

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2016] NZREADT 78**

**READT 042/16**

IN THE MATTER OF

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

BETWEEN

JASON O'REILLY  
Applicant

AND

REGISTRAR OF THE REAL ESTATE  
AGENTS AUTHORITY  
Respondent

Hearing:

2 November 2016, at Auckland (further documents and submissions received subsequently)

Tribunal:

Hon P J Andrews, Chairperson  
Mr G Denley, Member  
Ms N Dangen, Member

Appearances:

Mr O'Reilly (Applicant) in person  
Mr M Hodge, on behalf of the Respondent

Date of Decision:

8 December 2016

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**DECISION OF THE TRIBUNAL**

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## **Introduction**

[1] Pursuant to s 112 of the Real Estate Agents Act 2008 (“the Act”), Mr O’Reilly has applied to the Tribunal for a review of the decision of the Registrar of the Real Estate Agents’ Authority (“the Registrar”), dated 6 September 2016, in which she cancelled Mr O’Reilly’s licence, effective from 7 September 2016.

## **Background**

### *Mr O’Reilly’s application to renew his licence*

[2] Mr O’Reilly has been a licensed salesperson since 2007. On 22 January 2016, he completed an online application form to renew his licence (“the renewal application”). Mr O’Reilly was required to answer a number of questions set out on the application form. These included the following questions, both of which Mr O’Reilly answered “NO”:

...

d. Do you have any current or pending charges in New Zealand or overseas? If yes, contact us to discuss.

...

i. Are there any other circumstances that would or might make you not fit and proper person to hold a licence?

These questions will be referred to in this decision as “question (d)” and “question (i)”.

[3] Under the heading “Declaration”, Mr O’Reilly consented to the making of enquiries to authorities in New Zealand regarding matters relevant to the application, and certified that all the information he had provided was true and correct. Under the heading “Consent for Disclosure”, Mr O’Reilly confirmed that he had read and understood the information set out in the application form, and authorised the NZ Police to disclose any personal information it considered relevant to his application to the Authority, for the purposes of assessing his suitability.

[4] On the same day as he submitted his application (that is, on 22 January 2016), the Registrar advised Mr O'Reilly, by an emailed letter, that his application had been approved. The letter also advised Mr O'Reilly, under the heading "Change of Circumstances", that he was:

... required to notify us, within 10 working days, of any changes to your employment, business address or contact details, and any changes in your circumstances impacting your eligibility to hold a licence.

### *Police Vetting Reports*

[5] On 3 June 2016, the Police provided the Registrar with a "New Zealand Police Vetting Report". This indicated that Mr O'Reilly had an active charge, of "committing an indecent act". The alleged "offence date" of the charge was recorded as being 27 September 2015. This charge will be referred to as "the initial charge". The Report stated that Mr O'Reilly was remanded on bail on that charge. The report also stated:

ACTIVE CHARGES: Reapply late July 2016

An active charge means the applicant has been charged with an offence but the court process is not completed. Release of active charge information in this vetting result is not intended to imply in any way that the applicant is guilty of the charge.

[6] The Police provided the Registrar with a further Vetting Report on 3 August 2016. This set out a list of 12 further active charges against Mr O'Reilly, which alleged that he had committed offences of "unlawful sexual connection" (11 charges) and "attempted rape (1 charge), with "offence dates" ranging from December 2011 to May 2016. These charges will be referred to as "the subsequent charges".

[7] In an emailed communication on 22 August 2016, the Police advised the Registrar that Mr O'Reilly had been interviewed in respect of the initial charge on 27 September 2015, and had declined to make a further statement when invited to do so on 3 November 2015. Mr O'Reilly was arrested on the initial charge on 1 April 2016. He was subsequently granted diversion under the Police Diversion Scheme.

[8] In the same communication, the Police advised the Registrar, in relation to the subsequent charges, that Mr O'Reilly was made aware of the allegations on 28 June 2016, and was arrested and charged on 18 July 2016.

*The Registrar's first notice of her intention to cancel Mr O'Reilly's licence*

[9] On 4 August 2016, the Registrar wrote to Mr O'Reilly advising him (as she was required to do by s 55 of the Act) of her intention to cancel his licence pursuant to s 54(g) of the Act, as from 20 August 2016. Section 54(g) of the Act provides that the Registrar may cancel a licence:

If the licence was granted on the basis of any false or fraudulent representation or declaration made orally or in writing;

[10] The Registrar stated that:

- [a] in his renewal application, Mr O'Reilly had failed to state that at that time he was under investigation by the police, and charges were pending against him; this being contrary to his answer "No" to question (d); and
- [b] he had failed to advise her that the subsequent charges had been laid; this being a breach of his obligation to advise her of any circumstances that may result in his being no longer a fit and proper person to hold a licence.

[11] Pursuant to s 55 of the Act, Mr O'Reilly was given ten working days to make representations as to why his licence should not be cancelled. In a letter dated 9 August 2016, Mr Morgan QC, counsel for Mr O'Reilly, submitted that Mr O'Reilly had correctly answered "No" to question (d) and had made no fraudulent representation or declaration. This was because the matter referred to by the Registrar (the initial charge) was being dealt with by way of diversion. Mr Morgan noted that charges dealt with under the Police Diversion Scheme are dismissed as if they had never been laid.

[12] Mr Morgan further submitted, in relation to the subsequent charges, that these were still before the Court, awaiting a trial date in "mid-2017". He submitted that in

the absence of convictions, Mr O'Reilly was entitled to be treated as if he were innocent, and there were no "circumstances that may result in his being no longer a fit and proper person to hold a licence" that he was required to disclose.

*The Registrar's second notice of her intention to cancel Mr O'Reilly's licence*

[13] In a letter dated 19 August 2016, the Registrar advised Mr O'Reilly and his counsel that having considered the information provided to her, she intended to cancel Mr O'Reilly's licence as from 7 September 2016 under s 54(g), but on a different basis. This related to his answer to question (i) in the renewal application. The Registrar stated that Mr O'Reilly had answered "No" to question (i) when he was aware that he was under Police investigation in respect of the initial charge, having been interviewed on 27 September 2015 in relation to that charge, and invited to make a further statement on 3 November 2015.

[14] The Registrar stated that Mr O'Reilly's answer "No" to question (i) was a "false or fraudulent representation or declaration" which required his licence to be cancelled under s 54(g) of the Act. She further stated that it was irrelevant that the charge was eventually dealt with by way of diversion. Again, Mr O'Reilly was given ten working days to make representations as to why his licence should not be cancelled.

[15] In response to the Registrar's second notice, Mr Morgan submitted that Mr O'Reilly's licence could not be cancelled. His first submission was that having a criminal investigation under way and/or charges laid is not a reason to deem an applicant not to be a fit and proper person, or to prohibit the applicant from holding a licence. His second submission was that the convictions that are relevant to holding a licence are convictions within the preceding ten years for crimes of dishonesty, and that nowhere in the criteria for licensees did the Authority require anything other than convictions to deem an applicant either prohibited from holding a licence or not to be a fit and proper person to hold a licence.<sup>1</sup>

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<sup>1</sup> This appears to be a reference to s 37(1)(a) of the Act. The Tribunal notes that ss 36(2), 37(1)(d)(i), and s 54 of the Act, and the Tribunal's decision in *Revill v Registrar of the Real Estate Agents Authority* [2011] NZREADT 41 are relevant.

[16] In a letter dated 6 September 2016, the Registrar, having referred to Mr Morgan's submissions and communications from Mr O'Reilly, advised that she intended to proceed to cancel Mr O'Reilly's licence as from 7 September 2016.

### **Submissions**

[17] Mr O'Reilly submitted that when he completed the renewal application he was 100% honest and, as a licensee, properly took into account the full context of any matter requiring consideration. His reasons for answering questions (d) and (i) as he did were that at the time of his application he was not aware of any pending charges, he had not been charged with any offending, and nothing had been, or will be, proved against him. He said that in all cases he had been falsely accused and he was innocent of all of the charges alleged against him. Further, he had taken advice from his (then) manager before giving his answers and had been advised that he was not required to disclose that he was being charged.

[18] Regarding the initial charge, Mr O'Reilly submitted that it could not be said that having been interviewed, and invited to make a statement, meant that he was aware of a pending charge which he had to disclose. He further said that he had been severely assaulted by a person or persons associated with the complainants in the alleged offending. He said that he had gone into, or telephoned, the Police seeking further information from them, but had no response. He put it that the Police had implied that he had failed to co-operate with them, and the Registrar had run with it.

[19] Mr O'Reilly acknowledged that he had been told that, in order to receive diversion under the Police Diversion Scheme, he had to acknowledge responsibility for the alleged offending. However, he said he had never acknowledged responsibility but had nonetheless been offered and accepted diversion. He said he did so in order to avoid the risk of being wrongly convicted of something he had not done.

[20] As to the subsequent charges, Mr O'Reilly submitted that the Registrar had wrongly taken into account the Police advice as to the subsequent charges, and had assumed he was guilty on all charges, when he was in fact presumed to be innocent

until found guilty. In doing so, the Registrar was biased against him. Mr O'Reilly said that his key point was that nobody knows what the future holds: at the time of his renewal application in February 2016, he could not have known that a few months later his life was going to change. He submitted that he could not be said to have acted in a dishonest matter.

[21] Mr Hodge submitted that pursuant to s 54 of the Act, a licence must be cancelled in the event of one of subsections (a) to (h) occurring. While these include s 54(g) (licence granted on the basis of any false or fraudulent representation or declaration), there is a range of other events from which cancellation is mandatory.

[22] With regard to the reference in s 54(g) to a "false or fraudulent representation or declaration", Mr Hodge submitted that "false" is different from "fraudulent". Having referred to the use of the term "false representation" in a number of statutory contexts, he submitted that proof of a dishonest intent is not required to prove a false representation under s 54(g) of the Act. Nor, he submitted, is proof required that an applicant has actual knowledge that the representation is false; at most, recklessness will be sufficient. He submitted that this is consistent with the high degree of honesty and probity required of licensees. Thus, if a licensee makes a representation that is erroneous then that is a false representation under s 54(g), subject to the licensee demonstrating that he or she took all reasonable care to ensure that the representation was correct.

[23] Mr Hodge advised that the bulk of licence renewal applications are granted immediately on application, as Mr O'Reilly's was. He submitted that this recognises the delays involved in receiving information from third parties such as the Police. However, renewal is dependent on the accuracy of information provided by the licensee, and the licensee having complied with the obligation of complete candour when completing the application.

[24] He submitted that the key question for determining Mr O'Reilly's application for review was whether Mr O'Reilly made a false representation when he answered "No" to question (i). On this point, he submitted that there was an "information vacuum", for example:

- [a] As to the content of any discussion Mr O'Reilly had with his manager. Mr Hodge submitted that this was potentially significant: first, it may demonstrate that at the time of his application, Mr O'Reilly turned his mind to the question of disclosure; and secondly, it may be considered as supporting Mr O'Reilly's submission that he was advised that he did not have to answer "Yes" to question (i).
  
- [b] As to Mr O'Reilly's visits and/or telephone calls to the Police, which may be significant in determining the nature of the statements Mr O'Reilly is said to have provided to the Police, or been invited to provide. Mr O'Reilly submitted that these supported his assertion that he had tried hard to deal with the complainants' allegations against him but Mr Hodge submitted that by not disclosing them to the Registrar, Mr O'Reilly removed any possibility of the Registrar considering them in his favour, while at the same time he conceded that he was aware of the allegations.
  
- [c] As to Mr O'Reilly's diversion, Mr Hodge accepted that Mr O'Reilly had received diversion in respect of the initial charge, and that the effect of diversion on a charge is that the charge is dismissed as if it had never been laid. However, he submitted that in order for that to occur the person charged must acknowledge guilt, in writing. He submitted that diversion is not available if a charge is denied. He noted that there was no evidence before the Tribunal regarding his receipt of diversion.

[25] Mr Hodge submitted that following Mr O'Reilly's and Mr Morgan's responses to the first notice of her intention to cancel Mr O'Reilly's licence, the Registrar reviewed the matter and issued the second notice, founded only on Mr O'Reilly's not having disclosed the Police enquiries concerning the allegations which led to the initial charge. The Registrar said that non-disclosure of a matter which "would *or might*" make him not a fit and proper person to hold a licence (that is, it is not necessary for the matter to be one which *would* have that effect) was the sole ground on which Mr O'Reilly's licence was then cancelled.



[26] In relation to the Registrar's cancellation on this ground, Mr Hodge submitted that she was correct to say that the fact that Mr O'Reilly received diversion was irrelevant to his obligation to disclose the enquiries.

[27] Mr Hodge submitted that the Registrar had never attempted to conceal the fact that she had been advised of the subsequent charges, however, her second notice of intention to cancel made it clear that those charges were not considered as a ground for cancellation. He submitted that contrary to Mr O'Reilly's submission, the subsequent charges were not inextricably part of the decision to cancel his licence.

### **Material received after the hearing**

[28] At the conclusion of the hearing, Mr O'Reilly was asked to provide to the Tribunal:

- [a] copies of diary notes of his visits and/or telephone calls to the Police seeking further information as to the initial charge;
- [b] copies of statements made to the Police;
- [c] copies of documents relating to his diversion under the Police Diversion Scheme, in particular, the form he signed in order to receive diversion; and
- [d] a copy of the Summary of Facts in relation to the charge in respect of which he received diversion.

[29] Mr O'Reilly provided copies of:

- [a] statements made to the Police on 27 September 2015 and two Police Job Sheets concerning Mr O'Reilly's allegations of assault against him;
- [b] diary notes of three visits to the Police, in October and November 2015;

- [c] a document headed “Police Diversion”, which noted that Mr O’Reilly had an appointment on 1 June 2016 regarding diversion, and setting out tasks he might be required to complete as conditions of diversion;
- [d] a letter from Sergeant Cronin of the Hamilton Police dated 8 July 2016, concerning conditions Mr O’Reilly was required to complete in order to receive diversion; and
- [e] a further letter from Sergeant Cronin dated 18 July 2016, which recorded that Mr O’Reilly had completed the diversion conditions.

[30] Mr O’Reilly did not provide a copy of the form he signed in order to receive diversion, or the Summary of Facts relating to the charge on which he received diversion. Further, the Tribunal does not have a copy of a statement which (according to the Police Report) he made on 27 September 2015 regarding the offence he was alleged to have committed that day.

[31] The Tribunal directed the case manager to write to Mr O’Reilly’s then manager, requesting that he advise the Tribunal as to whether he and Mr O’Reilly had a discussion about his response to question (i) in the renewal application, and whether he and Mr O’Reilly had at any time (including when Mr O’Reilly completed the renewal application) discussed the allegation that he had committed an indecent act. The manager’s response (in two emails) was (as relevant) as follows:

The incident from September 2015 I was only made aware of by Mr O’Reilly at a later date. The police never contacted me. Mr O’Reilly completely denied the accusations and I had no evidence to the contrary.

Mr O’Reilly and I did not discuss his responses on the renewal application form

As stated in my previous email Mr O’Reilly made me aware of the September allegation but vehemently denied it. I felt I had no option at that point, as a responsible employer, to consider him innocent until the police either formally charged him or at least informed me of the allegation.

[32] Mr Hodge filed a supplementary submission, dated 18 November 2016, in relation to the response from Mr O’Reilly’s manager. He submitted that it is apparent that Mr O’Reilly did not discuss his renewal his renewal application form

with his manager. He further submitted that despite his assertions to the contrary, it must have been obvious to Mr O'Reilly that a Police investigation into his alleged commission of an indecent act against children might or may be relevant to the Registrar's assessment of whether he was a fit and proper person to hold a licence.

[33] At the very least, he submitted, Mr O'Reilly must have appreciated that there was a risk that this information may need to be disclosed, but chose not to disclose it. He submitted that this is tacitly acknowledged by Mr O'Reilly's attempt to justify his actions by saying he sought and received guidance from his manager, when his manager has told the Tribunal this did not occur.

[34] In the light of the manager's statement that "Mr O'Reilly and I did not discuss his responses on the renewal application form", the Tribunal finds that Mr O'Reilly did not discuss his response to question (i).

### **Assessment**

[35] As recorded earlier, the Registrar's decision to cancel Mr O'Reilly's licence was based solely on his not having disclosed the allegations made against him in September 2015 in his answer to question (i).

[36] Mr O'Reilly was arrested and charged with having committed an indecent act on 1 April 2016. Patently, the Registrar could not have considered that arrest to be a matter Mr O'Reilly should have disclosed in his renewal application in February 2016. The Registrar's finding that Mr O'Reilly was aware of the allegations that had been made against him were based on his having been interviewed on 27 September 2015, when (according to the Police Report) the allegations of a sexual nature were put to him. It was also based on the Police advice that Mr O'Reilly had been contacted by the Police on 3 November 2015 and asked if he wished to provide a further statement regarding the allegations.

[37] We accept without hesitation that Mr O'Reilly is entitled to the presumption of innocence until such time as he is found to be guilty. However, in the context of an obligation to disclose circumstances which *might* make him not a fit and proper

person to hold a licence, it is not for Mr O'Reilly to determine his guilt or innocence, just as it was not for the Registrar to do so. Nor was it for Mr O'Reilly to determine whether a possible "circumstance" was one which *would* make him not a fit and proper person to hold a licence. In the context of the requirement for disclosure for the purposes of renewal of his licence, Mr O'Reilly was required to disclose *any* circumstance. The possibility of conviction of an offence (of any nature) was something which *might* make him not a fit and proper person to hold a licence.

[38] As to Mr O'Reilly's diversion, we accept Mr Hodge's submission that this was irrelevant to the Registrar's decision. It was irrelevant because in order to be considered for diversion he had to acknowledge responsibility for the offending he was charged with. Therefore, notwithstanding that he was not convicted, he had acknowledged that he was responsible for an indecent act.

[39] The central issue is whether Mr O'Reilly was "aware" in February 2016 that he was going to be, or might be, charged with an offence. The only matters that might have caused him to be "aware" were the interview on 27 September 2015 and the subsequent invitation to make a further statement. The Registrar did not have a copy of any statement made by Mr O'Reilly to the Police recording the allegations put to him, and his response to the allegations made against him. The Registrar only had the Police Report which stated that the allegations had been put. There is no reference to the Registrar having asked the Police for a copy of any statements Mr O'Reilly made, or any consideration as to whether that could be done pursuant to Mr O'Reilly's consent to disclosure.

[40] We note Mr Hodge's submission that at the very least, Mr O'Reilly must have appreciated that there was a risk that he may need to disclose information as to his interview on 27 September 2015, but we are in the position where the only information we have as to an interview on that date is one where Mr O'Reilly was interviewed about an assault against him. We find that there is some uncertainty as to Mr O'Reilly's "awareness".

In all the circumstances, we have concluded that we must give Mr O'Reilly the benefit of the doubt as to his "awareness", and that as a result, the Registrar did not

have sufficient grounds to conclude that he was aware of circumstances which might make him not a fit and proper person to hold a licence.

## **Result**

[41] The Registrar erred in cancelling Mr O'Reilly's licence, and the cancellation must be reversed.

[42] We remind Mr O'Reilly of his obligation (recorded in the Registrar's letter granting his renewal application) to notify the Registrar of any "... changes in your circumstances impacting your eligibility to hold a licence".

[43] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews  
Chairperson

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Mr G Denley  
Member

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Ms N Dangen  
Member