BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 4

READT 113/11

IN THE MATTER OF	a charge laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**THE REAL ESTATE AGENTS AUTHORITY**
	Appellant
AND	**SHANE ROSS**
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr G Denley - Member

HEARD at WELLINGTON on 20 February 2012

DATE OF DECISION: 23 February 2012

REPRESENTATION

Ms Nicole Wilde for complainant
Defendant on his own behalf

REASONS FOR DECISION OF THE TRIBUNAL

The Charge

[1] The defendant has pleaded guilty to the complainant's charge of misconduct under s.73(c)(iii) of the Real Estate Agents Act 2008 ("the Act") in that his conduct described below consisted of a wilful or reckless contravention of rules made under the Act. The particulars of the charge were as follows:

> *"The defendant failed to act in the best interests of a client, namely Machirus Properties Ltd (client), in breach of rule 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, in that:*
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> *(a) On or around 15 April 2011, $6,164 was paid into the defendant's personal bank account by Gerard Vaney of IDM Marketing Ltd (Funds);*
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> *(b) The defendant knew that the funds were paid as a deposit in respect of a lease agreed between the client and IDM Marketing Ltd (transaction);*

(c) The defendant knew that the funds were paid into his personal bank account by mistake and that they should have been paid into the trust account of Pelorus Real Estate Ltd;

(d) The defendant failed to transfer the funds, in full, to the trust account of Pelorus Real Estate Ltd. Instead, on or around 17 April, the defendant transferred $3,780.67 only of the funds to the trust account of Pelorus Real Estate Ltd, being the funds less an amount he claimed was owed to him as commission in respect of the transaction."

Background

[2] At material times, the defendant was a licensed salesperson contracted to licensed agent Pelorus Real Estate Ltd in Wellington specialising in commercial property transactions. He worked for Pelorus between 2008 and 2011 and the principal of Pelorus is a Mr Malcolm Morris, the initial complainant.

[3] The defendant ended his employment or contractual relationship with Pelorus on 13 April 2011 and at that time owed Pelorus a debt for monies previously advanced to him at $700 per week against future commissions which he expected to earn. The defendant admitted to us that on 13 April 2011 he knew the debt was about $18,000, but in fact it was $20,000. Mr Morris would decide, on a case by case basis, whether commissions earned by the defendant would be paid out to him or set off against the debt owed on their running account.

[4] More particularly for present purposes, the defendant had negotiated the lease of commercial premises at Lower Hutt on behalf of the landlord, Machirus Properties Ltd, the client of Pelorus. The lessee was IDM Marketing Ltd. The annual rent payable under the lease was $26,800 and a deposit of 20% of that plus GST (namely, $6,164) was payable by IDM to the Pelorus Trust account upon acceptance of the lease.

[5] However, on 15 April 2011, a Mr Gerard Vaney of IDM paid that deposit of $6,164 into the personal bank account of the defendant.

[6] It is alleged by the prosecution and Mr Morris that Mr Vaney was a friend of the defendant and had been directed to pay the deposit into the defendant's bank account. It seems that Mr Vaney was no more than an acquaintance of the defendant and, probably, paid the money into the defendant's account by mistake because he was under medication due to an accident at the time.

[7] In any case on 17 April 2011 the defendant emailed Mr Morris stating *"there was a mistake made with the deposit on – High Street from IDM Marketing, they put the $6,164 into my account"*. In the same email the defendant stated that, due to his bank account being overdrawn, some of the money deposited had been *"sucked up"*. Accordingly, the defendant deposited only $3,780.67 to the Pelorus Trust account on 18 April 2011. That represented the IDM deposit less the defendant's perceived share of the total commission due to Pelorus for negotiating the transaction. That share retained by the defendant was the amount (namely, $2,383.33) which would have been due to him personally from the overall commission payable by the lessor in the ordinary course of events. However, this was not the ordinary course of events.

[8] When interviewed by an investigator for the Authority on 9 June 2011, the defendant confirmed that his account was only overdrawn by about $900 when the $6,164 payment was made into it in error by IDM. The defendant acknowledged to us that because his overdraft was therefore much less than the $2,383.33 retained by him, he could have paid more to Pelorus than the $3,780.67 which he did pay into the Pelorus trust account.

[9] In his 7 November 2011 response to the charge, the defendant stated, inter alia:

> *"I admit to the charges laid on me regarding the breach of professional conduct and client care relating to Machirus Properties Ltd and had I been in a position to forward the entire funds on receipt, then I certainly would of , but as my previous statement states I was in overdraft and my bank would not allow me to forward the whole amount so I was forced to only forward the received funds less my entitled commission. This was not intentional and were I able to on pay the incorrectly deposited monies then I certainly would of.*
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> *I reiterate this was not an intentional act but merely a result of circumstances outside of my control. I would ask for your understanding in this matter and assure you I will be more careful in handing out my personal information in the future."*

Further Evidence

[10] In the hearing before us, usefully more detail was provided and we heard further evidence directed towards penalty.

[11] Mr Morris is concerned, inter alia, that the defendant has made no attempt to repay him the $2,383.33 which, as Mr Morris points out, was money belonging to the lessee (and being paid to the agent of the lessor) which Pelorus was obliged to hold on trust for at least 10 days before taking its commission. The deposit should have been paid into the Pelorus trust account to the credit of the lessor.

[12] Accordingly, Mr Morris (or his Pelorus business) felt obliged to, and did, reimburse the lessor the $2,383,33. Otherwise, the lessor could have required it from the lessee by contract. Mr Morris also said that the commission due to Pelorus on arranging the lease for the lessor was approximately $6,000 and it was not intended that the defendant receive any share of commission on the transaction because of his indebtedness to Pelorus at material times.

[13] Mr Ross had a different interpretation of the facts of this case. He accepted that he owed at least $18,000 to Pelorus at material times, but maintained that there was no clear arrangement that all the commission on the said lease transaction would go to Pelorus i.e. that he would not receive his normal portion of that. He insisted that it was not his fault that the lessee paid the $6,164 into his, the defendant's, bank account by mistake; and that he was simply unable to pass it on in full to Pelorus because he was $900 in overdraft at the time. He admitted he could have passed it all on to Pelorus less the $900 overdraft.

[14] The defendant also acknowledged that he had then been a real estate agent for three years and, in the course of his training, become well aware that deposits were required to be held in the licensed agent's trust account for at least 10 days and that the relevant funds were trust monies at material times.

[15] For a time, at the hearing, the defendant seemed to be insisting that, at material times, he was unaware of the amount of his debt to Pelorus, but then he acknowledged that he knew it was about $18,000. He seemed to be asserting that he had not been asked by Pelorus to pay that back. He also seemed to be asserting that he expected that Mr Morris, of Pelorus, would not require repayment of the $18,000 (or $20,000 according to Mr Morris) because the defendant believed that Mr Morris had not imposed such a requirement on another agent six months before when that agent left the employ of Pelorus.

[16] He asserted that Mr Morris had not been fair to him over that. In fact, the defendant had left Pelorus, so he said to us, because he did not like management methods and attitudes at Pelorus. He had gone to another reputable real estate firm in the area.

[17] Also, at first he asserted that the deposit funds went into his bank account by mistake about the same day that he terminated his employment with Pelorus (i.e. 13 April 2011), but then he accepted it was a few days after that (i.e. on 15 April 2011).

Discussion

[18] We accept that decisions of industry disciplinary Tribunals should emphasise the maintenance of high standards and the protection of the public above any punitive element, although orders made in disciplinary proceedings may have a punitive effect. To this effect, McGrath J for the majority of the Supreme Court in *Z v CAC* [2009] 1 NZLR 1 (Blanchard, Tipping and McGrath JJ) held (at [97]): *"... The purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure appropriate standards of conduct are maintained in the occupation concerned."*

[19] In terms of the particular statutory scheme under the Act, this Tribunal stated in *CAC v Walker* [2011] NZREADT 4:

> *"[17] Section 3(1) of the Act sets out the purpose of legislation. The principal purpose of the Act is "to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work". One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (s.3(2)).*
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> *[18] This function has been recognised in professional disciplinary proceedings involving other professions for example, in medical disciplinary proceedings: Taylor v The General Medical Council [1990] 2 ALL ER 263 and in disciplinary proceedings involving valuers: Dentice v The Valuers Registration Board [1992] 1 NZLR 720. This is reinforced by the reference in the purpose provision to the Act (s.3) to raising industry standards and the promotion of public confidence in the performance of real estate agency work.*
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> *[19] In Patel v Dentists Disciplinary Tribunal (High Court, Auckland, CN 2007-404-1818, 13 August 2007), Lang J held that disciplinary proceedings inevitably involve issues of deterrence and penalties and are designed in part to deter both the offender and other in the profession from offending in a like manner in the future."*

[20] The defendant has no previous findings of unsatisfactory conduct or misconduct against him.

[21] We shall accept that the customer, Mr Vaney of IDM Marketing Ltd, incorrectly paid the deposit into the defendant's personal account i.e. that he was not directed to do so by the defendant. Nevertheless, upon realising that the deposit had been paid into his account, the defendant wilfully retained part of it with the effect that only part was paid into the Pelorus trust account.

[22] The context of the defendant's actions is that when he ended his contractual relationship with Pelorus (prior to receiving the deposit funds), he owed Malcolm Morris, the principal of Pelorus, a debt of about $20,000. Commissions owed to the defendant were either being paid out to him, or set off against that debt, by Mr Morris, at his discretion on a case-by-case basis.

[23] We accept that the approximately $20,000 debt between the initial complainant, Mr Morris, and the defendant is a quite separate contractual civil issue between them and is not particularly relevant to the issue before us of the conduct of the defendant. However, that the state of account between the defendant and Mr Morris in April 2011 must have meant that the defendant immediately knew that the funds paid into his account by mistake could not properly belong to him.

[24] The penalty imposed by us must have a deterrent element in order to emphasise, both to the defendant and the wider industry, the importance of strict compliance with rules as to money received by licensees in respect of transactions.

[25] Particularly, there is the vital requirement that funds received in respect of a transaction by a licensee, in an agency capacity, must be held in a trust account, and held for at least 10 days. The importance of the requirement that funds be held in a trust account for at least 10 days is underlined by the fact that breach of the requirement can amount to an offence punishable on summary conviction; refer s.150 of the Act which, in turn refers to s.123. That states the 10 day rule.

[26] We accept that neither Pelorus' client (the lessor), nor the customer on the transaction (the lessee), suffered any loss as a result of the defendant's actions; but Mr Morris has lost $2,383.33 which he reimbursed to his client lessor and, in effect, to the lessee which had liability for it to the lessor.

[27] We agree with Ms Wilde (counsel for the CAC) that the defendant placed his own interests above those of the client lessor, and/or the lessee, and/or his employer Pelorus. As we explained to the defendant in the course of the hearing before us, we are concerned about the interests of the public in general with regard to real estate agency conduct such as described above. Members of the public, from time to time, pay large amounts of money to real estate agents so that there must be absolute trust and integrity from the real estate industry in so dealing with the public.

[28] The defendant's actions are not merely a breach of the Act in general (i.e. more particularly of the s.123 10 day rule for holding deposits) and of rules in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 such as:

> *"9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.*

9.2 A licensee must not engage in any conduct that would put a client, prospective client or customer under undue or unfair pressure"

[29] The above rules have been specifically referred to in the course of the proceedings, but we note that other rules also apply such as the following:

"6.1 An agent must comply with the fiduciary obligations to his or her client arising as an agent.

6.2 The licensee must act in good faith and deal fairly with all parties engaged in a transaction.

6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute."

[30] In the course of the hearing we referred to the facts of this case disclosing a concerning breach of trust or fiduciary duty on the part of the defendant and that his actions are a type of fraud and also showed a concerning casualness over the handling of client monies.

[31] Ms Wilde, fairly, accepted that this offending by the defendant had come about through rather extraordinary circumstances as we have covered above. The defendant had terminated his employment with Pelorus but then two days later, by mistake, received monies into his personal bank account which should have been paid into the trust account of Pelorus.

[32] Towards the end of the hearing, we emphasised that we found the defendant's conduct concerningly dishonest in principle and that much more evidence had been adduced to us about that conduct.

[33] In a final oral submission the defendant maintained that he was *"hugely regretful"*; so that we accept that there is the factor of some remorse. He also accepted that our remarks about his concerning dishonesty at material times cannot be gainsaid, and that real estate agents regularly handle funds for the public and must be completely honest in doing that. The defendant put it that he is an honest person except that in this case he was not; but, otherwise, he put it he had a good record and held good principles. He asserted that all this had been a valuable lesson and he would not so err again. We are conscious that his financial position is not good and take this into account.

[34] Accordingly, on 20 February 2012, when we stood back and looked at these so called extraordinary circumstances objectively, we imposed the following sentencing package (reserving the right to issue our reasoning in writing) namely:

[a] We order that the licence of the defendant as a salesperson under the Act is hereby suspended for a three calendar month period to commence 14 days from the date of these written reasons;

[b] We order that the defendant licensee pay Mr Morris, the initial complainant referred to above, the sum of $2,383.33 forthwith being the loss which Mr Morris has suffered by reason of the defendant's misconduct;

[c] We order that the defendant forthwith pay $1,000 towards the costs of the Real Estate Agents Authority relating to this prosecution.

[35] The above are our reasons for the sentencing package we imposed on the defendant at the end of the hearing on 20 February 2012 when we made it clear that the suspension would not commence until the date of these written reasons.

Judge P F Barber
Chairperson

Ms J Robson
Member

Mr G Denley
Member