

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2016] NZREADT 71**

**READT 025/13**

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

BROUGHT BY THE REAL ESTATE AGENTS AUTHORITY (CAC 20001)

AND BY THE REAL ESTATE AGENTS AUTHORITY (CAC 411)

AGAINST JANINE WALLACE  
Defendant

Hearing: 12 October 2016, at Auckland

Tribunal: Hon P J Andrews, Chairperson  
Mr G Denley, Member  
Ms C Sandelin, Member

Appearances: Ms N Copeland, on behalf of the Committee  
No appearance by or on behalf of Ms Wallace

Date of Decision: 18 October 2016

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**DECISION OF THE TRIBUNAL**

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**Introduction**

[1] The hearing of a charge of misconduct under s 73(d) of the Real Estate Agents Act 2008 (“the Act”) against Ms Wallace was held on 12 October 2016, in the District Court at Auckland. Ms Wallace did not appear, in person or by counsel.

The Tribunal is satisfied that Ms Wallace has been provided with all relevant documents, given proper notice of the hearing, given ample opportunity to engage counsel, and that no sufficient reason has been given by her as to why the hearing should not proceed in her absence.

[2] Accordingly, the Tribunal determined that the hearing of the charge should proceed in Ms Wallace's absence, by way of formal proof.

[3] Having heard from Ms Copeland on behalf of the Committees, the Tribunal found the charge proved. The background of this proceeding, and the reasons for the Tribunal's decision, are set out below.

### **Procedural background**

[4] On 21 May 2013, Ms Wallace was charged by Complaints Assessment Committee 20001 ("CAC 20001") with misconduct under s 73(a) of the Act ("the first charge"). Ms Wallace filed a response denying the first charge and it was set down for hearing on 26 November 2013.

[5] On 26 August 2013, Ms Wallace applied for a stay of proceeding, on the grounds that a criminal charge had been laid against her under s 220 of the Crimes Act 1961 ("the criminal charge"). CAC 20001 consented to the application and the proceeding was adjourned sine die, pending resolution of the criminal proceeding.

[6] The criminal proceeding was concluded on 3 February 2016, when Ms Wallace was convicted (following a guilty plea) on a charge of theft by a person in a special relationship under ss 220 and 223(a) of the Crimes Act ("the conviction"). Ms Wallace was sentenced to six month's community detention, 12 month's supervision, and ordered to serve 150 hours community work and to pay reparation of \$4000.<sup>1</sup>

[7] A directions conference regarding the first charge was scheduled for 10 May 2016. The Committee agreed to a brief adjournment of the conference when Ms Wallace advised that she had applied for legal aid. On 2 June 2016 (in response to

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<sup>1</sup> *R v Wallace* [2016] NZDC 1602.

an enquiry from the Tribunal), Ms Wallace advised that she had had several meetings with lawyers, was in the process of preparing for a Court hearing in early July 2016, and her lawyer (not identified) would be able to address this proceeding at the end of July 2016. She asked that the matter be scheduled at the end of July – early August.

[8] In a Minute dated 24 June 2016 (“Minute (1)”), the Tribunal directed Ms Wallace to have her lawyer advise the Tribunal as to the nature of the Court hearing referred to, and why it was that the lawyer could not attend a (purely procedural) directions conference before the end of July – early August. The Tribunal advised Ms Wallace that a directions conference would be scheduled for the week beginning 4 July 2016.

[9] Ms Wallace responded by email the same day, advising that she had a trial starting on 4 July 2016, scheduled for ten days, and that she was unwell. She gave no information as to the nature of the trial. On 6 July 2016, Ms Wallace provided a medical certificate which stated that:

Ms Wallace is emotionally too fragile to produce any letters or documents requested by the Real Estate Tribunal. I expect she will not be able to do this for at least 4 weeks.

[10] In its Minute (2) dated 12 July 2016 (“Minute (2)”), the Tribunal advised Ms Wallace that the medical certificate was inadequate, in that apart from saying that Ms Wallace was “emotionally too fragile to produce any letter or documents” to the Tribunal, the author gave no indication as to the nature of any illness that would cause her to be “emotionally too fragile” to deal with the Tribunal at the time she was involved with a trial. The directions conference was re-scheduled, and Ms Wallace was advised that if she did not attend either in person or by her lawyer, a hearing date would be scheduled, and directions made, in her absence. The Tribunal notes that Ms Wallace did not subsequently provide a medical certificate in proper form.

[11] On 14 July 2016, Complaints Assessment Committee 411 (“CAC 411”) decided to lay a further charge against Ms Wallace under s 73(d) of the Act, based on the conviction (“the second charge”). On 20 July 2016, CAC 411 applied for leave to lay the second charge.

[12] Attempts to affect personal service of the documents relevant to the second charge on Ms Wallace were unsuccessful. The process server instructed by counsel for CAC 411 was advised that (on one occasion) Ms Wallace was away on holiday and (on the second occasion) that she was not at home, notwithstanding that she had advised she would be available to accept service. All relevant documents were emailed to Ms Wallace on 25 July 2016, and she responded on 28 July 2016 that she had received and opened them, but would not attend any conference or meeting without her lawyer. The Tribunal advised Ms Wallace on 1 August 2016 that a directions conference was scheduled for 1 August 2016, and asked her to provide contact details for her lawyer. Ms Wallace did not respond.

[13] Ms Wallace did not attend the directions conference on 1 August 2016, in person or by her lawyer. The Tribunal's Minute (3) dated 1 August 2016 ("Minute (3)"), advised Ms Wallace that counsel for the CAC 411 had been given leave to lay the second charge.

[14] A further directions conference was held on 19 August 2016. Ms Wallace did not attend, in person or by her lawyer. The Tribunal's Minute (4) dated 23 August 2016 ("Minute (4)") included a chronology of this proceeding, and noted that Ms Wallace had failed to attend directions conferences on 28 July, 1 August, and 19 August 2016. The Minute recorded that the Tribunal was satisfied that Ms Wallace had been given copies of all relevant documents (on more than one occasion), had been given ample opportunity to obtain legal advice but, despite reference to a lawyer, had not identified her lawyer despite directions to do so.

[15] Minute (4) further recorded that the first charge was to be withdrawn, and the second charge would proceed. The hearing of the second charge was set down for hearing on 12 October 2016, and directions were made as to filing evidence and submissions. A direction was also made that Ms Wallace's lawyer enter an appearance on the record.

[16] On 22 September 2016, the Tribunal received an email from Ms Wallace which appeared to be a request for the hearing to be adjourned. Ms Wallace attached

a medical certificate. This stated only that Ms Wallace had been “medically unfit from 1 Sept 2016 and should be fit to resume work 1 December 2016”.

[17] In its Ruling issued on 28 September 2016 (“the Ruling”),<sup>2</sup> the Tribunal set out the respects in which the medical certificate was inadequate. The Tribunal recorded, in particular, that the author of the medical certificate had given no indication as to in what respect Ms Wallace was not able to attend a hearing in person or by counsel, or to instruct counsel, or to take any steps in respect of a hearing.<sup>3</sup> For this reason, the medical certificate could not be relied on by the Tribunal.

[18] The Tribunal noted that:<sup>4</sup>

Ms Wallace has chosen not to engage in the proceeding brought against her, except to make repeated requests to delay the hearing. She has not complied with any directions given by the Tribunal. While having made frequent references to her wish to engage counsel or, indeed, that she has instructed counsel who has been said to be not able to deal with the matter until a certain time (which time has passed without any apparent action by such counsel), Ms Wallace has repeatedly failed to comply with directions that her counsel’s name is to be entered on the record.

[19] The Tribunal also recorded that the second charge (now the only charge against Ms Wallace), was founded on the conviction, and was brought under s 73(d) of the Act. This provides that the Tribunal may make a finding of misconduct in respect of conduct which constitutes an offence on which the licensee has been convicted, and which reflects adversely on the licensee’s fitness to be a licensee.<sup>5</sup> The Tribunal further noted that pursuant to s 47 of the Evidence Act 2006, proof that a person has been convicted of an offence is conclusive proof that the person has committed that offence.<sup>6</sup> The Tribunal went on to rule:<sup>7</sup>

[11] The Tribunal is satisfied that no further adjournments should be granted and if Ms Wallace does not appear at the hearing, the hearing will proceed in her absence, by way of formal proof. In this regard, the Tribunal refers to s 105 of the Act, which provides that the Tribunal may regulate its procedures

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<sup>2</sup> *Complaints Assessment Committee 20001 v Wallace* [2016] NZREADT 66.

<sup>3</sup> At [4].

<sup>4</sup> At [5].

<sup>5</sup> At [7].

<sup>6</sup> At [10].

<sup>7</sup> At [11] – [13] (Citations omitted).

as it thinks fit, and to the principles set out in *Hart v Auckland Standards Committee of the New Zealand Law Society* and *R v Hayward*.

[12] The Tribunal has a discretion as to whether a hearing should take place in Ms Wallace's absence. In deciding whether the hearing of the charge against Ms Wallace will proceed by way of formal proof, should she not appear at the hearing, the Tribunal has taken into account her failure to engage in the proceeding (even to the extent of accepting service of documents and attending at purely procedural directions conferences), the delay that had already occurred by accommodating Ms Wallace's repeated request for adjournment, her failure to provide any adequate reason for seeking yet another adjournment, the fact that the charge against her will be conclusively proved by way of the certificate of convictions, and the Tribunal's lack of any confidence that she will engage in the proceeding at a later date.

[13] The Tribunal is satisfied that if she does not appear at the hearing of the charge against her, it should proceed in her absence, by way of formal proof. The Tribunal rules accordingly.

[20] On 6 October 2016, the Tribunal received an email from Ms Wallace in which she said that she would "not be in a position due to medical issues to attend the hearing scheduled for the 12<sup>th</sup> October 2016". Ms Wallace said she had been "trying to obtain the services of a lawyer" and identified, for the first time, a particular lawyer (but noted that it was "too short notice" for him to represent her).

[21] The Tribunal advised Ms Wallace, in its Minute (5) dated 6 October 2016 ("Minute (5)"), that it would take no steps in respect of her email until it received confirmation from the lawyer that he was instructed by Ms Wallace, and he had entered an appearance on the record. The Tribunal provided the lawyer named by Ms Wallace with copies of Minute (5), and the Ruling. He subsequently advised the Tribunal that he did not have instructions from Ms Wallace. This was recorded in the Tribunal's Minute (6) dated 7 October 2016 ("Minute (6)").

[22] On 11 October 2016 (the day before the hearing), the Tribunal received the following email from Ms Wallace:

I would like it noted that at no time was I informed that my Medical Certificates were not acceptable. If this was the case I should have been informed what is required and this would have been supplied, as there is certainly no doubt about my disabling health issues.

I requested to have this Tribunal Hearing postponed so that I can have Legal Representation which is my legal right. This request was declined.

When my Barrister is available, date and times to suit him, all of these matters will be discussed and addressed in full.

Yours faithfully  
Janine Wallace

[23] In response to that email, the Tribunal referred Ms Wallace to the relevant paragraph in Minute (2) and the Ruling, both of which set out the inadequacy of the medical certificates she had submitted.

### **Formal proof hearing**

[24] Paragraphs [11] to [14] of the Ruling, (set out at [19], above), referred to the Tribunal's jurisdiction to proceed by formal proof, and gave Ms Wallace notice that if she did not appear at the hearing of the charge against her, it would proceed in her absence, by way of formal proof. When the proceeding was called on 12 October, Ms Wallace did not appear at the hearing, in person or by counsel. Counsel for the Committees submitted that the hearing should proceed.

[25] With regard to the two matters referred to in Ms Wallace's email of 11 October, the Tribunal notes:

[a] Ms Wallace was informed of the inadequacy of the two medical certificates she submitted (in Minute (2) and the Ruling), but did not provide an adequate medical certificate;

[b] Ms Wallace has been given ample opportunity to obtain legal representation (as recorded in paragraphs [7], [8], [9], [11], and [13], above). The most recent of these was in Minute (4), sent to Ms Wallace on 23 August. It was not until 6 October that Ms Wallace identified a lawyer (who in fact did not have instructions from her).

[26] The Tribunal is satisfied that neither of the two matters raised by Ms Wallace in her email of 11 October were sufficient for not proceeding by way of formal proof. The Tribunal is satisfied that Ms Wallace was given notice well in advance of the hearing, was provided with all relevant documents, and has been given ample opportunity to engage with the hearing and to instruct counsel to represent her. She

has not provided any sufficient grounds as to why the hearing should not proceed in her absence. The Tribunal finds that it is appropriate for the hearing to proceed by way of formal proof.

### **Factual background**

[27] It is evident from the particulars of the first charge, and the facts set out in the summary of facts relating to the criminal charge that the same factual background is the foundation of the first charge, and of the criminal charge on which Ms Wallace was convicted.

[28] Ms Wallace was the real estate agent who negotiated an agreement of sale and purchase of a property known as Silverstream Falls, in Tairua. The purchase price was \$370,000. The vendor was Professional Contractors Ltd (a trustee of a trust) and Mr P Kendall signed the agreement on behalf of the trust. The purchasers were Mr and Mrs Hammond.

[29] Conditions of the agreement included a requirement that the purchasers pay a 10 percent deposit into a trust account belonging to Ms Wallace, and that the agreement was subject to the purchasers obtaining Overseas Investment Office approval.

[30] The purchasers paid the deposit into a bank account of New Zealand Properties Ltd, believing that this was a trust account, as required by the agreement. In fact, the account was a company account, of which Ms Wallace was the sole signatory. Ms Wallace then made withdrawals from the account, as follows:

- [a] A cash withdrawal of \$1,500 on 5 July 2012;
- [b] A withdrawal of \$15,000 on 4 September 2012, which was paid to a lawyer's trust account for legal fees; and
- [c] A cash withdrawal of \$2,000 on 30 October 2012.

[31] The purchasers did not obtain approval from the Overseas Investment Office, and their purchase did not settle. On 14 November 2012, the vendor and the purchaser signed an agreement which provided that 25 percent of the deposit (\$9,250) was to be repaid to the purchasers, and the remaining 75 percent (\$27,750) was to be paid to the vendor. Ms Wallace paid the purchasers \$9,250 on 5 December 2012, but made no payment to the vendor. On 20 February 2013, Ms Wallace was declared bankrupt on her own petition.<sup>8</sup>

[32] As noted earlier, Ms Wallace was ordered to pay reparation of \$4,000 to the vendor. That order left a shortfall owing to the vendor. In a statement provided to the Tribunal, Mr Kendall said that Ms Wallace had said (at a restorative justice conference) that the Inland Revenue Department was due to make her a refund which would cover the shortfall. Although Ms Wallace promised to provide the relevant paperwork to Mr Kendall so that he could make a claim for the refund, she failed to do so. Accordingly, although he had received the reparation payment from the Court, Mr Kendall was still owed \$13,000.

### **The charge of misconduct**

[33] Section 73(d) of the Act provides:

#### **73 Misconduct**

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

...

(d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

[34] As recorded earlier, Ms Wallace was convicted on a charge of theft by a person in a special relationship under ss 220 and 223(a), arising out of the facts set out earlier. A copy of the Certificate of Conviction has been provided to the Tribunal and is conclusive proof that Ms Wallace committed the offence of theft by a person in a special relationship.

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<sup>8</sup> Ms Wallace was automatically discharged from bankruptcy on 20 February 2016.

[35] Section 47 of the Evidence Act 2006 provides that proof that a person has been convicted of an offence is conclusive proof that a person has committed that offence. The Tribunal finds that the Certificate of Conviction provided to the Tribunal proves conclusively that she has been convicted of the offence of theft by a person in a special relationship and that she committed that offence.

[36] The second element required to be proved for a charge under s 73(d) of the Act is that the offence “reflects adversely on” Ms Wallace’s fitness to be a licensee.

[37] Ms Copeland submitted for the Committees that Ms Wallace’s conviction clearly reflects adversely on her fitness to be a licensee. She submitted that while engaged in her capacity as a licensee, Ms Wallace abused her position of trust and intentionally used funds, paid in by the purchasers as the deposit for a real estate transaction, for her own purposes. Ms Copeland submitted that it is self-evident that Ms Wallace’s theft of deposit funds arising out of a real estate transaction, where the funds were required to be held by her on trust, was a flagrant breach of her position of trust as a real estate agent.

[38] We note that in his sentencing notes, Judge Earwaker recorded that counsel for Ms Wallace had accepted on her behalf that Ms Wallace’s breach of trust was an aggravating factor of her offending, and she did not wish to make excuses for her conduct or behaviour. The Judge also accepted that there was no reason at all that any professional should do what Ms Wallace had done, in terms of taking money that did not belong to her from an account.<sup>9</sup>

[39] We accept Ms Copeland’s submissions. We are in no doubt that the offence for which Ms Wallace has been convicted adversely affects her fitness to be a licensee. This is, as Ms Copeland submitted, self-evident. Ms Wallace acted as agent in a real estate transaction. In the course of that transaction, she received the deposit which she was required to hold on trust. She did not hold the funds in a trust account. Rather, she held the funds in a company account of which she was the sole signatory. She then appropriated and used the deposit funds for her own purposes.

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<sup>9</sup> *R v Wallace*, above n 1, at [13].

[40] We find the charge of misconduct under s 73(d) of the Act proved.

### **Penalty**

[41] Having been provided with a copy of Ms Copeland's submissions for the Committees, Ms Wallace had notice that submissions would be made as to penalty, and as to an order for compensation. The Committee's submissions were set out in full in the Opening Submissions for the Committees.

[42] We accept Ms Copeland's submission that the misconduct charge which we have found proved relates to serious offending. Ms Copeland submitted that the appropriate starting point for a penalty is cancellation of Ms Wallace's licence.

[43] We have not sought Ms Wallace's submissions regarding cancellation, although we note that orders for cancellation have been made in similar cases, and the previous finding of misconduct against Ms Wallace would be a relevant factor. However, because Ms Wallace allowed her licence to expire on 29 August 2013, and that pursuant to s 37(1) of the Act, Ms Wallace's conviction for a crime involving dishonesty prohibits her from holding a licence for a period of ten years, we have concluded that the appropriate penalty is to censure Ms Wallace, and to make an order under s 110(2)(g) for compensation to be paid to Mr Kendall.

### **Orders**

[44] Leave is given for the charge of misconduct, laid by Complaints Assessment Committee 20001 under s 73(a) of the Act, to be withdrawn.

[45] The charge of misconduct, laid by Complaints Assessment Committee 411 under s 73(d), is found proved and the following orders are made:

[a] Ms Wallace is censured; and

[b] Ms Wallace is ordered to pay the sum of \$13,000 to the Real Estate Agents Authority, for the benefit of Mr Peter Edward Kendall, within three months of the date of this decision.

[46] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.

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Hon P J Andrews  
Chairperson

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Mr G Denley  
Member

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Ms C Sandelin  
Member