

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 11

READT 013/12

IN THE MATTER OF

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

BETWEEN

**THE REAL ESTATE AGENTS
AUTHORITY (CAC 20003)**

Prosecutor

AND

MURRAY ROSS COOPER

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION 28 January 2013

REPRESENTATION

Ms H McKenzie, counsel for the Authority
The defendant on his own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] Murray Ross Cooper faces a charge of misconduct laid by Complaints Assessment Committee 20003.

[2] The charge relates to six occasions between October 2010 and January 2011 where the Defendant deducted commission from funds in the Ross Cooper Real Estate Ltd trust account before the required 10 working day period had expired and without written authorisation from the parties. This was in contravention of s 123 of the Real Estate Agents Act 2008. "Misconduct" is defined under s 73 of that Act as follows:-

“73 Misconduct

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

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or*
- (c) consists of a wilful or reckless contravention of—*
 - (i) this Act; or*
 - (ii) other Acts that apply to the conduct of licensees; or*
 - (iii) regulations or rules made under this Act; or*
- (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.”*

[3] Since the facts are not in dispute, on 5 October 2012 we made timetabling orders for Mr Cooper to file submissions in relation to the matter and for the Authority to reply. It was agreed to the parties that we would then determine whether a hearing was necessary or whether the matter could be dealt with on the papers. The submissions came to hand and we feel able to deal with the charge on the papers.

[4] The Prosecution does not oppose our dealing with liability on the papers based on the submissions filed to date and understands, as do we, from the defendant’s submissions that he wishes to take no further active role in the proceedings.

Factual Background

[5] It is agreed between the parties that the facts are as set out in the following Summary of Facts, namely:

- “1.1 Murray Ross Cooper (**defendant**) is a licensed agent under the Real Estate Agents Act 2008 (**Act**) and is the sole director of Ross Cooper Real Estate Limited (**Company** or **Agency**). The Company is also a licensed agent under the Act.
- 1.2 The Company offers real estate agency services in Rotorua. At all relevant times, it operated a trust account with the Bank of New Zealand, account number 02-0412-0002002-002 (**trust account**).
- 1.3 The defendant had control over the trust account. The Company had an office administrator to administer the trust account under the defendant’s supervision.

Section 123 of the Act

- 1.4 Section 123 of the Act prohibits an agent's payment of money received in respect of any transaction before the expiry of 10 days without relevantly, an authority signed by all parties.

.....

The transactions

- 1.6 On six occasions between October 2010 and January 2011, the defendant failed to comply with his obligation under s 123 of the Act as follows:

"153 Old Taupo Road

- (a) *On 29 October 2010, the defendant received \$33,500 into the Company's trust account by way of deposit from Mark Pedersen, Sharyn Pedersen and Paul Pedersen. This was pursuant to an agreement to purchase a property at 153 Old Taupo Road, Rotorua, dated 7 October 2010.*
- (b) *On 1 November 2010, the purchasers' solicitor, Mark Copeland, advised the defendant by facsimile that the purchaser did not authorise the early release of the deposit.*
- (c) *On 1 November 2010, without authorisation, the defendant caused \$14,950, being the agency's commission on the sale of the property, to be withdrawn from the Company's trust account and deposited into the Company's general account.*
- (d) *The defendant was aware this transaction took place before the 10 working day period under s 123 had expired.*

24 Pandora Avenue

- (e) *On 7 December 2010, the defendant received \$5,000 into the Company's trust account by way of deposit from Sid Obregon and Jeffrey Obregon. This was pursuant to an agreement to purchase a property at 24 Pandora Avenue, Rotorua, dated 26 November 2010.*
- (f) *On 8 December 2010, the vendor's solicitor signed a written authorisation for the early release for the deposit. The purchaser's solicitor did not sign the written authorisation.*
- (g) *On 15 December 2010, without authorisation from the purchasers, the defendant caused \$5,000, being part of the agency's commission on the sale of the property, to be withdrawn from the Company's trust account and deposited into the Company's general account.*
- (h) *The defendant was aware this transaction took place before the 10 working day period under s 123 had expired.*

6 Jackson Street

- (i) On 27 January 2011, the defendant received \$17,275 into the Company's trust account by way of deposit from Hilary Currie. This was pursuant to an agreement to purchase a property at 6 Jackson Street, Rotorua, dated 18 January 2011.
- (j) On 1 February 2011, the purchaser's solicitor signed a written authorisation for the early release for the deposit. The vendors' solicitor did not sign the written authorisation.
- (k) On 1 February 2011, without authorisation from the vendors, the defendant caused \$14,794.75 being the agency's commission on the sale of the property, to be withdrawn from the Company's trust account and deposited into the Company's general account.
- (l) The defendant was aware this transaction took place before the 10 working day period under s 123 had expired.

10 Carter Drive

- (m) On 10 February 2011, the defendant received \$20,000 into the Company's trust account by way of deposit from Matthew Lemen, Heather Lemen, and Pauline Lemen. This was pursuant to an agreement to purchase a property at 10 Carter Drive, Rotorua dated 21 January 2011.
- (n) Neither the vendors' solicitor nor the purchasers' solicitor signed written authorisation for each release of the deposit.
- (o) On 11 February 2011, without authorisation, the defendant caused \$23,445.62 which included the amount of \$12,621.25, being the agency's commission on the sale of the property, to be withdrawn from the Company's trust account and deposited into the Company's general account.
- (p) The defendant was aware this transaction took place before the 10 working day period under s 123 had expired.

[Note: it was not explained how \$23,445.62 could be taken from the account in terms of the original receipt apparently being \$20,000].

270 Pukehangi Road

- (q) On 26 January 2011, the defendant received \$32,200 into the Company trust account by way of deposit from David Tuari. This was pursuant to an agreement to purchase a property at 270 Pukehangi Road, Rotorua, dated 20 January 2011.
- (r) On 27 January 2011, the vendor's solicitor signed a written authorisation for the early release for the deposit. The purchaser's solicitor did not sign the written authorisation.

- (s) *On 27 January 2011, without authorisation from the purchaser, the defendant caused \$11,000, being the agency's commission on the sale of the property, to be withdrawn from the Company's trust account and deposited into the Company's general account.*
- (t) *The defendant was aware this transaction took place before the 10 working day period under s 123 had expired.*

5/100 Millers Road, Tauranga

- (u) *On 20 January 2011, the defendant received \$15,000 into the Company's trust account by way of deposit from Caizhu Yang and Canming Yang. This was pursuant to an agreement to purchase a property at 5/100 Millers Road, Tauranga, dated 14 December 2010.*
- (v) *On 20 January 2011, the purchasers' solicitor signed a written authorisation for the early release for the deposit. The vendor's solicitor did not sign the written authorisation.*
- (w) *On 21 January 2011, without authorisation from the vendor, the defendant caused \$13,685, being the agency's commission on the sale of the property, to be withdrawn from the Company's trust account and deposited into the Company's general account.*
- (x) *The defendant was aware this transaction took place before the 10 working day period under s 123 had expired.*

Trust account administration

- 1.7 *On 25 March 2011, the Real Estate Agents Authority exercised its power under s 27 of the Act to appoint Deloitte Wellington as the trust account administrator for the Company's trust account.*
- 1.8 *Following the administration, the Company's trust account was closed on 12 May 2011".*

The Act's requirements in relation to trust monies

[6] The Act contains several provisions relating to the receipt of monies. Section 123 reads:-

"Section 123(1) When an agent receives any money in respect of any transaction in his or her capacity as an agent, he or she must not pay that money to any person for a period of 10 working days after the date on which he or she received it.

(2) Despite subsection (1), a court order or an authority signed by all the parties to the transaction may require the agent to pay the money before the expiry of the period specified in that subsection.

(3) If at any time while holding any money on behalf of any party to the transaction, the agent receives written notice of any requisitions or objections in respect of the title to any land affected by the

transaction, the agent must not at any time pay that money to any person except in accordance with a court order or an authority signed by all the parties to the transaction.”

[7] In *Real Estate Agents Authority v Ross* [2012] NZREAD 4 we classified the s 123 requirements as “vital”, noting:

“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.”

[8] We have made it clear we shall treat breaches of duties concerning client money by licensees very seriously. The three decisions summarised below illustrate the point.

[9] In *CAC v Downtown Apartments Ltd (in liquidation) and Anor* [2010] NZREADT 6 we found proved charges of misconduct that alleged, *inter alia*, that Downtown Apartments Ltd had drawn on deposit funds paid into its trust account without the complainant purchaser’s consent and before the relevant sale and purchase agreement had gone unconditional. We held (at [63]) that such conduct was “at the high end of disgraceful conduct which struck at the very heart of the duties of a real estate agent as set out in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.” Had the defendant not been in liquidation and ceased trading, we would have made an order cancelling its licence.

[10] In *CAC v N* [2012] NZREAD18 the defendant made transfers of funds totalling \$76,650 to her personal bank account from the trading and trust accounts of a real estate company of which she was director and 50 per cent shareholder. The defendant repaid the funds in full and voluntarily surrendered her licence. We concluded that the only appropriate penalty was an order cancelling the defendant’s licence.

[11] In *CAC v Ross* [2012] NZREADT 4 a client mistakenly paid deposit funds of \$6,164 into the defendant salesperson’s personal bank account. The defendant retained part of these funds, transferring only \$3,780.67 to the trust account of his former employing agent. The defendant retained the funds on the grounds that he was owed commission in respect of the relevant transaction. We held (at [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.*”

[12] Although neither the lessor nor the lessee in respect of the transaction suffered any loss as a result of the defendant’s conduct, we noted that the case disclosed a concerning casualness over the handling of client monies. We imposed penalty as follows:

- (a) Suspension of the defendant’s salesperson’s licence for three months;
- (b) Order that the defendant repay the funds retained to his former principal; and
- (c) \$1,000 costs.

[13] The Authority submits that the Act's provisions relating to trust monies form a central component of its consumer-focussed and protective regime; and this is all the more so given the large sums which can be involved and the difficulty for the client or customer to get redress once the funds have been disbursed. We agree.

The Stance of the Defendant

[14] In two sets of typed submissions the defendant covered his position clearly and fully. However he did not wish there to be a formal hearing at this stage because he cannot afford legal representation. It was agreed that we deal with this matter on the papers as we saw fit.

[15] At the outset, the defendant expressed his enormous regret and remorse for his offending as charged.

[16] He explained that from early 2010, he was affected by various personal problems

He put it that these factors

created immense stress which seemed to have affected his capacity to adequately manage his real estate business which went into liquidation in October 2011. He voluntarily suspended his licence as at 31 March 2012.

[17] A particular theme from the defendant is that he could have used an independent trust account, apparently operated through the Public Trustee, for managing deposits on unconditional property transactions. Apparently under this structure, the deposits are released to the various parties after three working days despite the 10 day requirement under the Act; so that the licensee would get his or her commission seven days earlier than otherwise. The defendant puts it that if he had known about and followed this opportunity earlier, he would not be facing the present charges.

[18] In more recent submissions the defendant covered much the same ground as above and accepted there were discrepancies with his company's trust account management as identified by the Committee of the Authority, but he put it that these discrepancies were neither wilful nor reckless and occurred as a result of the personal circumstances set out above. We have endeavoured to give reasonable confidentiality about those matters.

[19] He then indicated that his problems commenced sometime in 2009, probably due to the decline in the real estate market since 2007. He said that had put his company into *"a very tight cash flow situation, placing extreme pressure on myself to keep the business functioning"*.

. He believes that this difficult period definitely affected his ability to manage the real estate business, and

. He put it that all this *"compounded the business problems in that I found it extremely difficult to make prudent decisions, think clearly and manage the running of the business properly. This, I believe led to the discrepancies in the trust account ..."*

[20] By mid 2011 the defendant realised he needed to dispose of his business which he did. However, there was an insufficient balance to pay all his business debts but he says that he has made a commitment to repay all creditors. In May 2012 he relocated to Sydney, Australia to obtain employment and try and rebuild his life. He feels that he has fully cooperated with the Authority.

Discussion

[21] It is submitted by the Authority that:

- (a) The conduct alleged amounts to misconduct rather than unsatisfactory conduct given the Defendant was put on notice that he was not to disburse the funds early;
- (b) The matters raised by the Defendant in his submissions properly go to the mitigation of any penalty rather than to liability;
- (c) The Act's obligations in relation to trust accounts exist for a protective reason and must be taken seriously;
- (d) Any issues about practices relating to independent trustees are not relevant; and
- (e) The matter can be dealt with on the papers.

[22] We can only agree with those submissions.

[23] The Prosecution particularly submits that the conduct is properly classified as misconduct rather than unsatisfactory conduct.

[24] At the telephone conference of 5 October 2012, the defendant stated that he accepted the contents of the Summary of Facts. He disputed, however, whether the facts as contained in that summary amounted to misconduct by a wilful or reckless breach of the Rules, or to unsatisfactory conduct by a breach of the Rules.

[25] In his submissions of 27 October 2012, the defendant raised a number of issues in the context that these contributed to the discrepancies and "*affected [his] ability to adequately manage the real estate business*". We have detailed those issues above. They include

. Ms McKenzie submits for the Prosecution that these matters are relevant to penalty rather than to whether the conduct breaches set out in the charge were wilful or reckless. We agree.

[26] She submits that the breaches were wilful. The defendant has acknowledged that in each of the six transactions he was aware that he was withdrawing commission from trust funds before the 10 working day period under s 123 of the Act had expired. In most of the transactions one party to the transaction had

authorised early disbursement but the other had not. The defendant chose to withdraw the funds anyway.

[27] In one of the transactions, the sale of 153 Old Taupo Road, the purchaser's solicitor, Mark Copeland, expressly advised the defendant by facsimile that the purchaser did not authorise the early release of the deposit on 1 November 2010. Despite this, the defendant caused the agent's commission on that sale to be withdrawn from his Company's trust account and deposited into his Company's general account.

[28] It is a basic obligation under the Act (and was under the 1976 Act as well) to retain funds in trust for 10 working days unless expressly authorised in writing to release the funds early by the parties to the transaction. There is little room in this area for claims of mere carelessness or oversight, as a licensee either has written authorisation or does not. In the six transactions referred to in the charges, the defendant did not have authorisation and was, therefore prohibited from withdrawing any part of the deposit funds. The defendant deliberately chose to withdraw monies from the deposits in the absence of the necessary authorisations and, in one case, in the face of express instructions to the contrary.

[29] The defendant has raised a practice whereby agencies are having independent trustees manage their trust funds and, hence, circumventing the requirements of, for example, s 123 of the Act. The defendant does not appear to advance this as a defence. In any event it is not a defence to the charges because the monies now in issue were kept in the Agency's trust account, and not in a professional trustee's account.

[30] We find that the charges are proved against the defendant by the Authority (as prosecutor) to the required standard of the balance of probability. That follows from the defendant agreeing to the facts set out above. He has wilfully breached s 123 of the Act and his conduct in so accessing funds early, or in one case also to funds to which he had no expectant entitlement, was disgraceful.

[31] These events took place in Rotorua. Mr Cooper is now resident in Sydney, Australia, and has applied for a real estate agents licence there. What happens before us will probably affect that. The defendant does not seem to accept that he is guilty of "*misconduct*" but rather (in his view) only of "*unsatisfactory conduct*". We have found him guilty of misconduct and, in effect, he has pleaded guilty to that by accepting the facts alleged in the charge.

[32] We are conscious that his only method of work for 26 years or so has been as a licensee real estate agent and that he seems to feel that he has only taken money to which he was entitled some days earlier than he ought to, and in his view there is no basic dishonesty. However, s 123 of the Act is a pivotal provision and must be observed. It is designed to protect consumers, in the event of issues arising following a sale becoming unconditional, by creating a 10 day window of protection to some extent for the vendor and purchaser.

[33] The defendant has succumbed to pressures but has been cooperative throughout. It may be that there be no cancellation or suspension of his licence but, perhaps, a censure, some required re-education and a commitment to costs when he has got back on his feet. We are conscious that

due to the defendant's financial position, it may not be appropriate to impose a proper fine. However, we emphasise the seriousness of this offending.

[34] We contemplate, of course, that our penalty (when imposed) take into account the various mitigating factors put forward by the defendant. In the interests of justice, we invite the Authority to file and serve brief submissions on penalty within 21 days of this decision, and the defendant shall have four weeks from service of same on him to respond. We shall then direct the Registrar to convene a short hearing at which we shall impose the penalty we consider appropriate.

[35] Pursuant to s 113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s 116 of the Act.

Judge P F Barber
Chairperson

Mr G Denley
Member

Mr J Gaukrodger
Member