

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2013] NZREADT 44

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 SUBSTANTIVE DECISION** 28 January 2013 ([2013] NZREADT 11)

**DATE OF THIS DECISION ON PENALTY** 24 May 2013

**REPRESENTATION**

Mr R M A McCoubrey, counsel for the Authority  
The defendant on his own behalf

**DECISION OF THE TRIBUNAL ON PENALTY**

***Introduction***

[1] In a decision of 28 January 2013 ([2013] NZREADT 11), we found that the Authority had proved a charge of misconduct against Mr Cooper.

[2] We made our decision on the papers with the consent of both parties.

[3] The charge related 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 is in contravention of s.123 of the Real Estate Agents Act 2008 ("the Act").

[4] Having found the charge proved, we invited the parties to file and serve further brief submissions on penalty.

### **Further Submissions on Penalty**

[5] Mr McCoubrey noted that at para [33] of our 28 January 2013 decision we made the following remarks:

*“The defendant has succumbed to financial, domestic and health 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 rather hopeless financial position, it may not be appropriate to impose a proper fine. However, we emphasise the seriousness of this offending.”*

[6] Mr McCoubrey also noted that we also described s.123 of the Act as a “pivotal provision”.

[7] We also set out the following further paragraphs of our 28 January 2013 decision, namely:

*“[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.*

...

*[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.*

...

*[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.”*

[8] As we covered in our substantive decision of 28 January 2013, the defendant has suffered a number of setbacks in life and now resides in Sydney, Australia and has not been operating in New Zealand as a real estate agent since about October 2011. He voluntarily suspended his licence as at 31 March 2012. He has expressed

his enormous regret and remorse for his offending as charged. He has been unable to afford legal representation.

[9] In final submissions to us on penalty, the defendant licensee emphasised that his licence has been inactive since March 2012 and, since then, he has been using any surplus funds to repay creditors, but this will still take him a number of years to complete. In terms of our suggestion in our decision of 28 January 2013 that, *inter alia*, he seems to require some re-education should he contemplate recommencing business as a real estate agent, he puts it that he now resides in Australia and has *“no intention whatsoever of returning to New Zealand, therefore, would be unable to fulfil any NZ based training requirements”*.

[10] Mr McCoubrey submits for the Authority that the defendant’s breaches of s.123 of the Act were wilful; that in each of the six transactions he was aware that he was withdrawing commission from trust funds before the 10 day working period; and that he deliberately chose to withdraw moneys from the deposits in the absence of the necessary authorisations and, in one case, in the face of express instructions to the contrary.

[11] Mr McCoubrey also submits that in those circumstances, and by analogy with the cases referred to above, suspension of the defendant is required. He puts it that the defendant’s offending is more serious than *Ross* where suspension was ordered.

[12] It is also submitted for the Authority that the defendant should undergo some training or education; and that a fine (perhaps to be paid at some point in the future) is also appropriate in Mr Cooper’s case.

[13] Mr McCoubrey submits that, even taking account of the mitigation aspects raised by the defendant, this was a deliberate breach of a pivotal provision of the Act which, should be met with a firm response.

### ***Previous Relevant Cases***

[14] In paragraph [9] to [11]] of our decision, we referred to three cases where a licensee wrongly dealt with monies in a trust account, namely *CAC v Downtown Apartments Ltd (in liquidation) & Anor* [2010] NZREADT 6; *CAC v N* [2012] NZREADT 18; and *CAC v Ross* [2012] NZREADT 4.

[15] In the first two cases, we had held that the only appropriate penalty was or would have been an order cancelling the licensee’s licence.

[16] In *Ross*, we noted that the case disclosed a concerning casualness over the handling of client moneys. We imposed a penalty package as follows: suspension of the defendant’s salesperson’s licence for three months; order that the defendant repay the funds retained to his former principal; and \$1,000.00 costs. At paragraph [24] of *Ross*, we noted:

*“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.”*

***Our Findings on Penalty***

[17] We have found that on the balance of probabilities, the licensee is guilty of misconduct, so that the penalty orders available to us are those set out in s.110(2) of the Act. They include any of the orders which can be made by a Committee under s.93 of the Act (refer s.110(2)(a)).

[18] Having absorbed the above and the views we expressed in our substantive decision of 28 January 2013, our sentencing package to be imposed on the defendant is as follows:

- [a] His licence is suspended for 14 months but from 1 April 2012;
- [b] He is fined the sum of \$1,000 to be paid to the Registrar of the Authority at Wellington within six months from the date of this decision;
- [c] He is ordered to pay the sum of \$1,000 towards the costs of this Disciplinary Tribunal to the Tribunals Unit, Ministry of Justice, 86 Customhouse Quay, Wellington, within nine months of the date of this penalty decision;
- [d] Should he wish to recommence practice as a real estate agent in New Zealand, he is to undertake such reasonable forms of education on the requirements of the Real Estate Agents Act 2008 (or any successor legislation) and its regulations as the then Registrar of the Authority may direct.

[19] 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.

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Judge P F Barber  
Chairperson

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Mr G Denley  
Member

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Mr J Gaukrodger  
Member