

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2018] NZREADT 41**

**READT 040/17**

IN THE MATTER OF

A charge laid under s 91 of the Real Estate Agents Act 2008

BOUGHT BY

THE REAL ESTATE AGENTS  
AUTHORITY (CAC 413)

AGAINST

GEOFFREY MAIRS  
Defendant

Hearing:

25 July 2018, at Auckland

Tribunal:

Mr J Doogue, Deputy Chairperson  
Mr G Denley, Member  
Ms C Sandelin, Member

Appearances:

Mr Simpson, on behalf of the Committee  
Mr Mairs

Date of Decision:

9 August 2018

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**DECISION OF THE TRIBUNAL  
ON SENTENCING**

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[1] Mr Mairs was charged with disgraceful conduct under s 73(a) of the Real Estate Agents Act 2008 (the Act). Mr Mairs defended the prosecution brought against him but on 27 April 2018 the Tribunal issued a decision finding that the charge was proved.<sup>1</sup>

[2] The facts of the offending are set out in detail in the decision<sup>2</sup>. In summary Mr Mairs was discovered in an apartment which had been listed for sale by the owner with Bayleys Real Estate Limited (Bayleys) by whom Mr Mairs was employed. A parent of the owner came to the apartment in the morning and found that the defendant who had stayed in the property overnight was using the shower.

[3] When a family member approached Mr Mairs she asked him what he was doing in the property and how he had got a key to the property. Mr Mairs, said that he was a real estate agent and he intended showing someone around the property that morning. The Police were called and eventually located Mr Mairs and spoke to him. Mr Mairs said to the Police Officer that he was meeting a client at the address and went early to have a shower on the property and that he took the keys from the desk of a person called David at Bayleys.

[4] Mr Mairs defence at the hearing was that on 27 February 2017 he had nowhere to stay the night. He had asked a fellow employee David Anderson if he had somewhere for him to stay. He said that Mr Anderson told him he could stay in a property at Mission Bay. He said that Mr Anderson deceived him into believing that he, Anderson, had the authority to let him stay at the property. He denied that he knew that the property was listed for sale. The prosecution case was that he ought to have concluded that on account of the presence of signs and the way in which a bed in the property was configured for the purposes of a staged photograph. Mr Mairs said that he did not find out until the next day when the family member of the owner came to the property that it was listed for sale with Bayleys.

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<sup>1</sup> *The Real Estate Agents Authority (CAC 413) v Mairs* [2018] NZREADT 9.

<sup>2</sup> Refer paragraph [3] of the decision.

[5] The Tribunal rejected the explanation that Mr Mairs gave and concluded that the explanation of Mr Anderson was to be preferred. Mr Anderson said that he had left the keys to the property at his desk at Bayleys and that he knew nothing about Mr Mairs taking them and entering the property to stay the night.

[6] The Tribunal concluded that Mr Mairs' conduct amounted to disgraceful conduct under s 73(a) of the Real Estate Agents Act 2008 (the Act). Mr Mairs is now required to be sentenced consequent upon the Tribunal finding that the charge is proved.

[7] Mr Simpson, counsel for the Real Estate Agents Authority (REAA) referred us to the main principles by which the Tribunal is to be guided when sentencing licensees.

- 3.1 It is well established that penalty decisions of professional disciplinary tribunals should emphasise both the maintenance of proper professional standards and the protection of the public through specific and general deterrence. While this may result in orders having a punitive effect, this is not their primary purpose.<sup>3</sup>
- 3.2 This is consistent with the Act's purpose to "promote and protect the interests of consumers in respect of transactions that relate to real estate work and to promote public confidence in the performance of real estate agency work".<sup>4</sup>

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<sup>3</sup> See *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [128]; *Complaints Assessment Committee v Walker* [2011] NZREADT 4 at [17]-[19]; *Complaints Assessment Committee v Black* [2016] NZREADT 64 at [6].

<sup>4</sup> Real Estate Agents Act 2008, s 3(1).

### 3.3 As set out in *Z v Dental Complaints Assessment Committee*:<sup>5</sup>

[128] It is accordingly appropriate to consider further the nature of, and public interest involved in, the disciplinary process, including the framework within which the Act provides for that process. The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus. Protection is a less prominent factor in the criminal process. One consequence of this difference is that the disciplinary process may cover much wider ground than that litigated at the criminal trial.

[8] We accept that the approach set out above is the correct one.

[9] The matters which seem to be of particular importance to the Tribunal are these. First, there was the extent of and duration of Mr Mairs' unauthorised intrusion into the property. It was not just a matter of entering the property briefly: he stayed the night and used the bed and bathroom.

[10] A further factor that aggravates his offending was his dishonesty on being apprehended. We have recorded earlier in this decision he initially said that he was meeting a possible purchaser at the property that day and had decided to use the shower at the property before meeting that person. This was not true and he had no instructions to offer the property for sale and he was not expected to meet a purchaser.

[11] A further matter that weighs with the Tribunal is Mr Mairs' lack of insight into the seriousness of the situation which he brought about. Mr Mairs continues to protest his innocence and says that he is going to appeal against the decision to the High Court. That may well be so but for present purposes he is to be sentenced on the basis that the factual conclusions which the Tribunal came to are correct. On that footing, Mr Mairs continued denial of any lack of authority to be in the property is of concern. His lack of candour in dealing with a member of the public, a

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<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR (footnote omitted). See also *Bolton v Law Society* [1994] 2 All ER 486 (CA) at 492. The observations in *Z* were applied in the Real Estate Disciplinary jurisdiction by the High Court in *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804 at [89]

Police Officer and investigators of the REA are aggravating features. The fact that he also gave misleading answers to investigators from the REA is an aggravating feature.

[12] Finally, the way in which Mr Mairs comported himself when dealing with the investigating officers of the REAA who were obliged to make enquiries into this matter was objectionable. Not only did he fail to cooperate with them, he made threats of legal action against them and used insulting language.

[13] The next factor that we take into account is that the protection of the public and compliance by licensees with their obligations under the Act and regulatory regime will be supported by a sentence which demonstrates the seriousness with which a charge of this kind should be regarded.

[14] We consider that the starting point is that cancellation of the licence of the licensee is called for pursuant to s 110(2)(b).

[15] While that is the starting point, any matters in mitigation that are relevant could influence the decision as to whether a cancellation order should actually be made. Mr Mairs, though, declined to provide any information to the Tribunal which would be relevant to sentencing. For that reason we do not know if he has any intention of resuming work as a licensee under the Act. Even if he did, we would be slow to accept that the Tribunal ought to stand aside and permit that to happen. Had Mr Mairs represented an exceptional case in which rehabilitation was a realistic possibility, then it may have been incumbent upon the Tribunal to consider a suspension of licence. However, we are unable to discern any grounds upon which suspension could be regarded as a realistic option in this case. The Tribunal is left with the stark realisation that Mr Mairs is simply unsuitable to be a person licensed under the Act to sell real estate. As Mr Simpson pointed out it is a requirement of s 36 of the Act that only persons who are fit and proper persons to hold a licence are entitled to issue of the same. Mr Mairs does not fall into that category.

[16] For the foregoing reasons we consider that Mr Mairs' licence be cancelled and there will be an order accordingly.

## **Non-publication order**

[17] Mr Mairs has sought non-publication of the decision which was issued by the Tribunal in April 2018 finding the charge of misconduct against him was proved.

[18] Mr Mairs applied by email on 15 May 2018 for such orders that:

- [a] the information published in the Tribunal's decision was false and misleading;
- [b] the Tribunal's decision was wrong and will be overturned in the High Court; and
- [c] the information was damaging to Mr Mairs' future career options.

[19] The first two grounds, as counsel for the Authority pointed out, are substantive challenges to the findings which the Tribunal made and are not a basis for a non-publication order.

[20] In regard to the last ground the position which Mr Mairs takes is apparently that it is self evident that the publication of a decision of this kind will be damaging to his work prospects. The Tribunal would accept that this is so. On the other hand, we also accept that publication of the findings of the Tribunal are supported by a public interest in that dissemination of the facts of the case and the serious consequences that have ensued for the licensee are likely to encourage licensees to comply with their obligations under the Act and regulatory regime. We are not satisfied that a non-publication order ought to be made in this case. We respectfully adopt the reasons which the Supreme Court based its decision on in its decision in *Erceg v Erceg*<sup>6</sup> where the Court expressed the opinion that a party seeking a non-publication order "must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule" of open justice. Mr Simpson particularly emphasised the following extract from the judgment of Arnold J:

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<sup>6</sup> *Erceg v Erceg* [2016] NZSC 135.

The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as “an almost priceless inheritance”. The principle’s underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice “imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges”. The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The courts have confirmed these propositions on many occasions, often in stirring languages

[21] We are not satisfied that there are proper grounds for making an order for non-publication.

[22] Even if there were some grounds upon which Mr Mears might qualify for the making of a non-publication order, we consider that it would be relevant to our discretion that publication of the details of the decision which we gave in April 2018 has already been made in the news media. It would seem likely that making an order preventing publication at this point would be futile.

[23] For those reasons we decline the application to prohibit publication of our decision given in April 2018.

[24] 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.

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J Doogue  
Deputy Chairperson

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G Denley  
Member

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C Sandelin  
Member