submissions as to the particular context in which it arose, Ms Marr's previously unblemished career in the real estate industry, and the character references.

[40] We have also considered the purposes of the Act, in particular, the need to protect the interests of consumers and to promote public confidence in the performance of real estate agency work. Having done so, we have concluded that the appropriate, and necessary, penalty is an order that her salesperson's licence is cancelled.

Orders

[41] We order that Ms Marr's salesperson's licence is cancelled.

[42] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Mr N O'Connor
Member