COURT:	MAGISTRATES COURT OF TASMANIA (AAD)
CITATION:	*Canning v Property Agents Tribunal* [2021] TASMC
PARTIES:	CANNING, Conor James v PROPERTY AGENTS TRIBUNAL
FILE NO:	M 1673/2020
DELIVERED ON:	29 September 2021
DELIVERED AT:	Hobart
DECISION OF:	Webster, C

CONOR JAMES CANNING V PROPERTY AGENTS TRIBUNAL

REASONS FOR DECISION **WEBSTER, C**
29 September 2021

1. Mr Canning (the applicant) held a property agent licence issued by the Property Agents Board (the Board) under the provisions of the *Property Agents and Land Transactions Act 2016* (the Act).

2. On 6th April 2019 a Mr Manton made a complaint to the Board alleging that the applicant, when he worked in the same office as Mr Manton (i.e. Ray White Hobart), copied the contents of Mr Manton's computer database which contained the names and contact details of approximately 16,000 people.

3. It was further alleged that the applicant used his Ray White Hobart's email account to transfer a copy of that database to the email account of Mr Joel Solak, (an assistant of the applicant) without the written consent of the persons listed in that database.

4. It was further alleged that the applicant, while working in the employ of a competing agency, used the misappropriated database to contact persons listed in that database.

5. The Board appointed an investigator and during the course of the investigation the applicant provided false and misleading information to the investigator.

6. Prior to the hearing by the Property Agents Tribunal (The Tribunal) the applicant accepted the allegations against him and signed a document entitled *"Conduct complaint "First Respondent"* wherein he accepted the agreed facts of each and every complaint and accepted his guilt in relation to each and every complaint.

7. Ultimately, the charges against the applicant were heard by the Tribunal on the papers and a decision and reasons for the decision were given by the Tribunal on 4 November 2020.

8. A brief summary of the Tribunal's findings are as follows:

   Allegation 1 - that the applicant accessed and copied Mr Manton's computer database without permission to do so.

   Allegations 2, 3&4 - that the applicant exported confidential information belonging to Mr Manton.

   Allegation 5 - that the applicant misused the confidential information which he had obtained by contacting persons on the database and provided information from the database to a Mr Marios, a mortgage broker, employed at Derwent Finance.

   Allegation 6 - that the applicant provided a false and misleading statement to the Board investigator to the effect that it was not possible to export content from the Ray White Hobart systems and that the information had been sourced from a different system than

that of Mr Manton and further that the information wrongly obtained had been removed from the Harcourt computer system.

Allegation 7 - that the applicant gave the investigator a statutory declaration dated 1 October 2018 in which he falsely claimed he did not export the database or instruct another person to export the confidential computer database (the subject of Mr Manton's complaint).

Allegation 8 - that the applicant provided a written statement dated 4 December 2018 to the Board investigator in which he falsely stated that he was unaware that Mr Solak had sent an email to his Harcourt address attaching the confidential information belonging to Mr Manton.

Allegation 9 - that the applicant provided false information to the Board investigator in a statutory declaration 13 December 2017 in which he falsely stated words to the effect that the data content, which Mr Manton had complained had been taken, was not within Harcourt Hobart IT systems and sites under the control of himself, Mr Solak or associates.

9. The Tribunal found that the applicant was guilty of unprofessional conduct.

10. As a result of the findings of the Tribunal of 4 November 2020 the Tribunal imposed a significant penalty on the applicant namely:

- The license of the applicant be cancelled and that the Board be prohibited from licensing the applicant without the approval of the Tribunal
- That **for** a period of five years from the date of the decision of the Tribunal the applicant should be prohibited from conducting any part of a real estate agency business, property management business or general auctioneering business without the approval of the Tribunal.
- A fine of $30,000.
- The applicant was ordered to pay the cost of the Board in respect of the hearing before the tribunal on a solicitor client basis and 80% of the Supreme Court scale.

Proceedings on the Review

11. On 16 November 2020 the applicant applied under section 116 of the Act and the *Magistrates Court (Administrative Appeals Division) Act* 2001 for a review of the decision of the Tribunal.

12. He also applied for a stay of the execution of the penalty imposed by the Tribunal until the determination of the review by the Magistrates Court. The stay was granted and the applicant has continued to practice.

13. A review of a decision of the Tribunal by the Magistrates Court is a hearing *de novo*.

14. In this review the parties have agreed the following:

a) That all findings of fact of the Tribunal were correct.

b) That the allegations against the applicant to the Tribunal were proved.

c) That the applicant was guilty of unprofessional conduct.

d) That the review of the Tribunal's decision is to be limited to a review of the penalty imposed by the Tribunal i.e. penalty is the only matter in dispute between the parties.

15. I do not propose to repeat, in this decision, the full allegations against the applicant; the findings of fact of the Tribunal; nor the penalty imposed by the Tribunal as they are readily accessible in the Tribunals decision.

16. At the hearing in the Magistrates Court the applicant and a number of witnesses gave evidence essentially as to the character of the applicant and the serious financial impact that the penalty, imposed by the Tribunal, would have on the applicant and other persons.

17. The proved and admitted allegations against the applicant were serious and a finding by the Tribunal that the applicant was guilty of unprofessional conduct was appropriate.

18. The allegations can be divided into two categories.

19. The first is the misappropriation of the property. This consisted of taking database details of customers and clients of Mr Manton without his permission. (This is akin to stealing). These actions involved considerable planning and was done by the applicant to gain a financial advantage in his new employment.(Although it appears that any advantage obtained was minimal)

20. In a similar vein upon leaving employment of Ray White Hobart the applicant transferred the Ray White Hobart database and six property reports to his new employer's database.

21. An aggravating feature of the taking of the Ray White material was that it was also provided to a friend of the applicant who was a mortgage broker. The potential value and confidentiality of the material taken is revealed in the email of 27 February 2018 which the applicant sent to his friend at the time of providing the Ray White material which stated:

"the golden list my man. This is highly confidential but I trust you".

22. The second category of allegations against the applicant are the lies that the applicant admits that he made to the Board's investigator and to the Board in written documents including in two statutory declarations.

23. His lies were made to conceal his misconduct. He conceded at the hearing in the Magistrates Court that his submission to the Board on 31 May 2018 was *"full of elaborate detail, mistruths and misleading information".*

24. An aggravating feature of his lies to the Board and its investigator was that he attempted to attack the credibility of Mr Manton whose material he had misappropriated. He attempted to blame Mr Manton, the victim, for reporting the applicant's wrongful actions.

25. He said his written submission to the B about Mr Manton's complaint :

> *"To date Mr Manton has shown his unwavering commitment to pursue myself and my assistant Joel, for motives that I am yet to understand, other than a determination to hurt, injure and offend me and a campaign of unruly, untrue, slander and harassment as though by some logic it will conceivably convince him that our departure was not at all caused by his inability to protect my assistant, Joel under the protections as described by Fair Work Australia and common sense expectations that all should be afforded with respect to safety and appropriate behaviour."*

26. In effect rather than accept responsibility for his actions he chose to attack a person making a legitimate complaint to the professional Board.

27. Additionally it is a most serious aggravating feature of the lies of the applicant that the lies were contained in a statutory declaration.

28. In the present case the applicant lies were not confined to the Board and its investigator but he even continued to lie to the Tribunal. It was acknowledged in Court that on 8 September 2020 he lied in a statutory declaration of 8 September 2020 when he stated:-

> *"I sincerely apologise for what has occurred. While I did not instruct Joel to export the Ray White database when we left the organisation it did occur, and I was made aware of it after the fact and I am ultimately responsible. At the time of sending my bulk email I believed I was sending it to an exported list of my Linked In connections..."*

29. I regard the attempt to deceive the Tribunal as even more serious than his attempts to deceive the Board and its investigators.

30. A person involved in disciplinary proceedings has a duty of candour to both investigators; the regulatory authority; and the Tribunal before he appears (*Legal Practitioners Conduct Board v Hay* (2001) SA SC 322, *Law Society of New South Wales v McNamara* (1980) 47 NSW LR 72)

31. Any attempt to mislead an investigator; a Board; or the Tribunal should be regarded as extremely serious.

32. The admitted and proved allegations against the applicant, particularly the lies to the Board and Tribunal are very serious examples of professional misconduct.

33. The Tribunal, when considering the penalty to impose upon the applicant, did not consider that the matters in mitigation raised by the applicant were such as to affect the penalties of the Tribunal.

34. The applicant now relies upon the evidence adduced at the Magistrate hearing in mitigation of the actions in order that the Magistrates Court will substitute a penalty, of a lesser nature, to that imposed by the Tribunal.

35. The overwhelming impression that I have after listening to the applicant and his witnesses is that the applicant is oblivious to the nature of the charges against him and the seriousness

of such charges or has deliberately misled referees as to the nature and seriousness of charges against him.

36. He in effect, advised his employer Harcourts Hobart and PRD Hobart that the charges against him were minor and would not be a bar to his future involvement with those businesses.

37. He appears not to have told anyone, giving evidence, that the most serious charges against him are those of lying to the Board; its investigator; and the Tribunal. (See paragraph 40 page 150; paragraph 0 to 5 page 204 para graphs 0-5 page 200; and paragraph 10 of page 200 of the transcript)

38. The witnesses all appeared to think that the allegations against the applicant are confined to that of misappropriation of intellectual property.

39. It is almost as if the applicant does not consider the allegation of lying to the investigatory authorities to be serious.

40. It also appeared that rather than take full responsibility for his previous actions that in his evidence in Court he was still trying to avoid or minimise his responsibility.

41. The applicant gave evidence that he had completed an online ethics course since the finding of the Tribunal against him.

42. Rather than fully admit his wrongdoing in the court proceedings he did his best his involvement in his misconduct and again blamed Mr Solak.

43. He also attempted to explain his actions as an act of spontaneity and panic when on the admitted facts he:

- misled the board over an extended period between 13 December 2007 to 4 December 2018.
- misled the Tribunal in submission 8 September 2020.
- misled Harcourt's so that he could obtain employment.
- misled PRD Hobart so that he could become a director.
- misled his character witnesses as to the nature of the complaints against him.

44. An example of his attempts before the Court to minimise his responsibility appears at pages 93 to 94 the transcript where he resiles from the agreed fact (that at the time he told the Board investigator that the Ray White material had been removed from the Harcourt system when he knew it had not been) and that he had been mistaken when agreeing to that fact.

45. He stated that that agreed fact was incorrect and that he now contested that complaint (paragraph 10 page 94).

46. Another example is found at pages 107 to 109 where he quibbles about whether or not he was honest in discussions with Mr Henry when, by direct lie or not, he misled Mr Henry.

47. It is noted that the hearing before the Court proceeded on the basis that the matters in the agreed facts were still agreed and that no attempt was made to formally amend or renege on the agreed facts.

48. He was not an impressive witness and did not give the Court any significant new evidence that was not before the Tribunal.

49. Mr Mark Berry, a character witness and also the Chief Executive Officer of the Real Estate Institute of Tasmania, stated that he was told by the applicant that the taking of the Ray White property was a mistake. He was unaware of any false or misleading documents that the applicant had provided to the Board. He conceded that if he had known all the circumstances surrounding the offending behaviour of the applicant he may have declined to provide the applicant with a reference.

50. He also stated (page 72 of the transcript) that the Real Estate Institute would be surprised to hear the allegations, which he now knows were made against the applicant, and potentially would not have given him permission to write the reference if they had known the full allegations.

51. It is unlikely that the applicant told Mr Tony College and Natalie Gray when he joined PRD that he had taken property from Ray White without consent. He certainly did not advise them that he had been lying to the Board and Tribunal.

52. Mr College knew little about the applicant's offending behaviour. In a letter from him to the Board of 23 January 2019 he stated that the applicant placed the blame on Mr Solak. (This appears to contradict the evidence of the applicant at the Court hearing that he did not in his discussions with PRD blame Mr Solak. (See pages 142 and 143 of the transcript). Mr College did not know whether the applicant had been found guilty or had pleaded guilty to the complaints against him; he wasn't aware of what the applicant was alleged to have taken from Ray White Hobart; thought that the applicant had stolen property "once and never again"; and that the applicant had mistakenly emailed Harcourt Hobart marketing material to the wrong people.

53. He had never seen a copy of the decision against the applicant; and had been told by the applicant that his appearance before the Board and Tribunal "wasn't going to be anything major".

54. Natalie Gray also had little knowledge of the nature of the applicant's wrongdoing.

55. She states that she didn't discuss the allegations with Canning (page 258 transcript).

56. Initially under cross-examination (page 251 of transcript) she states that she believes that Mr Canning only pleaded guilty to taking to taking a database. She was surprised, to be told, that he pleaded guilty to providing false statements and/or declarations (page 253 transcript) and ultimately stated that she wasn't sure what he pleaded guilty to (page 257 transcript). Despite these statements she said that she had read the findings of the Tribunal and would still employ Mr Canning.

57. In cross-examination, the following exchange occurred:

> *"don't you think as a business person it would have been encumbent upon you to make some investigation about exactly what had occurred....Mhm. Perhaps.*
>
> *Why the equivocation? Perhaps?.... Because I would still make the same decision today.*
>
> *Even if you knew?... Even if I knew. He has been a vital part of this business and without him that business would go under .We have 41 staff and they would not still have their jobs."*

58. As Counsel for the respondent submitted Ms Gray appears to be more interested in the commercial boost that the applicant gave her business rather than any wrongdoing he may have committed.

59. Mr Timothy Maroney, an accountant, gave evidence of the financial impact of the Tribunal's penalty upon PRD. He confirmed, under cross-examination, that he had not been requested to consider whether the applicant's interest might be sold to a person within PRD or sold to an external third-party.

60. Again he was unfamiliar with the particulars of the wrong doing of the applicant.

61. Mr Manton gave evidence. Since he had made the original complaint he had come to be an employee of PRD. He stated that forgave Mr Canning for his wrongdoing towards Mr Manton. The rest of his evidence was similar to that which was before the Tribunal.

62. I attach little credibility to character witnesses who know so little about the offences alleged against the person for whom they give character evidence.

63. The gullibility of the character witnesses is perhaps best illustrated by the fact that although the applicant advised them that there were proceedings before the Board and /or Tribunal before he entered into business arrangements with them they made no attempt, whatsoever, to verify with the Board or other independent source what the nature of the charges were against the applicant. A simple request to the applicant for a copy of the complaints against him would have revealed that there was more to the complaints then revealed to them by the applicant.

64. The weight to be given to the character witnesses is also diminished by the fact that the witnesses have only had close professional dealings with the applicant since the complaints were made and in relatively profitable circumstances. As was said in *Law Society of New South Wales v Foreman* (1994) 34 NSWR at 499 "character is tested by not what one does in good times but in bad"

Conclusions and decision.

65. There is a general expectation that those employed in the real estate agency industry should act with honesty and in particular not make false or misleading representations. There are many opportunities for a dishonest person working in this industry to gain a financial advantage for themselves or their clients by making a false declaration or misrepresentation

or to financially disadvantage others. It is particularly important that a dishonest person is not employed in that industry.

66. A dishonest person, that is a person who continually told lies or made misrepresentations, could not be said to be "a fit and proper person" to engage in that industry.

67. The applicant demonstrated by his actions (many of these actions are admitted) that he is not an honest person.

68. He has admitted:

- That he stole intellectual property from Mr Manton;
- That he stole intellectual property from Ray White Hobart:
- That he lied to the Boards investigator on two separate occasions:
- That he lied to the Board in a statutory declaration;
- That he lied to the Tribunal in a statutory declaration.

69. Subsequent to these admitted lies:

- He misled his potential employers (Harcourts) and fellow directors in business (PRD) by downplaying and by misrepresenting the nature of the charges against him to the Tribunal;
- He mislead Mr Henry as to whether the Ray White material was still held by Mr Henry's business;
- He mislead his character witnesses as to the nature of the complaints against him.
- He failed to recognise the seriousness of acts of dishonesty.

70. It has been said in many decisions that the primary purpose of disciplinary proceedings, such as in these proceedings, is to protect the public not to punish. It is inevitable that the effect of protecting the public will often result in hardship being suffered by the person (the subject of disciplinary proceedings); his family; his employees; and his associates. The primary concern of the decision maker however must be the protection of the public.

71. I conclude that the applicant is not a fit and proper person to practice in the real estate industry and that the need to protect the public requires that the applicant not to participate in the real estate industry until he has satisfied the relevant governing body that he is a fit and proper person to be readmitted into the real estate industry.

72. Finally, I am satisfied that the decision of the Property Agents Tribunal of 4 November 2020 should be affirmed and accordingly I affirm the reviewable decision.