Case No. EAA/2009/007

In the First-Tier Tribunal
(Estate Agents)
General Regulatory Chamber

On appeal from:

Office of Fair Trading
Decision Reference: ADJ/1965 - NOP/1015

Appellant: **Kevin Allsop**

Respondent: **Office of Fair Trading**

Heard at: The Tribunals Service, 4th Floor, City Exchange, 11 Albion Street, Leeds LS1 5ES

Date of hearing: 28 April 2010 (sitting in public)

Date of decision:

Before

David Marks QC (Tribunal Judge)

Attendances:

For the Appellant: Appellant in person

For the Respondent: Ms Ruby Adesuyi

Subject matter: Striking out of Notice of Appeal under The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009: Estate Agents Act 1979; section 3: fitness to conduct Estate Agency business

Cases referred to: *Hunter v Chief Constable of the West Midlands Police and others* [1982] AC 529

Swain v Hillman [2001] 1 All ER 91

DECISION

The Tribunal acting by a Tribunal Judge sitting alone strikes out the Appellant's Notice to Appeal dated 5 November 2009 under Rule 8 of the aforesaid Rules.

REASONS FOR DECISION

1. This is an application by the Respondent, namely the OFT, for the striking out of the Appellant's Notice of Appeal under Rule 8(3)(c) of The Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (the Rules). The application is made on the grounds in the words of the sub sub rule in question that: "… the Tribunal considers that there is no reasonable prospect of the Appellant's case, or part of it, succeeding".

2. The words "real prospect" reflect a well established formula by which the civil courts and tribunals address a striking out application. There seems no reason why in this instance the Tribunal should depart from the approach adopted by tribunals in general and in other jurisdictions, namely by applying the threshold test in Part 24 of the Civil Procedure Rules of the Supreme Court. The relevant principles were considered most noticeably by the Court of Appeal in *Swain v Hillman* [2001] 1 All ER 91 in terms of a decision to make a summary order in particular under CPR 24.2.

   Without reciting that decision in full it is enough to say that a court can order summary judgment against a party if it considers that the party in question has "no real prospect" of succeeding on or defending a claim as the case may be. The words in question as quoted speak for themselves and were held to mean that a court or tribunal as the case may be, had to decide whether there was a "realistic" as opposed to a "fanciful" prospect of success with regard to any appeal before it.

3. In more generalised terms the Tribunal is minded to restate the principle set out in the preceding paragraph to the effect that if there is no reasonable ground of appeal then the Tribunal such as the instant one is bound to accede to an application to strike out the appeal. If on the other hand there is a reasonable ground of appeal the Tribunal needs to go on to consider whether in the given case, the appeal has a realistic prospect of success.

The OFT's application

4. The OFT's application is based on 2 grounds. First, it is submitted that the Appellant's only or principal ground of appeal is that the Appellant has not acted in the capacity of an estate agent since the determination of his estate agency-related business in 2001. In the circumstances the Appellant contends any prohibition notice issued by the OFT is inappropriate. This is clearly principally, if not exclusively, a question of statutory construction. Secondly, the appeal is based on a re-assessment of the Appellant's own criminal convictions and sentences incurred by and imposed on him in June 2008.

The Estate Agents Act 1979 (the Act)

5. Section 3 of the Estate Agents Act 1979 (the Act) as amended describes the power of the OFT to make an order under section 3 "with respect to any person" not to be exercisable:

> "… unless the [OFT] is satisfied that that person -
>
> (a) has committed -
>
> (i) an offence involving fraud or other dishonesty or violence, …"

Subsection (2) provides as follows, namely:

> "(2) Subject to subsection (1) above, if the [OFT] is satisfied that any person is unfit to carry on estate agency work generally or of a particular description [the OFT] he may make an order prohibiting that person -

(b) from doing any estate agency work at all; or

(c) from doing estate agency work of a description specified in the order;

and in determining whether a person is so unfit the [OFT] may, in addition to taking account of any matters falling within subsection (1) above, also take account of whether, in the course of estate agency work or any other business activity, that person has engaged in any practice which involves breaches of a duty owed by virtue of any enactment, contract or rule of law and which is material to his fitness to carry on estate agency work."

Subsection (4) provides in general terms that with regard to an order made under section 3 the OFT shall specify as the grounds for the order those matters falling within paragraph (a) to (d) of subsection (1) as to which the OFT is satisfied and on which the OFT relies to give the OFT power to make the order.

6. For completeness sake it is perhaps appropriate to mention section 6 of the Act which entitles a person who has been the subject of an order under section 3 to apply to the OFT so as to request the OFT to "revoke or vary the order". Any applications so made by section 6(2) shall state the reasons why an applicant considers that the order should be revoked or varied and in the case of an application for a variation indicate the variation that the Appellant might seek.

The Notice of Prohibition

7. Notice of prohibition was issued by the OFT under cover of a letter dated 16 September 2009. The said letter formally informed the Appellant of his right to appeal to this Tribunal. The Notice in paragraph 4 referred to a hearing on 22 June 2009 which had taken place in Wakefield on that date. A note of the said hearing was appended as annex B to the Notice. The Appellant has not disputed the contents of the said Notice. It is fair to say, however, that during the oral hearing of this application the Appellant contended that at the said

hearing he had not been given enough time to make the representations which he thought were appropriate. The fact remains that in the wake of the hearing he was given leave to file further written submissions and indeed to ask for a further hearing, neither of which opportunity he took advantage of. Most significantly, however, with regard to the contents of the said hearing and insofar as they relate to the second ground of appeal the Appellant does not dispute the fact that he was the subject of a criminal conviction and sentence in the way described more fully below.

8. In the notes to the hearing of 22 June 2009, reference is made to the then most recent business of the Appellant, which business had been incorporated or set up in 2001 and which had been run from premises in Wakefield operating under the web address, www.homesRUs.co.uk. There is no need further to set out details of the business save to state that in the note it is described as "not a traditional estate agent" but as one classified for VAT purposes, at least, as a "property retailer" trading in residential property. For present purposes the Tribunal is entirely happy to assume that any such business either operated in the form it did in 2001 or at any time since did and does not constitute any form of activity which can be described properly or at all as the carrying on of business as an estate agent.

The convictions

9. The above Notice refers at paragraph 3 to the Appellant's convictions. The convictions occurred on 11 June 2008. The Appellant was convicted at Leeds Crown Court on one count of theft, on a further count of false accounting and on a yet further count of using a false instrument with intent contrary to section 3 of the Forgery & Counterfeiting Act 1986. On 1 July 2008 the Appellant was sentenced to 22 months' imprisonment. In addition a financial reporting order was made under section 76 of the Serious Organised Crime & Police Act 2005 with effect from 1 July 2008 until 30 June 2013. The Tribunal has been shown a copy of the Recorder's sentencing remarks.

10. The Recorder's observations are not without significance. The convictions arose out of financial advice given by the Appellant to a certain individual who can be called for present purposes, Mr R. A very short while before his

dealings with Mr R it seems that the Appellant was the subject on 30 March 2003 of a final order from the Financial Services Authority which prohibited him from conducting any further work in that sector. It seems that the reasons that were set out in respect of that order related to his conduct in relation to what are known as traded endowment policies over a period of time during which time he was not qualified or authorised to carry out the business but nevertheless did so, thereby effectively excluding himself thereafter from operating as a financial advisor.

11. The Recorder noted that Mr R had sought the Appellant's advice and probably at about the time of, or shortly before, the final order the Appellant was offering to help Mr R in relation to his financial affairs. The short result of this description of the activities of the Appellant and Mr R is that the Appellant received some £192,000 from Mr R, part or all of which he then used to employ to resolve his, ie the Appellant's, own financial problems since he had insufficient resources on his own, partly if not wholly to discharge tax liabilities and other significant personal debts. In due course it seems the Appellant went bankrupt and the resultant deficiency referred to by the Recorder was in the region of £100,000. This led to concealment of what the Appellant had done from Mr R. The Appellant sent a letter to Mr R alleging not only that some payments had been made which had not been made but that payments that he had not made had been made. One of these effectively relates to the second count on the indictment. The Appellant also purported to have repaid a mortgage when he had not done so. When in due course in November 2006 Mr R instructed a further independent adviser to make enquiries about this the Defendant, the Appellant, sent to the latter individual a forged bank statement setting out the fact that he had made a particular payment.

12. An initial trial date, it seems, was adjourned. The first date was on 11 March 2008. On the adjourned occasion the Appellant pleaded guilty claiming that the basis of his plea was that he never intended to cause any harm to Mr R. Nor, it was claimed, did he intend to keep the money from Mr R for ever.

13. The Recorder then turned to the three counts before him and stated:

> "These are offences that involve breach of trust and concealing that breach of trust."

The Recorder then referred to the Appellant's statement that he had not intended to use Mr R's money permanently. The Recorder also referred to the fact that the Appellant "did not seek to obtain money from others". Even though the point is not material for present purposes, somewhat curiously perhaps the Recorder then said:

> "Of course by then he was not in a position to do so having been debarred from dealing with other people's money by the Financial Services Agency."

The Tribunal finds this a curious observation quite apart from referring to the FSA as the Financial Services Agency and not as the Financial Services Authority. From the Recorder's own observations, there seems to have been no evidence one way or the other as to whether, and if so to what extent, the Appellant may have perpetrated similar acts on other individuals apart from Mr R. Moreover and more pertinently the fact that the Appellant was "debarred" by the FSA clearly had not deterred the Appellant from misappropriating Mr R's money.

14. The Recorder then alluded to the fact that the Appellant's children at least were even as at the date of the Recorder's comments, unaware of the Appellant's actions, behaviour which the Recorder himself described as reflecting or containing "an element of the head being kept in the sand which to my mind is very indicative of what is happening during the course of this offending".

<u>The Financial Services Authority (FSA) investigation</u>

15. The Tribunal has been shown a copy of the FSA's Final Notice addressed to the Appellant and dated 31 March 2003 as referred to by the Recorder.

16. It is sufficient for present purposes to refer to two matters. First, under the then relevant legislation, namely the Financial Services and Markets Act 2000, in particular by section 56, the FSA was authorised to exercise the power to make a Prohibition Order if it appeared to the FSA that an individual

was not “a fit and proper person” to perform functions in relation to a regulated activity as carried on by an authorised person and as those terms are defined and explained by the 2000 Act. It can be seen that the words “fit and proper person” is an expression or description which has echoes of the notion of “fitness” referred to under the Act. It is true that nowhere in section 3 does the exact phrase “fit and proper person” appear in terms but there occurs an express reference to a person being “unfit” to carry on estate agency work suggesting that the draftsman of the Act may well have had the same legislative intention as attached to the phrase used in the 2000 Act.

17. In Part 1 of the FSA Prohibition Notice a number of instances of conduct are specified dating from April 1988 which the FSA relied on to make its order. One in particular specifies various occasions between July 2000 and July 2002 in which the Appellant is alleged to have failed “to co-operate and/or be entirely truthful with FSA investigators …”. Further particulars are provided in the body of the Notice.

The OFT Adjudicator’s findings

18. In the Prohibition Notice which is in issue in the present appeal, the Adjudicator characterised the criminal offences which the Appellant had pleaded guilty to as involving or reflecting “very serious dishonesty” (see paragraph 17). Specific reference is made to the Recorder’s comments which have been set out above.

19. In the Adjudicator’s conclusions it is stressed that estate agents are “in a position of trust in relation to their clients”. This is, if nothing else, on the basis that they often handle clients’ moneys. At paragraph 18 it is stated:

> “Given the very serious nature of the dishonesty, I have no confidence that Mr Allsop can be relied on to act with honesty and integrity in the future”.

20. Despite the offer having been made to the Adjudicator by the Appellant that he would not wish to undertake estate agency or property related work in the future, eg by means of a suitable undertaking, the Adjudicator remained firmly

of the view that it was not shown to the Adjudicator's satisfaction that the Appellant was "fit" to carry on estate agency work. There was said to be no confidence that the Appellant would abide by the terms of any such undertaking.

The Appellant's Grounds of Appeal

21. The two grounds of appeal put forward by the Appellant have been set out above. The first ground is to the effect that the terms of the OFT's determination were inappropriate given the fact that the Appellant has not acted as an estate agent since 2001.

22. The OFT in its written and oral submissions referred to the terms of section 3 which have been set out above. The terms of section 3 which are relevant could not be more explicit with the express use of the phrase "any person". There is simply no warrant for the interpretation put forward by the Appellant that the Act in this regard is in some way limited to or addressed to persons currently engaged in estate agency work. Indeed it would be odd if such were the intended ambit of the prescription. As the OFT pointed out no licensing requirements are currently in place with regard to the carrying out of estate agency work. If anything it is perhaps more appropriate to extend the prescription to those who formerly did but no longer carry out such work, than to those who might propose to do so.

23. The second ground put forward by the Appellant addresses the true effect and consequences of his convictions and of his sentences. Prior to a letter received no more than 2 days before the hearing to strike out the application it appeared reasonably clear that the Appellant sought to appeal the sentences but no appeal against sentence had in fact been lodged. In a letter sent by recently instructed solicitors to the Tribunal some 48 hours before the oral hearing to strike out it appears as if there is now an intention to consider at least an appeal against both sentence and conviction. Nonetheless it remains the case that no appeal has been lodged on either basis. It should perhaps be pointed out that the Appellant would not be the subject of a rehabilitation order under the Rehabilitation of Offences Act 1974 until a date in June 2018. The fact remains that the convictions and sentence are still

very much firmly in place. It seems that the Appellant was advised to agree to a guilty plea being lodged by him in relation to the three counts in question although both in correspondence and in his oral submissions before the Tribunal the Appellant contended that he had been advised in a precipitate if not misguided manner in that respect.

24. Rule 15 of the Tribunal Rules provides that the Tribunal may admit any evidence whether or not the evidence would be admissible in a civil trial in England and Wales and whether or not the evidence was available to a previous decision maker. See generally Rule 15(2)(a)(i) and (ii). In the present case the latter condition does not apply. However, as to both conviction and sentence there is simply no evidence whatsoever before the Tribunal as at the date of this application to suggest that the conviction and/or sentence should be ignored or disregarded. In a letter of 26 January 2010 some three months prior to the hearing of this application the Appellant stated in express terms that he had by then consulted two legal firms, one of which specialised in criminal law with the second specialising in appealing criminal convictions. He said that:

> "As a result I have completed paperwork which is presently being prepared for delivery to Counsel for further legal opinion, with the intension [sic] of submitting an appeal of my sentences."

Despite that express statement there remains no evidence before the Tribunal that an appeal has been prosecuted or entered in the way suggested. Quite apart from the above there remains in the Tribunal's mind a serious doubt over whether at this late stage leave to appeal even in the criminal courts would be acceded to given the time that has elapsed since the date of the original conviction and sentence. That happily is not a matter with which this Tribunal need concern itself.

25. In addition there remains the irresistible double contention made by the OFT in its written submissions to the effect that first under section 11 of the Civil Evidence Act 1968 the general rule is that a conviction remains as admissible evidence of the facts which the conviction reflects and secondly, that as a general principle relating to res judicata and abuse of process a collateral

attack on a conviction should not be permitted if a court of competent jurisdiction such as the Crown Court in the present case has properly determined the matter and resolved the issues in question. See generally *Hunter v Chief Constable of West Midlands* [1982] AC529.

26. The Tribunal, therefore, respectfully agrees with the OFT that it is not the function of a civil court, let alone a tribunal such as the present Tribunal, to "second-guess" the determination of a court of competent jurisdiction which is final and conclusive on its face. Even if the convictions pleaded guilty to by the Appellant in the Leeds Crown Court were ignored, there is clearly sufficient material stemming from the FSA's investigations to have warranted the OFT in coming to the conclusions it did as reflected in the Prohibition Notice in this case.

27. Neither ground of appeal in the Tribunal's judgment represents or contains a reasonable ground of appeal. For all the above reasons the Tribunal grants the OFT's application to strike out the present Notice of Appeal.

David Marks QC

Tribunal Judge