

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 83

READT 023/14

IN THE MATTER OF charges laid under s 91 of the
Real Estate Agents Act 2008

BETWEEN **THE REAL ESTATE AGENTS**
AUTHORITY (CAC 20004)

AND **JOHN WHISKER**

Defendant

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Mr J Gaukrodger – Member
Ms N Dangen – Member

HEARD at AUCKLAND on 25-26 September 2014

DATE OF DECISION 23 October 2014

APPEARANCES

Mr Hodge and Ms Copeland for the Real Estate Agents Authority
Mr Bigio for defendant

DECISION OF THE TRIBUNAL

Background

[1] The Complaints Assessment Committee (CAC 20004) laid a charge against Mr Whisker which is annexed in this decision and marked with a letter A. In summary the Complaints Assessment Committee alleged that the defendant held advertising funds paid to his company by vendors in a separate advertising account. The agency went into liquidation in November 2012 and shortly before this event the defendant used these funds as his general account. He then transferred some to his accountant's Trust Account while considering the future of the company. Not all funds were sent to the accountant. He did not repay a balance of \$1,643.82. This was regarded as seriously incompetent or seriously negligent conduct pursuant to s 73(b).

[2] Prior to the hearing counsel for Mr Whisker and for the Committee had discussions and presented the Tribunal with an agreed Statement of Facts. This agreed Statement of Facts is set out below. To this agreed Statement of Facts Mr Whisker had agreed to plead guilty. He also accepted that this was unsatisfactory conduct pursuant to s 72(a) of the Real Estate Agents Act 2008. Both the Complaints Assessment Committee and Mr Whisker agreed to this reduction to

unsatisfactory conduct. Counsel suggested a penalty that might be imposed upon Mr Whisker.

[3] It is common ground that it is for the Tribunal to determine whether or not on the facts of any case the conduct complained of amounts to misconduct or unsatisfactory conduct.

Agreed Statement of Facts

1.1 Mr Whisker was signatory to two bank accounts operated by GVA Project Control Group New Zealand Limited (**agency**):

- (a) 03 0255 0732411-00 - general trading account (**general trading account**); and
- (b) 03 0255 0732411-01 - used for specific payments, i.e. vendor paid advertising, and considered by Mr Whisker to be an advertising account (**advertising account**).¹ This was an ordinary bank account and not a trust account.

1.2. The agency did not operate a trust account, and was not required to under the Real Estate Agents Act 2008, for holding advertising funds. However, such funds were kept separate by the agency from its general trading account, in its advertising account.

1.3 In late September 2012, the agency received vendor advertising funds in relation to four properties which were to be the subject of a promotional advertising campaign due to begin on Saturday, 13 October 2012 (**advertising campaign**). The funds were procured from the clients by Christopher Harding, a licensed salesperson engaged by the agency.

1.4 Around the time the funds were received Mr Whisker had concerns about the financial viability of the agency.

1.5 The first payment was received on 24 September 2012, from Nick Ward, in the sum of \$1,230.50. Further advertising funds were then paid in to the advertising account as follows:

Vendor client	Amount paid in to 01 account	Date
Nick Ward	\$1,483.50	02/10/12
Buchanan McDonald	\$5,726.20	03/10/12
Jackson Holdings	\$2,624.30	08/10/12
Young Jin Siesta Motel	\$3,802.16	08/10/12
J Polglase (The Mill Industrial Park Limited)	\$6,378.16	09/10/12

1.6 In total, therefore, Mr Whisker received \$21,244.82 in vendor paid advertising in late September/early October 2012, for the advertising campaign.

1.7 On 28 September 2012, with only \$67.07 in his general trading account (00), Mr Whisker decided to change the use of the advertising account to that of a general trading account. From 28 September 2012 to 9 October 2012, the following general expenses were paid out of that account:

¹ Page 3 of the Committee's bundle of documents.

	Amount	Date
Cash	\$300.00	28/09/12
The Pol Room	\$250.00	02/10/12
Gloria Jeans Coffees	\$6.50	04/10/12
Muffin Break	\$3.80	05/10/12
Planet Espresso	\$4.00	05/10/12
Auckland Engineering	\$45.52	09/10/12

- 1.8 As a consequence of Mr Whisker's decision to begin using the advertising account for general expenses, the vendor advertising funds for the advertising campaign were reduced.
- 1.9 Prior to the launch of the advertising campaign for all 4 properties, Mr Whisker asked Mr Harding about the likelihood of those campaigns being successful. Mr Harding replied that he felt there was a 50% chance of just one of the 4 would result in a sale. In the light of that assessment, Mr Whisker was forced to question the future viability of the company.
- 1.10 Foreseeing that liquidation was likely, Mr Whisker decided to refund the advertising money and halt company operations. Mr Whisker transferred what was left of the vendor advertising funds (\$19,600.00) to his accountant's trust account on 10 October 2012 and instructed his accountant to reimburse clients from those funds. This was not sufficient to meet the total amount owed to the vendor clients, there being a shortfall of \$1644.82.
- 1.11 In response to the Committee's investigation, Mr Whisker said that "in the first instance the advertising funds were paid into the companies advertising account ...". This was correct in the sense that the vendor advertising funds were paid into the advertising account. However, following the first payment received from Nick Ward on 24 September 2012, Mr Whisker then began using the advertising account as a general trading account as detailed in the table in paragraph 1.7 above. Mr Whisker permitted the agency to continue to collect vendor paid advertising funds, knowing that the agency was in serious financial difficulty and that he was using these funds to pay for general expenses, until coming to the decision described in paragraphs 1.9 and 1.10 above.
- 1.12 Although, under no legal obligation to do so, Mr Whisker has now repaid the balance of the vendor paid advertising funds.

[4] As can be seen from the agreed Statement of Facts Mr Whisker kept his general trading account (the 00 account) and the advertising payments account (the 01 account) separately. It is also common ground that there is no obligation on a licensee to maintain advertising funds in a Trust Account. They can legitimately be placed into the general trading account of the agency. However Mr Whisker did not do that, he kept these funds separately until just before he determined that the company should cease trading. Between the end of September and early October 2012 Mr Whisker began to use the 01 account to meet general expenses and some personal expenses. He used approximately \$1,500 of the advertising monies held in this way. On or about 10 October he transferred \$19,600 to his accountant's Trust Account. This left the 01 account with a balance of \$165.19.

[5] The Complaints Assessment Committee and Mr Bigio agree that this is unsatisfactory conduct because, while Mr Whisker was not required to hold these

monies in trust he had made a decision to keep them separately and it was unsatisfactory conduct to decide to use the advertising account as his general account at a time when he knew the business was in financial difficulty. It was this decision made in a relatively short space of time between late September and early October that both parties agreed was unsatisfactory conduct.

Discussion

[6] The Tribunal have found this a difficult proposition. On the one hand it is clearly arguable that as there was no requirement to hold the monies on trust Mr Whisker was free to use the advertising monies for any of the general trading purposes of the company and therefore is not guilty of any form of misconduct (in its widest sense) at all. In the alternative it is also quite possible to make an argument that while there was no requirement under the Act or the Rules to hold the money in a Trust Account Mr Whisker had nonetheless recognised that he held these monies for a specific purpose (ie on trust for that purpose) and kept them separately in order to achieve that purpose. He also clearly identified that these are monies which were not his and which needed to be returned to the clients. Therefore in making the decision to use these monies for general trading purposes he was breaching his fiduciary/trust/agreed obligations to his clients. This is arguably a much more serious breach of his obligations as a licensee and could be argued to be either seriously incompetent or seriously negligent such as to amount to misconduct under s 73(b).

[7] However the issue has been articulated by counsel in a different way. They argue that whilst Mr Whisker may have had an equitable or fiduciary obligation to hold the monies separately he had no legal obligation to do so. Nonetheless they argue it cannot be said that he is entirely free from criticism because he made a decision which a reasonable member of the public would consider he should not have made. This was the decision to take monies previously held separately by him and use them to maintain the trading of the company. It is this miscalculation or wrong decision or error of judgment which is characterised as unsatisfactory conduct.

[8] The difficulty that the Tribunal have with this articulation is in understanding the nature of the wrongdoing. As articulated by the parties the conduct was inappropriate but not in breach of Mr Whisker's legal obligations as a real estate agent. However Mr Whisker made the decision to keep the monies separate. Therefore he must have known that in using the money that he was going back on the decision that he had made to hold the monies separate. It may well have been that he thought that there would be further monies coming in which would enable him to replace these funds but nonetheless he made a decision to use the money. The Tribunal considers this could be a serious breach of his obligations. On the other hand with more information it can appreciate that Mr Whisker might not be under any obligation to hold the monies at all and his decision to use the money might have no disciplinary consequences.

[9] Counsel have urged the Tribunal to consider that in the circumstances of this case taking into account all of the material the Tribunal should accept that this is unsatisfactory conduct. In order to do this the Tribunal must put to one side any suggestion that the money was held on trust and simply say that this was a 'bad' decision by Mr Whisker when in difficult and financially pressing circumstances. If analysed in this way the argument in favour of unsatisfactory conduct is more simple. However the Tribunal cannot divorce from its analysis the fact that this decision was made after Mr Whisker had made a conscious decision [as licensee] to hold these

monies separately. He had no obligation to do so in law but he assumed that obligation, he then breached it. The Tribunal ask what did Mr Whisker do wrong? Answer: He used monies held for a specific purpose in another way. Why is this wrong? Because he agreed to hold the money for this purpose. Analysed this way we cannot conclude that this is unsatisfactory conduct. Accordingly the Tribunal are unable to reach the conclusion that this amounts to unsatisfactory conduct. They have reached the conclusion that the conduct must either be misconduct or in the alternative that there may be no misconduct at all.

[10] This means that the plea of guilty to unsatisfactory conduct is not accepted. There will need to be a hearing to determine whether or not the conduct is either misconduct or not misconduct at all. The Tribunal also accept that the agreed Statement of Facts may not be appropriate.

[11] The Tribunal proposes that a new Tribunal be convened to consider this question and to convene a hearing of the Tribunal to consider this point.

[12] The Tribunal draws to the parties' attention the provisions of s 116 of the Real Estate Agents Act 2008.

Ms K Davenport QC
Chairperson

Mr J Gaukrodger
Member

Ms N Dangen
Member