

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 49

READT 031/14

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

BETWEEN **COMPLAINTS ASSESSMENT**
COMMITTEE (per CAC 20005)

Prosecutor

AND **ALAN MORTON-JONES**

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms N Dangen - Member

HEARD at AUCKLAND on 23 and 24 March 2015 (with a subsequent series of typed submissions)

DATE OF THIS DECISION 24 June 2015

COUNSEL

Mr L J Clancy for the prosecution
Mr P Kennelly for the defendant

DECISION OF THE TRIBUNAL

Introduction

[1] This appeal is about a licensee's operation of a property management business; which is not real estate agency work. However, the concept of "*misconduct*" under s.73 of the Real Estate Agents Act 2008 is not confined to real estate agency work.

[2] Alan Morton-Jones ("the licensee") has been charged by Complaints Assessment Committee 20005 with three charges of misconduct under s.73(a) of the Act in that his conduct would be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[3] He is also charged with misconduct under s.73(c)(i) of the Act in that he wilfully or recklessly breached s.85 of the Act by failing to comply with a notice to produce documents to a Committee of the Real Estate Agents Authority without a reasonable excuse.

[4] Section 73 of the Act reads 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.”*

The Charges as Laid

[5] The full charges, as laid on 17 March 2014 (subsequently the particulars of Charge 1 were modified by consent to show repayment), read as follows:

“Charge 1

Complaints Assessment Committee 20005 charges Alan Morton-Jones of Rodney Real Estate (licensee) with misconduct, in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars:

The licensee short paid approximately \$11,055.72 of property management rental money to his client Rodger Sinclair between 2011 and 2012. After approximately 7 months and repeated demands by Rodger Sinclair and others acting on his behalf, the licensee eventually arranged for \$7,697.50 of the short paid money to be repaid Mr Sinclair. The licensee has subsequently repaid the rest of the outstanding debt to Mr Sinclair, but failed to provide any reasonable explanation for the short payments.

Charge 2

Complaints Assessment Committee 20005 charges the licensee with misconduct, in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

The licensee short paid approximately \$22,798.50 of property management rental money to his client Anton Poynter between 2011 and 2013. After approximately 3 months and demands by Mr Poynter and others acting on his behalf, the licensee eventually arranged for the repayment of \$17,114.76 to Anton Poynter. The licensee has failed to arrange the repayment of the remaining debt to Mr Poynter, and has failed to provide any reasonable explanation for the short payments.

Charge 3

Complaints Assessment Committee 20005 charges the licensee with misconduct, in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars:

The licensee short paid approximately \$9,000.00 of property management rental money to his client Karen Graham between 2009 and 2012. Following Karen Graham's demands the licensee eventually repaid this money to her, including \$6,509.05 to her by cheque from Alan Stuart Motors Limited (a separate company of which the licensee was the sole director). The licensee failed to provide any reasonable explanation for the short payments.

Charge 4

Complaints Assessment Committee 20005 charges the licensee with misconduct, in that his conduct consists of a wilful or reckless contravention of the Real Estate Agents Act 2008.

Particulars:

The Committee issued a notice requiring the licensee to produce documents and information pursuant to section 85 of the Real Estate Agents Act 2008 (Act) on 13 June 2013, which it served on him on 15 June 2013. The licensee failed to comply with the notice within the required 10 working days or since that time, and has failed to provide a reasonable excuse for that non compliance. Non compliance with the notice (and lack of reasonable excuse) constitutes an offence under section 148 of the Act."

[6] The basic facts or events set out in the above charges are not in dispute.

The Case for the Prosecution

[7] The nub of the prosecuting Committee's case against Mr Morton-Jones is that, in failing for a time to account to clients for over \$40,000 in rent collected from tenants on his clients' behalf, he either intentionally used those funds for his own purposes or, at the very least, displayed such negligence or incompetence in the handling of the funds as to amount to an abuse of the privileges attached to holding a real estate agents licence.

[8] The prosecution alleges that Mr Morton-Jones then compounded his misconduct by failing to produce records to the Committee investigating the alleged

discrepancies, when properly directed to do so by way of a formal notice issued under s.85 of the Act.

[9] At all relevant times, Mr Morton-Jones was the owner and manager of Rodney Real Estate Ltd (“the agency”) which operated a property management business. During the course of his ownership/management, rental monies collected from tenants were not properly paid on to landlord clients.

[10] It is accepted that, in running a property management business, the licensee was not involved in *real estate agency work* as defined under the Act. Section 4 of the Act excludes from the definition of *transaction* (and therefore from the definition of real estate agency work) the grant, sale, disposal or acquisition of tenancies to which the Residential Tenancies Act 1986 applies.

[11] However, it is the Committee's submission that, notwithstanding residential property management is not real estate agency work, the Licensee's actions were disgraceful.

[12] Also, the Committee submits that the subsequent failure to comply with the s.85 notice shows a complete disregard by the licensee for his professional obligations and is, in itself, a matter that we should regard as extremely serious and as also amounting to misconduct.

[13] The Committee submits that it is open to us to conclude that the Licensee's conduct was disgraceful, that he wilfully or recklessly breached his obligations under the Act, and that a finding of misconduct is warranted accordingly.

[14] It is put that the evidence establishes that for a time the Licensee failed to account to clients of his property management business for approximately \$40,000 in rent received from tenants; and that, in all three cases referred to in charges 1 to 3, it was only after the Licensee was threatened by his client with the Police that he made repayment.

[15] The Committee's case is that, on the evidence, there are only two explanations for the defendant's failure to account, namely:

- [a] That he used the rent money received for his own purposes and intentionally failed to account for it to his clients; or,
- [b] That, if the failure to account was inadvertent, he must have run his business with such negligence or incompetence as to amount to a disgraceful abuse of his responsibilities as a professional handling other people's money.

[16] The Committee submits that on either alternative, such misconduct, has a sufficient nexus to the Licensee's fitness to hold a licence under the Act, notwithstanding that property management is not *real estate agency work* as defined by the Act.

[17] It is also submitted that the Licensee's misconduct in failing to account for client money was seriously compounded by his frustrating the Committee's investigation into what occurred by his wilful failure to produce relevant records; and that was a failure which persisted into our hearing process.

The Basic Defence

[18] Mr Morton-Jones accepted at the hearing that his defence is distinctly different as between charges 1 and 2 (Rodger Sinclair and Anton Poynter) and charge 3 (Karen Graham).

[19] In respect of charges 1 and 2, there is no dispute that there was a significant failure to account to the clients for rent money they should have received.

[20] However, the Licensee denies any failure to account in respect of Ms Graham, stating that the cheque for \$6,509.05 which he gave to Ms Graham in September 2012 was for current rent and the return of bond money, and not a repayment of a previous shortfall as alleged by Ms Graham.

Salient Evidence for the Prosecution

The Evidence of Ms M Logan

[21] The first witness for the prosecution was Ms M Logan who is a very experienced property manager. She states that on 8 August 2012 Mr Sinclair telephoned her and told her that Rodney Real Estate Ltd owed him outstanding property rental money in respect of two of his investment properties. He had told that agency of that but not recovered the money and wanted Ms Logan's company to take over management of the two properties and help him get back the outstanding money.

[22] Ms Logan arranged to meet Mr Morton-Jones at his offices on 23 August 2012 to collect copies of Mr Sinclair's statements and records regarding the two properties as well as details of the tenants' rental payments. She continued her evidence-in-chief as follows:

"2.5 When I attended the offices on 23 August I was not provided with:

- (a) Bond lodgement details for the change of landlord form for 14 Dobell Road, as the bond had never been lodged despite it being paid on 3 May 2011.*
- (b) The keys for the two properties.*
- (c) The full tenancy agreements for both properties.*
- (d) The installing inspection forms for both properties.*
- (e) The routine inspection forms for both properties.*
- (f) Copies of the monthly landlord statements relating to the current tenancy agreements for both properties.*
- (g) Copies of all invoices and receipts for maintenance and expenses paid for the current tenancy agreements on both properties.*

...

- 2.7 *On 31 August 2012, I attended at the offices again and met Mr Morton-Jones for the first time. He informed me that he had paid about \$10,000 into Mr Sinclair's personal bank account but was unable to provide confirmation of that amount. We agreed that I would return an hour later to collect confirmation of that payment.*
- 2.8 *I returned at the agreed time and was told that the shortfall was accidental payment of rental receipts to the wrong landlord's account. After 2 pm a letter to Mr Sinclair on the agency letterhead was provided confirming \$10,520.60 has been paid into his bank account. Mr Morton-Jones said that because it was a string of payments it would not show up in his account until 1 September. A copy of that letter is at tab [7]."*

[23] Inter alia she said that the defendant assured her that all monies were paid on 1 September 2012 but Mr Sinclair contacted her and advised that he had only received \$7,697.50 and not the promised \$10,520.60. Accordingly, Ms Logan made a complaint to the Authority. Inter alia in her evidence-in-chief she stated:

"4.1 I am of the opinion that any accounting error could not have gone undetected by Mr Morton-Jones for long especially considering his accounting background that he has been at pains to reiterate to Rodger and myself. This conclusion is drawn from my own experience of managing the same properties owned by Rodger Sinclair that were previously managed under the supervision of Mr Morton-Jones and from my over 20 years' experience in property management."

[24] She also outlined in some detail the rather careful procedures she follows as a property manager.

[25] In a previous affidavit sworn 16 June 2014 Ms Logan had, inter alia, stated that in all her dealings with the defendant she found him *"to be extremely dishonest, very intimidating, threatening ..."*. She felt that he used his position as a trained accountant in an attempt to cover up *"his behaviours with the theft of monies from clients and to silence the complainant/victims"*. She accused him of intimidation and bullying. She asserted that, after taking over both properties of Mr Sinclair from the management of the defendant, she found that a number of expenses charged against Mr Sinclair by the defendant, were for maintenance and repairs which had never been undertaken, but those items do not seem to be part of the current charges against the defendant as they were not identified until after the charges were laid.

[26] In further oral evidence to us, Ms Logan gave more detail and explained her difficulties in creating reconciliation statements from the defendant's management activities for Mr Sinclair. She states that there was a \$12,000 shortfall at least in payments to him by the defendant but, eventually, he repaid \$10,520.60. She also remarked that she could produce comprehensive records for any landlord client *"within five minutes"*.

[27] She was carefully examined by counsel for the defendant and it seems that the agency's property management business ended in July 2012. It was put to her that she did not like the defendant but she said *"not so. I didn't like the way he treated Rodger Sinclair"*. She seemed to be saying that she thought the defendant was intelligent but did not check statements. She had no personal gripe against him but

made the complaint on behalf of Mr Sinclair because *“he is not up to doing it for himself”* and she felt someone needed to stand up on his behalf.

[28] It was put to her that the defence is that the defendant’s employees made an error and loaded an incorrect three digit number into the defendant’s computer system so that payments went to the wrong client. Ms Logan said that could not be so as the errors were both computer based and paper based. She mentioned that the defendant seemed to have acted for 45 landlords and used his system through Westpac bank based on payees having three digits to isolate them. She was pressed that if a staff member put in the wrong digits or codes there would be errors, but she maintained that the errors were based on deliberate procedures.

The Evidence of Ms K Graham

[29] Ms Graham is a retired licensed salesperson who owns several properties and had an old friend, Ms Tina Louis, at the defendant’s agency manage three of those properties since 2007. Since then she had spoken to the agency on two occasions *“regarding serious rental shortfalls”* as she put it. She believed that the first rental shortfall occurred in 2009 or 2010 and was \$2,000 to \$3,000. She continued:

“3.2 When I spoke to the agency about it I was told that the money had got muddled and had gone into a different account. The money appeared in my bank account a few weeks later.

4 Second rental shortfall

4.1 The second occasions was in 2012. I noticed a pattern in my bank account that did not look right. There were missing payments, particularly for my property in Silverdale. I had been given rental records and they did not match with what was in my bank account. Unfortunately I no longer have these records. They were lost when my computer failed in November 2014.

4.2 The agency told me that I should give the tenants 90 days notice. I thought that the tenants were not paying their rent but I went and spoke with them directly and ascertained they had not missed their payments.

4.3 Mr Morton-Jones told me that there had been an accounting error.”

[30] That led to her severing her management contract with the defendant as at 22 September 2012. She told the defendant that she wanted full settlement or she would go to the Police so she was given a cheque for \$6,509.05 which she said was from an account of Alan Stuarts Motors Ltd, another company operated by the defendant. She said a further amount was repaid by the agency to her in about October 2012 but she had contacted the Authority on 28 September 2012. She then reviewed her accounts and found there was no other money missing.

[31] In her oral evidence to us she covered that the defendant maintained that there had been accounting errors which he would sort out and that, eventually, he did, but she said that the repayments came in dribs and drabs and the experience was very upsetting to her and she needed to go to the Police. She gives evidence to us *“as I don’t want someone else to be treated like me by the defendant”*.

[32] Ms Graham was thoroughly cross-examined by Mr Kennelly along the lines that she could not support her evidence with documentary evidence. She said that she had the relevant bank statements “*at home somewhere*” and that she rather thought the defendant owes her more than she had sought. She offered to go and obtain the relevant bank statements to support that. She mentioned that all this had led to the end of her friendship with Ms Louis and that the experience had been devastating to her at the time.

[33] Mrs Graham was prepared to accept that there had been a mistake by the agency or the defendant on the first occasion, but not on the second occasion. She did not accept the defendant’s explanation that there had simply been an accounting error. She seemed to be saying that her accountant had analysed her records and confirmed her views. Of course, that is hearsay.

[34] She also seemed to be saying that she was given to believe by the defendant that her tenants had not been paying their rent when, in fact, they had been and were excellent tenants and as a result of the defendant’s error, she lost them. She asserted that she had been swindled by the defendant out of rent due to her which he had collected as her property manager. It appears that the defendant and his agency had managed four rental properties for her.

The Evidence of Mr R Sinclair

[35] Mr Sinclair covered how the agency managed two of his properties from 2007. He said that in February 2012 he was advised by his accountant that she had discovered that the amounts shown on the agency’s landlord statements did not reconcile with the amounts the agency paid into her bank account and that for the year 2011 the shortfall was \$4,724.24. He requested the accountant to review rental accounts for the 2012 year and found there was a further shortfall of \$5,059.57. He said that, accordingly, on 27 February 2012 she (the accountant) expressed her concern to the defendant and asked him to immediately pay her the shortfall. The defendant advised her that this was not the first time that had happened “*and that they had a temp in and that money had been put into other people’s bank accounts by mistake. He wanted time to figure the situation out*”.

[36] Ms Sinclair states that the accountant met the defendant again accordingly on 12 June 2012 and he acknowledged there was a shortfall to her and was concerned that the same thing had happened in 2012 and requested more time to review the 2012 records. He subsequently acknowledged that the total rental shortfall to her was about \$12,000 but he later changed that to \$8,000 and promised to pay the shortfall as at 31 March 2011 by June 2012 and the shortfall as at 31 March 2012 by the end of July 2012. He kept fobbing off her telephone calls saying he needed more time to check his records and neither of those promised payments were made. Mr Sinclair continued that his accountant then contacted Ms Logan whose evidence we referred to above and Ms Logan’s company took over management of the property on 20 August 2012. Mr Sinclair concluded his typed evidence-in-chief as follows:

“4 Repayment

4.1 *On 31 August 2012, Mishael Logan contacted me to advise that she had met with Mr Morton-Jones and he had provided a letter acknowledging*

that \$10,520.60 had been paid into my account. A copy of that letter is at Tab [7].

- 4.2 *On the morning of Saturday 1 September 2012, I checked my bank account and found a number of deposits but I had not received a full payment of the amount advised in the letter.*
- 4.3 *I received the following payments for Whangaparoa Road:*
- (a) \$326.42 on 7 August 2012;*
 - (b) \$326.42 on 14 August 2012; and*
 - (c) \$399.12 on 21 August 2012.*
- 4.4 *I received the following payments for Dobell Road:*
- (a) \$275.85 on 7 August 2012;*
 - (b) \$275.85 on 14 August 2012; and*
 - (c) \$79.92 paid on 21 August 2012.*
- 4.5 *Further payments of \$2,356.30 and \$3,477.62 were also received. Tab [25].*
- 4.6 *Full restitution was eventually made on 3 September 2012 which was after the complaint was made by Mishael Logan to the Real Estate Agents Authority.*
- 4.7 *It took Mr Morton-Jones seven months for full repayment to be made and this was repaid in a variety of instalments."*

[37] In further evidence-in-chief and in detailed cross-examination the facts were analysed further. Mr Sinclair explained that he is a crane operator and not good at paperwork and, otherwise, he would have realised sooner that he was not receiving proper rental amounts from the defendant. He seemed to also say that he really only had such a problem with the defendant for about a year.

The Evidence of Mr Poynter

[38] Mr Poynter owns several properties through a family trust and the defendant's agency managed three of them. That arrangement commenced with one property in 2003 and then another in 2006 and the third property from 2009. After deduction of management fees, Mr Poynter received net rent either weekly or fortnightly from the agency and he would agree in advance where there needed to be deductions for other services to the properties. However, a rental reconciliation was undertaken by his accountant in 2012 and showed that there was missing rent for all three properties. Accordingly, that accountant reviewed the two previous years and an analysis of the overall rental shortfall was adduced to us. At times the incorrect amount of rent was put into the family trust's bank account, and at times no rent at all was paid and a number of examples were adduced to us.

[39] For one property, \$3,561.03 was missing for the year 2011 and \$6,470.95 was missing for the year 2012. For another property \$3,304.91 was missing for the year

2011 and \$6,588.29 was missing for the year 2012. For the other property \$2,873.32 was missing for the year 2011. Accordingly, for these three properties the total amount of rent not paid over to the owner was \$22,798.50.

[40] In about August 2012 Mr Poynter ascertained that one tenant never missed paying any rent so that he approached Ms Louis at the agency and then placed the matter to his solicitor. Since no response was received from the defendant, he intended to refer the matter was referred to the Police. Eventually Mr Poynter received \$17,144.76 on account of his claim for \$22,798.50. He accepted that and did not take the matter to the Police as he had threatened. The final payment seemed to be made by the agency to Mr Poynter's family trust on 24 December 2012. At this stage, Mr Poynter remarks that he and his wife had been foolish not to have checked the rental payment position monthly.

The Proposed Witness Ms D Leef

[41] The prosecution filed a brief from a Ms D Leef who had worked in property management for the agency over 1997 to 2009 and, in 2010, worked for Alan Stuart Motors Ltd in a role unconnected with property management until October 2010. Then she joined Global Rentals and Property Management Ltd where she currently works. Global Rentals had taken over the agency's property management business in July 2012.

[42] Ms Leef's evidence brief is very negative about the defendant but, although she had been subpoenaed and did not appear, we understand that the prosecution decided not to rely on her evidence. Accordingly, we take it no further other than to say that her theme is that the defendant was responsible for making net rental payments to all landlords and he checked matters every week. She seemed to be putting it that rental shortfalls could not arise due to a temporary staff member incorrectly directing payments into the wrong account because each landlord had a unique three digit bank account code. However, she then seemed to concede that such an error could occur but put it that should have been picked up by the defendant when he undertook the monthly reconciliation, which she knew he did as would be expected.

[43] The defendant seemed to accept her brief as evidence for us.

Evidence from Mr G M Gallacher

[44] In the usual way Mr Gallacher, as the senior investigator of the Authority, gave careful evidence to cover the documentary background to this case and particularly the documents included in the agreed bundle of documents. In this case he was cross-examined at length by the defendant, but those matters are dealt with in the course of this decision.

[45] Mr Gallacher had first assessed the defendant as a calm and plausible person who seemed determined to put right matters involved in the complaints.

[46] Eventually, Mr Gallacher needed to ask the defendant for relevant records which seemed lacking and the defendant could not explain that. Of course, Mr Gallacher was very conscious that the complaints did not concern the defendant's conduct as a real estate agent but as a property manager.

[47] Mr Gallacher felt that the real issue to the defendant seemed to be that he considered that the Complaints Assessment Committee 20005 and Mr Gallagher did not know of the repayments to various complainants which the defendant eventually made. To that Mr Gallacher commented that it was possible that he might not have known of the various repayments at the time they were made but the issue to him is how the defendant, as a licensee under the Act, allowed the situations complained of to occur.

Evidence for the Defence

The Evidence of Mr R White

[48] Mr White is a self-employed computer technician of nine years experience. He had been regularly contracted to Rodney Real Estate Ltd to maintain and support its computer systems since about 2010. In May 2013 he was contracted to upgrade that agency's computers because the computer used for all data from rentals was displaying a blue screen. It seems that the hard drive for that computer had started to fail and its programmes and files had become corrupted, including the rental database, and he was unable to salvage the backup. He was asked to repair the computer but it could not be done.

The Evidence of Ms L White

[49] Ms White is an employee of the agency company and she gave detailed evidence about its operation and the type of clients it had at material times. She said she was staggered to learn of some of the complaints leading to these proceedings.

[50] She said that Ms K Graham ended her management arrangement with the agency in July 2012 and appointed her daughter Ms Louise Graham to manage her properties. The tenants still paid their rental to the agency company for a further three to four months and, Ms White said, all this money was paid to Ms K Graham.

[51] She referred to the Roger Sinclair situation and emphasised that he was told by letter from the agency dated 31 August 2012 that \$10,520.60 had been paid into his account with an apology, and that payment included current rentals. She put it that on 25 August 2014 the CAC accepted that full payment had been made to Mr Sinclair.

[52] With regard to the complaint of Mr A Poynter, she said that a rental shortfall to him was identified "*with scrutiny of accounts*", he was paid all money owing to him within three months of identification of the problem, and he was satisfied at the time about that.

The Evidence of the Defendant

[53] Mr Morgan-Jones denies all the charges and strongly asserts that he has done nothing to warrant the suspension of his real estate agent's licence and that the charges involve matters which only relate to a property management business and not to the business of a licensed real estate agent. He points out that he has not carried on property management business since 31 August 2012.

[54] He continually expressed concerns about the investigation preceding this case and about the matters raised.

[55] We found him a little belligerent and to not understand the purposes and requirements of the Real Estate Agents Act 2008 and, consequently, not understanding the role of the Authority or of this Tribunal.

[56] Simply put, the defendant's response seems to be that he says he has repaid all monies owing to the complainants and was not undertaking real estate work at material times. He then went in great detail through many aspects of the charges against him and the facts covered above, but we deal with all that in the course of covering the very helpful and thorough submissions from Mr Kennelly his counsel. While the defendant in many ways seemed a good type of person, he was rather stubborn and somewhat arrogant before us.

Submissions for the Prosecution

The Charges re Messrs Sinclair and Poynter

[57] Mr Clancy noted that Mr Morton-Jones contends that the shortfalls affecting Messrs Sinclair and Poynter occurred due to manual accounting errors, whereby rent due to those clients was incorrectly credited to the bank accounts of other clients.

[58] The prosecution submits we should reject that account, on the balance of probabilities, for the following reasons:

- [a] The Licensee failed to produce both to the Committee and to us, any documentary evidence to show any such erroneous payment. This was despite his producing a three-volume hearing bundle of 554 pages; and such records could have been easily obtained from the Licensee's bank.
- [b] The Licensee was unwilling to name, both to the Committee and to us, the alleged recipients of the erroneous payments. When directed to answer questions put to him by counsel at the hearing, he could only provide one name (Peter Ridley), one partial name ("McMillan"), and a reference to "a guy in Australia". No evidence from any of those clients was put before us. Lauren White, a witness called by Mr Morton-Jones who answered the telephone at Rodney Real Estate Ltd over the relevant period, confirmed that no client had ever contacted the office to advise they had received more rent than they should have.
- [c] The Licensee's evidence as to how such errors, which occurred a number of times over a period of months, were not picked up in monthly accounting reconciliations was confused and, it is submitted for the prosecution, unconvincing. The defendant licensee is a chartered accountant and yet was unable to give a straight answer to questions from our member with expertise in accounting (Mr J Gaukrodger) as to how the "errors" remained undetected if monthly bank reconciliations for individual clients were undertaken.
- [d] It is inherently unlikely that the type of manual errors described by the Licensee could occur in a way so as to affect at least 19 landlord clients,

as was his evidence. While the numbers in a three-digit code might be transposed in error from time to time in the course of manual data entry, in order to affect 19 landlord clients such an error would have to have occurred at least 19 times without being detected. The prosecution submits that, even without a robust system for cross-checking payments, that number of inadvertent manual errors would be very unlikely.

- [e] Mr Morton-Jones' explanation also fails to address why many of the missing payments appear to result from part-payments rather than full payments of rent. If the error was one of transposition of digits in an accounting code, one would expect the full payment of rent to go to the wrong account, not part to the correct account and part to an incorrect account, which is what appears to have occurred.
- [f] The Licensee does not appear to have made any efforts (there is no documentary evidence of such efforts) to have the unintended recipients of the funds repay the money which they were not entitled to. Instead, he has met the shortfalls from his own funds, even though this required him to refinance and sell the Rodney Real Estate Ltd rental roll to obtain the money to do so over a period of months.
- [g] Mr Morton-Jones accepted, in cross-examination, that he was aware of shortfalls affecting Mr Poynter by June or July 2012. Despite this, he admits that he did not contact Mr Poynter to advise him of the situation (as might be expected in the event of an inadvertent accounting error). Instead, it was left for Mr Poynter to contact Mr Morton-Jones in October 2012, when the issue was detected by Mr Poynter's accountant.
- [h] There is documentary evidence that, in both cases, payment by Mr Morton-Jones occurred only *after* a threat was made to report the issue to the Police.

[59] For the reasons set out above, Mr Clancy submits for the prosecution that it is more likely than not that the shortfalls affecting Messrs Sinclair and Poynter did not occur inadvertently as claimed by the Licensee. Mr Clancy put it that if those shortfalls cannot be explained by inadvertent error, there is an available inference on the balance of probabilities that the issue arose because the Licensee was intentionally using rental funds in a way other than he was entitled to. It has not been suggested that anyone other than Mr Morton-Jones could have taken or used the missing money.

[60] If we were to conclude that, then Mr Clancy put it to follow that Mr Morton-Jones is guilty of misconduct. He submits that both reasonable members of the public and agents of good standing would find such conduct disgraceful; and that there is clearly a sufficient nexus between such conduct and fitness to carry out real estate agency work, given that the conduct occurred in the context of the Licensee handling client funds as a professional property manager.

The Charge re Karen Graham

[61] Mr Clancy notes that the position with charge three (Ms Graham) is different from the first two charges, because the defendant licensee does not accept that any shortfall occurred.

[62] The Licensee claims that the cheque for \$6,509.05 that he gave Ms Graham on 25 September 2012 was for *current* rent and bond repayments subsequent to Ms Graham ending her property management agreements with the defendant's company, rather than a repayment for a previous shortfall as Ms Graham said in evidence.

[63] The prosecution submits that account (of the defendant regarding Ms Graham) should be rejected for the following reasons:

- [a] The evidence is that the payment was made after a threat by Ms Graham to involve the Police. If there had been no discussion of, or admission to, a previous failure to account for rent (as Ms Graham stated had occurred), it is difficult to see any reason for Ms Graham to refer to the Police. On the defendant's version of events, this was a standard transfer of current rent and bond money.
- [b] The bank statements of Ms Graham's company, Krystal Sky Developments Ltd, show that rent for her properties (both the Waiwera property and the Pine Valley Road property) was transferred from Rodney Real Estate Ltd by *direct credit*, not by cheque, during both August and September 2012. There are transfers dated 7 August, 16 August, 21 August, 31 August, 19 September, and 28 September 2012 which clearly refer to the properties and are plainly unrelated to the cheque.
- [c] If the cheque was for current rent and bond received by Rodney Real Estate Ltd, there would have been no reason to pay the funds by way of a cheque on the account of Alan Stuart Motors Ltd which would then require, presumably, a corresponding transfer back to that company. Mr Morton-Jones' claim that this was expedient, as he was out of Auckland at the relevant time, is not credible given the evidence from the Krystal Sky Developments Ltd bank accounts that the standard practice was for money to be transferred by direct credit and that this occurred both before and after the date of the 25 September 2012 cheque.
- [d] The prosecution submits that the documents produced by Mr Morton-Jones to us, purportedly as evidence of the payments received by Rodney Real Estate Ltd that were then passed on to Ms Graham by way of the cheque, prove no such thing. The first page of that exhibit is simply a schedule put together by the defendant and the documents attached to it, which purport to be original records supporting the schedule, are incomplete and redacted to the point of being meaningless.
- [e] Evidence adduced in cross examination by the defendant's counsel was that bond money was not held by Rodney Real Estate Ltd but was held, in the normal way, by the Department of Building and Housing. When Ms Graham cancelled her property management agreements, the bonds would therefore have likely simply remained with the Department rather

than being returned to her, by cheque or otherwise, subject to the filing of the appropriate forms registering that the agency was no longer acting.

- [f] Ms Graham was adamant and unshaken in her evidence that the said \$6,509.05 cheque was to cover an admitted previous short-payment of rent and not for current rent or bond.
- [g] The pattern alleged by Ms Graham; i.e. confronting the defendant about a failure to account, threatening to go to the Police, then receiving payment, is identical to that described by Messrs Sinclair and Poynter.

[64] Again, the prosecution submits that if we conclude that it is more likely than not that the cheque was not for current rent and bond, but was to repay a previous failure to account for rent, there is an available inference that such a shortfall must have occurred, on the balance of probabilities, due to the defendant intentionally using his client's money otherwise than as he should have.

Negligence / incompetence

[65] It is the prosecution's strong submission that the evidence supports a finding, on the balance of probabilities, that the failure to account for rent to all three clients did not occur inadvertently.

[66] However, the prosecution submits that, if we are not prepared to draw that inference, on the only other alternative Mr Morton-Jones has, nevertheless, been guilty of misconduct. It is put that if the failure to account was inadvertent, then it could only have occurred due a level of negligence or incompetence by the defendant in running his business as to demonstrate an indifference to and abuse of the responsibilities and privileges he had as a professional trusted with clients' money and as a licensee under the Act.

[67] The Committee emphasises the following factors in support of its submission:

- [a] Mishael Logan's evidence that such errors could not occur within a properly run property management company, with appropriately robust systems in place.
- [b] Mr Morton-Jones' admission that no-one but himself was responsible for any "accounting errors" and that questions about who was responsible for the actual data entry were irrelevant given his responsibilities as the principal of the company, a licensee, and a chartered accountant. He admitted that he completed the monthly reconciliations and checks personally, which was consistent with Lauren White's evidence about fortnightly financial reports being produced and left on his desk; and with Diane Leef's written statement (which Mr Morton-Jones said in evidence he had "no problem with") stating that a report of rents collected would be provided to the Licensee, who would then be responsible for payments to landlords.
- [c] The defendant's inability to satisfactorily explain what safeguards or cross-checks he had in place to guard against such errors or how such errors could have occurred if such safeguards were in place.

- [d] The fact that the "errors" affected a large number of landlord clients, occurred over a period of months, and were detected by the clients themselves, not by Mr Morton-Jones.
- [e] The fact that the defendant was not in a position to repay the clients immediately, but was required to refinance or sell assets over a period of months before his clients were reimbursed.
- [f] The trust account into which the client's money was paid was not audited, despite Mr Morton-Jones being required to have his real estate agent's trust account (used for real estate agency work) audited. It has since been clarified that the Real Estate Agents (Audit) Regulations 2009 require auditing of the trust accounts used in real estate agency work. That does not include property management work.

[68] The prosecution submits that if we conclude that the defendant licensee ran his property management business with such a degree of negligence or incompetence as to demonstrate an indifference towards, or abuse of, his privileges as a professional handling client money, it is open to us to find that agents of good standing, and reasonable members of the public, would find such conduct disgraceful.

[69] Again, it is submitted by the prosecution that there is clearly a sufficient nexus between such conduct and fitness to perform real estate agency work under the Act, given the context.

The Section 85 notice

[70] The prosecution submits that the evidence at the hearing demonstrated a sustained pattern of obfuscation and non-compliance by Mr Morton-Jones when the Committee sought relevant records from him during the investigation.

[71] In the context of an investigation by a regulator into allegations of failing to account for client funds, the prosecution submits that such a failure is extremely serious and is misconduct under s.73(a) of the Act.

It is put that the Licensee failed to provide relevant records:

- [a] At a meeting with the investigator on 4 October 2012 (despite being on notice of the meeting, and the request for records, from 18 September 2012);
- [b] Within 10 working days of the 4 October meeting, despite agreeing to do so;
- [c] In answer to an email request on 7 February 2013;
- [d] In answer to a letter dated 27 May 2013;
- [e] In answer to the s.85 notice dated 13 June 2013;
- [f] In answer to further correspondence dated 9 July 2013.

[72] The clear impression, both from the documents and from the licensee's evidence to us, is that he considered he was not obliged to respond to the Committee as it was (in his opinion) overstepping its authority given the complaints did not involve real estate agency work. Such a view was clearly wrong and it was not open to the Licensee to place his own view of his obligations above that of his statutory regulator. He was clearly advised that failing to answer a s.85 notice is an offence, carrying a maximum penalty of a fine of \$10,000. Despite this, he attempted to avoid service and declined to substantively respond to the Committee.

[73] In *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 83, the High Court made clear that a failure by a professional to comply with a lawful request made by a regulator is a serious matter. The Court said that practitioners have a duty to act in a professional, candid and straightforward way in dealing with investigating committees and that it is axiomatic that practitioners must co-operate with those tasked with dealing with complaints, even where practitioners consider the complaints are without justification.

[74] The prosecution submits that the Licensee's claim to have been unable to comply with the notice due to a computer failure should be rejected. The evidence from Mr White was that the computer which failed was the computer at the main desk of the agency, used by everyone in the office, not the "rental computer" used by Tina Louis. The failure was also to a single machine, not to the server or any backups, and the defence witnesses agreed that data was backed up at the relevant time. In any event, many of the documents listed in the s.85 notice would have been available from other sources, particularly from the company's bank.

[75] The prosecution submits it is much more likely, that the Licensee simply failed to respond, as he had done to all previous requests, because he considered the Committee to be interfering in an area he considered it had no right to interfere in.

[76] The Committee now invites us to find that the Licensee's failure to meet his obligations under the notice was wilful and disgraceful conduct under s.73(a) of the Act.

[77] The Committee also submits that the evidence establishes that Mr Morton-Jones failed to account for rents received to clients of his property management business; and that there is an available inference that, on the balance of probabilities, that this was not inadvertent and the Licensee used the money received for his own purposes.

[78] It is also put for the prosecuting Committee that even if we are not prepared to draw that inference, for such errors to have occurred inadvertently it must be the case that the Licensee ran his business with such a level of negligence or incompetence as to amount to a disgraceful abuse of his responsibilities as a professional handling other people's money.

[79] On either alternative, the Committee submits that such misconduct has a sufficient nexus to the licensee's fitness to perform real estate agency work under the Act.

The Case for the Defendant

[80] Mr Kennelly submits there is nothing in the evidence in the nature of a defalcation and that the charges are at best speculative and at worst malicious and vexatious.

[81] He submits the evidence is that there was a genuine mistake by the defendant not helped to some extent by both Messrs Sinclair and Poynter failing to pick it up from their own bank statements at the end of the months when the errors had been made.

[82] Mr Kennelly put it to be clear on the evidence that Mr Morton-Jones had commenced to sell the property management business in early 2012 and succeeded in doing so in July 2012 with settlement on 31 August 2012. It was sold to Global Properties and since then he and his company, Rodney Real Estate Ltd, have not been involved in property management.

[83] Mr Kennelly submits there is so much wrong about this prosecution that the lack of care in laying the charges and the presentation of the evidence is also a matter we must address. He had submitted there is no case to answer on Charges 1 and 2. He puts it that it has now become apparent from the file which the defendant obtained from the Real Estate Agents Authority under the Official Information Act 1982 that there were payments made to Karen Graham's bank account in the period September through until October 2012 and, on Mr Morton-Jones' evidence, as late as January 2013; this despite advice being given by her that Rodney Real Estate Ltd was no longer the property manager for her properties.

[84] Mr Kennelly adds that this position was confirmed in a letter to Karen Graham on 30 August 2012 which was on the Authority's file and in its control or possession at the time it prepared the brief of Karen Graham. He asserts that a copy of that letter was on the Authority's file despite Karen Graham denying its existence or having any knowledge of it when it was put to her under cross examination. He submits that in the same way, there is no explanation to show how her bank statements came to be in the possession of the Authority and therefore with its Committee 20005.

[85] The statement which the defendant produced to us shows funds derived in the same period in various accounts under the control of the defendant as rent and bonds due for properties owned by Karen Graham. These sums are clearly more than those paid to those accounts but Mr Kennelly put it there is a reasonable explanation as to the difference. It is put that there is no evidence of the \$2,000 to \$3000 misappropriation claimed in her brief and this is inconsistent with her complaint. She said in her complaint that she *"is reviewing her records prior to April 2012 to see if there are further funds missing."* Mr Kennelly submits that we are entitled to infer that the \$6509.05 cheque was for current monies owing from July 2012 and nothing to do with any claim for funds any earlier than that.

[86] He submits that it is clear on the evidence that the particulars in Charge 3 are not made out.

[87] Inter alia, Mr Kennelly observed that Messrs Sinclair and Poynter freely admitted that they were not in the habit of checking their bank statements each

month. He observes that, it is clear that if this had happened, then the issues that subsequently arose for both of them may have been avoided.

[88] Mr Kennelly submits that the investigator had more evidence than he was prepared to disclose; and that it was only in cross-examination did we become fully aware of the extent to which Mr Gallacher had taken it upon himself to provide information to us but, in doing so, made it very difficult for the defendant.

[89] Mr Kennelly submits there is no evidence that anyone lost any money from the defendant's conduct. He puts it that Mrs Graham's allegations were without any proper foundation, evidential or otherwise; that she made a quite calculated allegation of having had money "*stolen*" from her of a sum between \$2000 and \$3000, but no evidence was produced to support that allegation.

[90] He adds that it is also clear that, at material times, the investigator had in his file copies of bank statements which related to the period August through October 2012 showing payments being made regularly by Rodney Real Estate Ltd into accounts under the control of Karen Graham.

[91] Mr Kennelly submits that Mr Morton-Jones has clarified matters in relation to the payment of \$6,509.05 and that payment of itself from an account of which he had control is of no real consequence. It is accepted that Mr Morton-Jones was running a real estate agency and a used car sales yard alongside his property management business. He was required to make a payment to Mrs Graham by a certain time and he did so. It is also put that the fact that he used another cheque account is clear evidence that was the only cheque account in his control and there is nothing more sinister that can be taken from it. It is submitted that the fact that the charge was laid with particulars that allege the defendant was using the landlord's money for his own purposes is not founded on a simple cheque drawn on another account; and, as Mrs Graham was the landlord and had cancelled the agency to manage her properties, it was entirely appropriate for bond monies for new tenancies to be sent to her to deposit with the appropriate agency; and there is nothing sinister or inappropriate in that conduct by the defendant.

[92] Mr Kennelly also submits there is no evidence before us that Mr Morton-Jones used the monies for his own purposes. It is his evidence that the bank accounts balanced and there were errors of payments to other landlords of monies they clearly were not entitled to. It is put that the fact that the defendant was able to reimburse those funds and to put the parties right is at odds with the nature of the charges.

[93] Mr Kennelly put it to be clear on the evidence of Mr Poynter that he accepted the payment which was agreed between him and Mr Morton-Jones on the basis the two of them having sat down and worked through a fair and reasonable process, i.e. they took into account amounts paid for maintenance and other related outgoings properly made by the property management company.

[94] Mr Morton-Jones has accepted that he did not exercise proper supervision and control as he had a number of people working for him in the property management business. He accepts that some of them had difficulty. Mr Kennelly submits that there is no evidence that any of the landlords' monies were applied in any other manner other than as he has suggested. It is put that the fact that the prosecution has relied upon circumstantial evidence and attempted to draw an inference from that

is insufficient, on the balance of probabilities, to prove the charges which have been laid against him.

[95] Mr Kennelly submits that charges 1 to 3 should be dismissed as there is no proper foundation for us to be required to discipline Mr Morton-Jones on those matters.

[96] Mr Kennelly then turned to charge 4 for failing to comply with the s.85 notice. He puts it that the Authority's investigator had a lot of information already as was confirmed by the handwritten memorandum presented to us.

[97] Mr Kennelly submits that the defendant quite rightly took the view that property management work was not "*real estate real estate agency*" work as defined in the Act. He puts it that the defendant was not given any written advice that the complaints fell within the definition of misconduct under s.73 until the charges were laid in March 2014. Mr Kennelly adds that against this is the damage that has already been done to the defendant's reputation and remains because the charges laid and published are plainly wrong and make him out to still owe money when that is not true.

Discussion

[98] Section 73 of the Act provides:

"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."*

[99] The Tribunal considered the ambit of the term disgraceful, as used in s.73, in *CAC v Downtown Apartments Limited* [2010] NZREADT 06. The prosecution submits that, for present purposes, we must find on the balance of probabilities that the conduct of the defendant represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public.

[100] Section 73(a) allows us to assess whether conduct is disgraceful, both by reference to reasonable members of the public, but also by reference to the standards of agents of good standing. The section allows for disciplinary findings to be made in respect of conduct which, while not directly involving real estate agency

work, nevertheless has the capacity to bring the industry into disrepute and which, for that reason, agents of good standing would consider to be disgraceful.

[101] Mr Clancy submitted that, on the evidence, there are really only two explanations for what occurred in respect of the rental shortfalls:

- [a] Either Mr Morton-Jones was intentionally using rental money properly payable to landlord clients for his own purposes; or,
- [b] Mr Morton-Jones ran his business in such a negligent or incompetent manner as to demonstrate indifference for, and an abuse of, the privileges that accompany holding a licence under the Act.

[102] Mr Clancy submits that the evidence establishes that Mr Morton-Jones failed to account for rents received to clients of his property management business; and that there is an available inference that, on the balance of probabilities, this was not inadvertent and he used the money received for his own purposes.

[103] It is put that even if we are not prepared to draw that inference, for such errors to have occurred inadvertently, it must be the case that the defendant ran his property management business with such a level of negligence or incompetence as to amount to a disgraceful abuse of his responsibilities as a professional handling other people's money.

[104] The prosecution submits that, on either alternative, such misconduct has a sufficient nexus to the defendant's fitness to perform real estate agency work under the Act.

[105] In particular, the prosecution submits that the defendant's misconduct in failing to account for client money was seriously compounded by his wilful failure to comply with the Committee's requests for relevant records, particularly under the s.85 notice.

[106] Accordingly, the prosecution invites us to make a finding of misconduct against the defendant licensee, under s.73(a) of the Act. The onus of proof rests with the prosecution. Under the Act, the standard of proof is the balance of probability. Broadly, we agree with the submissions for the prosecution and find them supported by the evidence on the balance of probability.

[107] To deal with charge 4 first, we have no hesitation in finding it proved for the reasons covered by Mr Clancy in his submissions as we have summarised them above under the heading "*The Section 85 Notice*". We feel that the defendant was high handed, stubborn, and disrespectful in his dealings with the Committee in terms of s.85 of the Act which reads as follows:

"85 Powers to call for information or documents

(1) If the conditions stated in subsection (2) are satisfied, a Committee may, by notice in writing, require any person to produce to the Committee any papers, documents, records, or things.

(2) The conditions referred to in subsection (1) are that—

- (a) *the members of the Committee believe, on reasonable grounds, that the exercise of the powers conferred by that subsection is necessary to enable the Committee to carry out its inquiry; and*
- (b) *the person to whom a notice under that subsection is to be given has failed to comply with a previous request to produce to the Committee, within a reasonable time, the papers, documents, records, or things required by the notice; and*
- (c) *the members of the Committee believe, on reasonable grounds, that—*
 - (i) *it is not reasonably practicable to obtain the information required by the Committee from another source; or*
 - (ii) *for the purposes of the investigation, it is necessary to obtain the papers, documents, records, or things to verify or refute information obtained from another source.”*

[108] We consider that failure to comply with the normal application procedures from the Committee in terms of s.85 is a very serious failure on the part of a licensee and is misconduct under s.73(a) of the Act set out above.

[109] We find the submission of counsel for the defendant that these proceedings are in some way speculative at best, and malicious and vexatious at worst, to be puzzling. The evidence is clear that the defendant, in terms of the three specific charges covered in some detail above, failed to pass on net rental proceeds he had collected for the complainants until they spotted the failures, confronted him, and needed to threaten to refer the issues to the Police.

[110] It is irrelevant whether, as the defendant seemed to be saying, Messrs Sinclair and Poynter were slow to note from their Bank statements that these errors had occurred. We can accept that at material times the defendant experienced some computer trouble but the errors in question had already arisen and it is likely were known to the defendant. In any case, those errors were due to his rather inefficient method of operating his property management business. That is particularly curious when he is also a chartered accountant. Also, he was far too slow to put matters right.

[111] There is no convincing evidence that, as the defendant maintains, payments were made in error to other customers of the defendant's property management business rather than to the complainants. They simply were not made over material times and seemed to be used by the defendant in his various businesses.

[112] In terms of his appearance before us, we consider that the defendant has an attitudinal problem towards complying with his duties as a licensee under the Act.

[113] The submissions of counsel for the defendant that there has been some sort of failure on the part of the Committee and this prosecution regarding laying of charges and presentation of evidence is concerning because it is so unfounded. We consider that the witnesses for the prosecution are all people of integrity and we accept their evidence; but we find that much of the evidence for the defendant is not credible and overall is unconvincing. We much prefer the evidence for the prosecution.

[114] Having said that, we do not find anything particularly sinister in that the payment of \$6,509.05 to Mrs Graham came from the defendant's used car sales business.

[115] In terms of the defendant seeming to wish to blame his staff at material times, we find that he had taken on personal responsibility for the proper functioning of his property management business and was well aware of its financial position at all material times and of its accounting detail, including its bank accounts and its liabilities to its customers month by month.

[116] We have endeavoured to make it clear above that, of course, we accept that the defendant is correct in the view that his property management work is not real estate agency work in terms of the Act. However, the saga we have covered above over the defendant's failures to properly and honestly manage his property management business shows that his fitness to perform real estate agency work under the Act is questionable. In other words, there is a strong nexus between the conduct with which the defendant has been charged and his suitability to continue as a licensee. The complaints against him cannot be simply dismissed as the defence would have it, on the basis that real estate agency work is not involved.

[117] As explained above, we find all four charges proved against the defendant. Accordingly, we direct the Registrar to initiate procedures towards a hearing on penalty. In the usual way those procedures can be commenced by a telephone conference call between both counsel and our Chairman. It is for the parties to indicate whether their preference is that there be a series of written submissions on penalty or a full hearing as is usually the case.

[118] 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 J Gaukrodger
Member

Ms N Dangen
Member