BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 61

READT 023/14

IN THE MATTER OF	charges laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE (CAC 20004)**
	Prosecutor
AND	**JOHN WHISKER**
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms C Sandelin - Member

HEARD at AUCKLAND on 20 July 2015

DATE OF THIS DECISION 18 August 2015

COUNSEL

Mr M J Hodge for the prosecuting Authority
Mr D Bigio for the defendant licensee

DECISION OF THE TRIBUNAL

Introduction

[1] An agent facing closure of his real estate sales business was about 12 days too slow in actually closing down. Although, upon closing down, he immediately transferred money held for prospective vendor customers (to be spent on advertising their respective properties as for sale) to his accountant's trust account, he had created a relatively small shortfall which he was slow to repay. He is charged with misconduct or, in the alternative, with unsatisfactory conduct.

The Charges In Full

[2] The charges against the defendant (as amended on 23 February 2015) read:

> *"Following a complaint by Christopher Harding, Complaints Assessment Committee 20004 (Committee) charges John Whisker (defendant) as follows:*

Charge 1

The Committee charges the defendant with misconduct under s.73(a) of the Real Estate Agents Act 2008 (Act) in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars:

1. *The defendant was a licensed salesperson, principle officer and sole director of GVA Project Control Group New Zealand Ltd (agency).*

2. *The defendant was signatory to two bank accounts operated by the agency:*

   a) *03 0255 0732411-00 – general trading account (general trading account); and*

   b) *03 255 0732411-01 – used for specific payments, i.e. vendor paid advertising, and considered by the defendant to be an advertising account (advertising account).*

3. *Despite liquidation of the agency being a possibility, Christopher Harding (complainant), on behalf of the agency, collected approximately $20,000 in vendor paid advertising, from a number of vendor clients in late September – early October 2012, for a promotional advertising campaign that was to begin on 13 October 2012 (vendor advertising funds). $6,378.16 of the vendor advertising funds was paid in by a client by the name of Jonathan Polglase.*

4. *The defendant held the vendor advertising funds separate from trading funds in the advertising account, on behalf of vendors, to be used for the purpose of the upcoming vendor advertising campaign. In doing so, the defendant held the vendor advertising funds on trust for the vendors.*

5. *The advertising campaign was not run as liquidation of the agency was contemplated in early October 2012. The agency went into liquidation in November 2012.*

6. *On 28 September 2012, with only $67.07 in his general trading account (00), the defendant decided to change the use of the advertising account to that of a general trading account. The defendant then began using the vendor paid advertising funds as part of trading funds to pay for general expenses.*

7. *As a consequence of the defendant's decision to begin using the advertising account for general expenses, the vendor advertising funds were reduced.*

8. *Foreseeing that liquidation was likely, the defendant decided to return the vendor advertising funds and halt company operations.*

9. *The defendant 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.*

10. The defendant did not repay Mr Polglase the full $6,378.16 paid by Mr Polglase to the agency for advertising costs until 24 March 2014.

Charge two:

The Committee charges the defendant with misconduct under s.73(b) of the Act in that his conduct, in dealing with funds paid by vendor clients for advertising costs, was seriously incompetent or seriously negligent.

Particulars:

The Committee repeats the particulars 1 – 10 above.

In the alternative:

If the Tribunal, after hearing the charges above, is not satisfied that the defendant is guilty of misconduct, the Committee further alleges that the defendant has engaged in unsatisfactory conduct and seeks a finding under s.110(4) of the Act."

[3] There is no real dispute that we have four options in that we can find:

[a] There was nothing blameworthy in the defendant's conduct at material times; or

[b] Charge 1 is proved or not proved; and/or

[c] Whether or not charge 1 has been proved, charge 2 has been or has not been;

[d] In the event that neither of the charges have been proved we may find unsatisfactory conduct on the part of the defendant.

Factual Background

[4] There is no real dispute about the facts material to these charges.

[5] The defendant was signatory on two bank accounts operated by GA Project Control Group New Zealand Limited ("the agency"), namely, 03 0255 0732411-00 – used as general trading account (general training account); and 03 0255 0732411-01 – used for specific payments, i.e. vendor paid advertising, and considered by the defendant to be an advertising account (advertising account).

[6] The agency did not operate a trust account and, under the Act, was not required to for holding advertising funds. However, the agency kept such funds separate from its general trading account by holding them in its advertising account.

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

[8] At the time the funds were received, the defendant had concerns about the financial viability of the agency and the possibility of insolvency.

[9] The first payment of the said advertising funds was $1,230.50 received on 24 September 2012, from Nick Ward. Further advertising funds were then paid in to the agency's advertising account as follows:

Vendor client	Amount paid to advertising 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

[10] Accordingly, the defendant received a total of $21,244.82 in vendor paid advertising over late September/early October 2012, for the proposed advertising campaign of the said five properties.

[11] On 28 September 2012, with only $67.07 in his general trading account (the above 00 account), the defendant decided to change the use of the advertising account to that of a general trading account and, from 28 September 2012 to 9 October 2012, the following general expenses were paid out of that account:

	Amount	Date
Cash	$300.00	28/09/12
The Poi Room (New Zealand art and design shop)	$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
Wilson Parking	$7.00	05/10/12
Gloria Jeans Coffee	$6.50	08/10/12
Albert Park Café	$18.30	09/10/12
Auckland Engineering	$45.52	09/10/12
The Bread Winner	$6.70	10/10/12
Starbucks Westgate	$8.40	10/10/12
Gloria Jeans Coffee	$14.80	11/10/12
Gloria Jeans Coffee	$14.80	11/10/12

[12] As a consequence of the defendant's decision to begin using the advertising account for general and other expenses, the vendor advertising funds for the advertising campaign were reduced.

[13] On 10 October 2012, knowing of the agency's financial problems, the defendant transferred $19,600.00 from the advertising account to his accountant's (Mr Bright) trust account. This left $165.19 left in that account.

[14] The agency ceased trading in the week following and has since been liquidated.

[15] The defendant then (on 10 October 2012) instructed Mr Bright to reimburse the said vendor clients from those funds. However, the amount transferred to Mr Bright ($19,600) was not sufficient to meet the total amount owed to the vendor clients, there being a shortfall of $1644.82.

[16] The defendant has now repaid the balance (or said shortfall) of the vendor paid advertising funds. However, Mr Polglase was not repaid a final amount of $1,643.82 until 24 March 2014.

The Defendant's Explanation

[17] The facts as set out above are largely not disputed by the defendant. He accepts he collected $21,244.82 in vendor paid advertising funds and that, as a general practice, he operated two accounts, a *"trading account"* and a separate *"advertising account"* in which the advertising funds were held. He accepts that he transferred the balance of these funds to Mr Bright's trust account on 10 October 2012 while he considered the future of the agency.

[18] The prosecution put it that the issue for our determination is whether the defendant's conduct amounted to misconduct under the Act by collecting advertising funds when the viability of the agency was in doubt, putting them in a separate dedicated advertising account, and then deciding to use part of those funds for other purposes when there were no funds remaining in the general trading account.

A Summary of Further Material Evidence Adduced to Us

The Evidence of Mr C J Harding for the Prosecution

[19] Mr C J Harding is a real estate agent who, at material times, was engaged by the agency (i.e. the defendant's said company (G V A Project Control NZ Ltd)) as a commercial and industrial real estate agent. The defendant was the sole director and shareholder of that agency company.

[20] Mr Harding said that, shortly after joining the agency, he obtained approximately $20,000 in vendor paid advertising for four clients and one of those was a Mr J Polglase whose brief has been admitted by consent. The advertising campaign was to begin on 13 October 2012 and the funds were received into the real estate company by direct credit from the clients. All matters of bank accounts and funds were handled by the defendant alone.

[21] Mr Harding said that on 9 October 2012 the defendant informed him that his company was most likely going into voluntary liquidation and was *"shutting its doors"*. As a result the planned advertising campaign did not occur and no real-estate-agency work went ahead for any of those clients.

[22] Mr Harding said that he advised the defendant that the vendor-advertising money which had been received should be repaid to the respective clients and that bank cheques should be made out to them promptly. Mr Harding said that the defendant responded that Mr Harding's suggestion was against advice the defendant had received, that the money was safe and in a separate account and was being transferred to his accountant's trust account, and would be disbursed back to the vendors from there.

[23] Accordingly, Mr Harding emailed all the prospective vendors, including Mr Polglase, to inform them of that and that they would be refunded as soon as the defendant's accountant obtained their bank account details. Mr Harding then ascertained that the accountant was overseas for two months. However, a week later the defendant informed him that all the clients' advertising money had been repaid; but Mr Harding soon discovered that it had not been fully repaid. He ascertained that on 17 October 2012 one client received $5,000, when he was owed about $5,750, and the other prospective vendor clients had received nothing. He therefore challenged the defendant about this, he said, and the defendant explained that his accountant could only transfer $5,000 a day from his trust account so that the other repayments would take some time to be paid out for that reason.

[24] Mr Harding further deposes that, after a while, the defendant took up employment in Auckland with another real estate company and because, as at late October 2012, the prospective vendors had not been repaid he, Mr Harding, lodged a complaint against the defendant with the Real Estate Agents Authority. It seemed to concern him that, at that point, the defendant was still operating as a real estate agent.

[25] Mr Harding continued that by November 2012 Mr Polglase had only been paid $4,378.16 when he should have received $6,378.16; so that Mr Harding passed his concerns on to the Authority.

[26] Mr Harding was carefully cross-examined by Mr Bigio. It was put to him that the defendant would say that his decision to close the business followed the defendant's discussion and advice received from Mr Harding about the likely chances of the proposed advertising campaign being successful. Mr Harding accepted that; except that he did not think he gave a percentage likelihood of success to the defendant, although he had mentioned to the defendant that the vendors were all motivated to sell. Mr Harding added that he understood the defendant's problem to be that the company brand his agency operated under was owned by an Australian company which was more interested in project management than real estate agency work. Accordingly, at material times, the defendant had been seeking another brand to operate under.

[27] It was also put to Mr Harding by Mr Bigio that Mr Harding had laid a complaint about a week after the agency closed its doors and when, a day or two before Mr Harding lodged his complaint to the Authority, the defendant had commenced repaying the various prospective vendors. Mr Harding concurred.

The Evidence of Mr J M Polglase for the Prosecution

[28] Mr Polglase's brief was adduced by consent as one of the prospective vendors (in the name of his company The Mill Industrial Park Ltd).

[29] Mr Polglase said he dealt specifically with Mr Harding and paid the defendant's company $6,378.16 to be applied towards advertising and promoting the sale of a property. He said that by 24 October 2012 he had received back $4,378.16 but was still owed about $2,000. He said then there began an exchange of emails between the

defendant and himself over about six months and that the defendant made excuses for not repaying the balance of the money and kept making promises to pay, but did not keep his word.

[30] Accordingly, Mr Polglase felt that the defendant had misappropriated that money and gave serious thought to referring the matter to the Police or suing the defendant or his company through the Courts, but he did not take any immediate action. He said that one of the many excuses he received from the defendant was that the money was still in the trust account of the defendant's accountant and he could not locate his accountant, but he would not disclose to Mr Polglase whom the accountant was so that Mr Polglase could have contacted that accountant.

[31] Mr Polglase stated that in about the middle of 2013 he unexpectedly received $356.18 from the defendant but was then still owed $1,643.82 which he received early in 2014.

[32] Mr Polglase's evidence concluded with the following two paragraphs:

> *"1.12 On the 24th July 2014 I received an unsolicited call from John Whisker asking to meet so he could explain and apologise for what happened. This meeting took place on the 28th July 2014. On the phone and at the meeting John Whisker stated that the only reason we were repaid was because he had taken the money and put it into his accountant's trust account to keep it safe. He clearly stated that the company had not gone into liquidation and in hindsight he should have liquidated the company instead of trying to help. He claimed his actions saved the money for the clients, whereas the liquidation would have failed to return any funds to us.*
>
> *1.13 Having reviewed this statement today and checked the companies office I am reminded that the company did go into liquidation. I find that contrary to the statements and message that John was conveying on the call and at our meeting although I did not raise this with him directly as I did not have the facts with me and wanted to give him the benefit of the doubt."*

The Evidence of Mr C J Bright for the Prosecution

[33] Also adduced by consent was a brief from Mr Bright, the accountant for the defendant and his company as referred to above.

[34] Mr Bright stated that on 10 October 2012 the defendant transferred into his trust account the sum of $19,600 and told Mr Bright that those monies were prepaid advertising monies from a number of clients and, as the future of the defendant's company was uncertain he, the defendant, wanted the money protected before returning it to the clients.

[35] Mr Bright said that, a week later on 17 October 2012, the defendant contacted him again to provide details for the return of the monies to the various clients but it was not possible to pay all the clients immediately because he (Mr Bright) was restricted by a condition of the trust account, which only allowed a maximum withdrawal of $5,000 per day. He said that he had not recalled that condition until commencing to transfer monies as, generally, all transactions from his trust account are for less than $5,000 per day. He said he returned $4,378.16 to Mr Polglase on 24 October 2012 but noted that Mr Polglase was then still owed a further $2,000.

[36] Mr Bright concluded his evidence as follows:

> *"1.9 On providing details for the repayment of the monies, it became clear that not all the money collected from those clients had been sent through to my trust account. I do not know the reason for this, I just followed Jon Whisker's instructions at the time and didn't question what he was doing. He advised he would arrange to transfer the extra funds required as soon as he was able.*
>
> *1.10 When I was first contacted about this matter by an investigator from the REAA in May 2013, there was $356.18 remaining in the account – shortly after that on 20th May 2013 I was instructed by Jon Whisker to pay that money to Jonathan Polglase, which I did.*
>
> *1.11 Jon Whisker transferred the sum of $1,645.00 to my trading account on 21st March 2014 and the balance of $1,643.82 was repaid from there to Johnathan Polglase on 24th March 2014.*
>
> *1.12 I do not know why Jon Whisker did not immediately pay the advertising money back to the company's clients, rather than lodging it in my trust account ..."*

The Evidence of Ms C Gerrard for the Prosecution

[37] Also adduced to us by consent was a brief from Ms C Gerrard as the investigator for the Authority in this case. She recorded that Mr Harding had made a complaint to the Authority about the said actions of the defendant on 18 October 2012. Also, she exhibited the various documents in the agreed bundle of documents. She confirmed that, at all material times, the defendant held a licence as an agent under the Act and worked for the said GVA Project Control NZ Ltd.

The Evidence of the Defendant

[38] The defendant said that he had wanted to bring to New Zealand a globally established real estate brand which was not already here, and that is why he became involved with an Australian company called "Project Control Group". He opened his New Zealand company under that brand in late June 2011, and the company was involved in fit-out of commercial premises work as well as endeavouring to be a real estate agent.

[39] In late August 2011 the defendant had planned to marry in Croatia so he appointed a head contractor for his company and liaised with staff during his absence on what was supposed to be a fairly quick trip. However, on the day after his wedding, he and his wife were involved in a very serious accident near Dubrovnik and were hospitalised in Croatia for a week and then further hospitalised in Germany and elsewhere and underwent a number of operations.

[40] On returning to New Zealand eventually, the defendant became very ill and was hospitalised in Auckland for a further two weeks. He then ascertained that his company's effort to become involved in traditional real estate activities was not working well and he detailed that and his remedial efforts.

[41] The defendant said that all that led to him hiring the said Mr Harding on 16 July 2012 and he covered background rather similar to that adduced by Mr Harding. He said that approximately two weeks prior to the launch of the proposed advertising campaign for five properties (with four vendors), he asked Mr Harding what was the likelihood of these

campaigns being successful. He said Mr Harding replied that there was a 50% chance that just one of the five properties would result in a sale. Accordingly, the defendant made the decision to refund the advertising money and halt company operations. He transferred the money in the company's trading account to his accountant for the accountant to disburse funds from there.

[42] He maintains that his only interest then was to try and ensure that those advertising funds were refunded in full to the people who had paid them to the agency company. He insists that, at the time, he believed that it was absolutely the right and morally correct thing for him to do i.e. to fully protect those advertising monies.

[43] The defendant said all this came to a head in early October 2012 and he recalls that he told Mr Harding of his intention to close the doors on about 9 October 2012. He said he paid *"what monies I could out of the company's trading account"* into the accountant's trust account on about 10 October 2012 and that he then made arrangements for the accountant to start refunding the prospective vendors, but was slowed by the accountant only being able to transfer a maximum of $5,000 per day. He said that the final two payments to Mr Polglase were made by him (the defendant) as monies became available to him and that, in the meantime, he had been required to personally repay $18,841.44 to the landlord of his company's premises.

[44] The defendant stated that, since those events, he has been working as a commercial real estate salesman with another Auckland company, a franchisee of Harcourts, and he enjoys that work and will never step back into the role of a business owner. He is aged 59 years and feels he is achieving increasing success as a commercial real estate salesperson.

[45] The defendant was carefully and thoroughly cross-examined by Mr Hodge with reference to a number of financial exhibits.

[46] Mr Hodge brought out that, at material times, the defendant's financial position was not robust and had been weakened by his sojourn in hospital and experience of ill health referred to above, and that he needed to have his new wife inject funds into his business which she did to quite some extent.

[47] Also, the defendant's business had no particular work on hand as at September 2012, other than the prospect of selling the properties for the said four vendors who were clients obtained by Mr Harding, so that the defendant and his wife (in particular) paid money into the business to keep it going.

[48] Mr Hodge drew out that the time came when the defendant felt unable to seek more money from his wife and that he had commenced using the bank account of his business for routine and living expenditure without realising that he would soon need to close the business. He said that from about 28 September 2012 he, in effect, had recourse to the advertising funds for some day to day expenses without realising that was happening and that further funds would not be injected into the business by his wife. That situation simply developed rather than flowed from a conscious decision of the defendant because, by 28 September 2012, the only money in the company's business account was that received from the four prospective vendors towards an advertising project for the sale of their properties.

[49] It seems that sometime after 28 September 2012 the defendant's wife decided *"enough was enough"* in terms of her providing funds to keep the real estate business functioning. That meant that the defendant could not make up a deficiency which had been

accumulating in the advertising funds and it was not until 9 October 2012 that the reality of needing to close down the business became clear to the defendant.

[50] The defendant again emphasised that he feels he did the right thing in transferring all funds of the business, as at 10 October 2012, to the trust account of his accountant but accepts that over the 12 day period from 28 September 2012 until then, he was using funds provided by the prospective vendors.

Misconduct – Principles

Charge 1: Disgraceful conduct

[51] We considered the ambit of the term *"disgraceful"*, as used in s.73, in *CAC v Downtown Apartments Limited* [2010] NZREADT 06 and stated:

> *"[55] The word disgraceful is in no sense a term of art. In accordance with the usual rules it is given its natural and popular meaning in the ordinary sense of the word. But s.73(a) qualifies the ordinary meaning by reference to the reasonable regard of agents of good standing or reasonable members of the public.*
>
> *[56] The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess. See Blake v The PCC [1997] 1 NZLR 71.*
>
> *[57] The "reasonable person" is a legal fiction of common law representing an objective standard against which individual conduct can be measured but under s.73(a) that reasonable person is qualified to be an agent of good standing or a member of the public.*
>
> *[58] So while the reasonable person is a mythical ideal person, the Tribunal can consider, inter alia, the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the ... defendant.*
>
> *[59] So, in summary, the Tribunal must find on a 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.*

[52] It is well established that s.73(a) of the Act allows us to assess whether conduct is disgraceful both by reference to reasonable members of the public or agents of good standing. It encompasses conduct from deliberate dishonesty through to such serious negligence as to amount to indifference and an abuse of privilege of being a licensee.

Charge 2: Serious negligence/incompetence

[53] Charge 2 is a charge of seriously negligent or seriously incompetent real estate agency work, which amounts to misconduct under s.73(b) of the Act.

[54] Merely negligent or incompetent real estate agency work is unsatisfactory conduct under s.72(c) (alternative to charge 2).

[55] The High Court has addressed the test for serious negligence as follows in *CAC v Jhagroo* [2014] NZHC 2077 (per Thomas J):

> *"[49] The words of s 73(b) must be given their plain meaning. Whether serious negligence or serious incompetence has occurred is a question to be assessed in the circumstances of each case ... the Tribunal is well placed to draw a line between what constitutes serious negligence or incompetence, or mere negligence or incompetence, the Tribunal having considerable expertise and being able to draw on significant experience in dealing with complaints under the Act."*

[56] In reaching that conclusion, her Honour agreed with the approach of Woodhouse J in *Wyatt v REAA* [2012] NZHC 2550 where he commented as follows on the correct interpretation of s.72 (unsatisfactory conduct):

> *"... the words in s 72 should not, in my judgment, be over-refined by treating the words in s 72 on the basis that they have some technical meaning or by seeking synonyms for words which have natural meanings."*

[57] Thomas J also referred to comments of the High Court in *Brown v REAA* [2013] NZHC 3309, where the Court observed that:

> *"... the types of misconduct specified in s 73 are qualitatively different. One would not expect an identical legal threshold to apply to all. Conduct which a reasonable member of the public would regard as disgraceful would obviously be qualitatively different from serious incompetence or wilful contravention of the Act."*

[58] It is put for the prosecution that this Tribunal, as a specialist body with expertise in real estate matters, is well placed to draw the line between negligence/incompetence and serious negligence/incompetence in all the circumstances of the particular case.

[59] Under the Act, an error of judgment or carelessness breaching acceptable standards will generally be unsatisfactory conduct under s.72(c). Serious negligence or incompetence, amounting to a serious departure from acceptable standards, is misconduct under s.73(b).

Submissions for the Prosecution

[60] Mr Hodge puts it that the starting point in this case must be that the defendant collected $21,244.82 in vendor-paid advertising funds for an upcoming advertising campaign, despite his concerns about the viability of the agency. These funds were paid in by vendor clients who were entitled to expect that those funds would be used for the purpose of their advertising campaign.

[61] The prosecution accepts that there is no requirement under the Act for a licensee to hold advertising money in the agency's trust account. However, as a general practice, the defendant operated two accounts, namely, a *"trading account"* and a separate *"advertising account"* where the advertising funds were held. No other type of funds were held in the advertising account.

[62] The prosecution submits that, given the defendant's practice and decision to hold vendor advertising funds in a separate account to be used only for the purpose of vendor advertising campaigns, and the reasonable expectation of vendor clients that the money paid in was to be used for that purpose, the defendant held these funds in a constructive trust for his vendor clients.

[63] Mr Hodge submits that constructive trusts are remedial and arise by operation of law and not by the express or implied intention of the parties. The prosecution acknowledges

there is ongoing common law debate about constructive trusts. It also accepts that the term *"constructive trusts"* appears to cover a number of situation categories, including the two most common, namely, *"institutional"* and *"remedial"* constructive trusts. However, the prosecution does not consider that this distinction is relevant in determining whether the defendant's conduct amounts to misconduct. Mr Hodge puts it that constructive trusts share the intuitional features of other trusts, in that they have subject-matter, trustees, a beneficiary (or beneficiaries), and personal obligations relating to the property. While orthodox constructive trusts arise in somewhat disparate circumstances, the common factor appears to be (refer Jessica Palmer *"Constructive Trusts"* in Andrew Butler (ed) Equity and Trusts in New Zealand (2nd ed, Thomson Reuters, Wellington, 2009) at 338):

> *"The unconscionability of the defendant in denying the plaintiff an equitable interest in the relevant property because of a previous understanding, whether subjectively agreed upon between the parties or more common deemed by the law to have been appropriate in the circumstances. It is the element of consent or intention (or lack of either of these, as the case may be) that triggers the institutional constructive trust which arises to reverse the defendant's unconscionability."*

[64] Mr Hodge submits that, at the very least, it is arguable that a constructive trust arose in the circumstances of this case and that the defendant failed to take advice on his position makes the defendant's conduct disgraceful. Rather, he simply began using the vendor-paid advertising funds for general and other expenses before eventually transferring the remainder to Mr Bright's trust account. It is submitted that, in doing so, the defendant was unjustly enriched at the expense of the vendor clients, and Mr Polglase in particular.

[65] The prosecution submits that, irrespective of whether the advertising funds were held in a constructive trust, the defendant was guilty of misconduct in making the decision to switch the use of the dedicated advertising account to a general trading account at a time when he knew the agency was in financial difficulty, and then using the funds for expenses such as art and/or jewellery or homewares from the Poi Room. It is submitted that agents of good standing or reasonable members of the public would consider this to be disgraceful.

The Stance for the Defendant

[66] Mr Bigio submits that once the defendant's actions are considered in their full context, there is no basis for a finding of either disgraceful conduct or serious negligence/incompetence.

[67] With regard to the prosecution's reference to *CAC v Downtown Apartments Ltd*, he seemed to accept that *"disgraceful"* should be given its natural and ordinary meaning but put it that, in terms of *REAA v Brankin* [2013] NZREADT 32, we should, as we did then, rely on the concise Oxford dictionary (11th ed) definition of *"disgraceful"* as *"shockingly unacceptable"*. He submits that more than a mere error in judgement or carelessness is required for charges based on s.73 of the Act to be proved.

[68] In terms of the factual context of the offending, Mr Bigio referred to the company's trading position becoming difficult and that its receipt of the advertising monies into its advertising account was made during a time when the defendant was considering whether his business should continue to trade; and that included whether he (in effect, his wife) should continue to fund the business.

[69] Mr Bigio put it that it was open for the defendant (or his company) to carry on and await the outcome of the marketing programme for the said properties which would have yielded commission income to the company if the campaign was successful. Mr Bigio also put it that if the marketing programme had continued and been unsuccessful, then the advertising monies would have been lost without the company or the defendant being responsible. He puts it that, nevertheless, the defendant took the prudent step of asking Mr Harding to give his assessment of the likelihood of the marketing endeavours being successful and, in the light of Mr Harding's views, the defendant decided he was not prepared to risk the funds of those clients by proceeding in business; and he then immediately moved to protect those funds by transferring whatever funds were in the company's account to the trust account of the accountant with a direction for the accountant to reimburse to clients systematically.

[70] That meant that of the $21,244.82 received from the four prospective vendors, $19,600 was *"captured and repaid promptly"* as Mr Bigio put it.

[71] Mr Bigio submits that the defendant's actions were not disgraceful nor seriously negligent or incompetent. He conceded, with hindsight, that one might challenge whether the defendant acted soon enough to cease trading but that hesitation lasted for about 12 days rather than weeks or months. Mr Bigio seemed to concede that, also with hindsight, the defendant made an error of judgement but not to the extent of being disgraceful or seriously negligent.

Discussion

[72] There is no real factual dispute in this case and the substance of the evidence we summarised above is unchallenged.

[73] The advertising funds had initially been kept separate. There has been quite some interesting argument from Mr Hodge, as counsel for the Authority, that on the particular facts of this case a constructive trust arose with those advertising funds but, on 28 September 2012, the defendant licensee commenced using those advertising or, perhaps, trust funds as if they were general trading funds or circulating capital of his business. That position continued for about 12 days from 28 September 2012 until 10 October 2012 when the licensee faced up to reality and closed down the real estate sales business. There is no dispute that his company was then in financial difficulty and, realistically, had been for a few months previously.

[74] We accept that the defendant could not have been expected to know that there seems to have been a constructive trust attaching to those advertising monies in terms of the particular facts of this case. However, we do not need to deal with that constructive trust concept here because we think it best to deal with the charge on the basis of the conduct of the defendant at material times as adduced to us in evidence. The need for *"trust"* from an agent to the client and the public is reflected in ss.72 and 73 and various of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.

[75] Inter alia, Mr Hodge emphasised that when the defendant's company ran out of money with regard to operating requirements on 28 September 2012, the defendant chose to use the advertising funds and did not take advice about his quandary at that point, However, 12 days later he discussed matters with Mr Harding and, presumably, with his accountant Mr Bright and took the very sensible step of then transferring all available funds to the trust account of his accountant in order to protect the four clients we have referred to above.

[76] Nevertheless, Mr Hodge submits that we could well find the defendant's conduct in accessing those trust monies over the said 12 day period to be disgraceful or seriously negligent conduct by a licensee. He put it that we could interpret such conduct as showing a lack of care and thought against a background of the business prospects being grim at all material times.

[77] As Mr Bigio pointed out, the defendant's company was trading and seeking to operate as a profitable business but, as covered above, its trading position became difficult and it had been for a matter of weeks if not months supported by advances from the defendant and, more particularly, from his wife as well. The point came when the defendant was unable to expect his wife to continue funding the business. We find that he was 12 days late in facing the reality that his business enterprise had failed. We take into account that eventually all these monies were repaid.

[78] As we understand it, the first contribution for the advertising monies was received by the defendant's company in late September 2012 with the remaining advertising monies being paid into his company's advertising account over 2 and 9 October 2012; so that the decision to close was made very soon upon final advertising monies coming to hand.

[79] As Mr Bigio emphasises, the payment of these monies into the company's account used for advertising monies was made during a period when the defendant was considering whether the company should continue to trade and against the background of he and his wife having been making cash injections into the company so that it could continue over then recent weeks. It seems that, as at early October 2012, they were still in a position to fund the business but the material issue was the reality of the future prospects of the business both with regard to real estate work and property fit-out work.

[80] As Mr Bigio also emphasised, of the $21,244.82 total advertising monies received, the sum of $19,600 was protected by transfer to the accountant and repaid fairly promptly, and that represents about 92% of those funds. The then missing balance of $1,644.82 had been used for both business expenses and drawings.

[81] Mr Bigio puts it that a further $356 was paid to Mr Polglase from the funds in the accountant's trust account and that the defendant had awaited the outcome of the liquidation of his company *"to see if the shortfall could be recovered by the liquidators ... this was not to be the case".* Mr Bigio notes that at that time Mr Polglase was an unsecured creditor of the company for a balance then of about $1,288.82 and it took time but the defendant eventually repaid him personally when, according to Mr Bigio, he had no legal obligation to do so. The defendant felt he had needed to satisfy obligations of his company which he had personally guaranteed.

[82] Inter alia, Mr Bigio submits that there is no statute, regulation, rule, or industry standard requiring advertising monies to be held on trust by a licensee.

[83] Mr Bigio emphasises that there is no evidence that the defendant held the monies in a separate account (of his company) by virtue of an express agreement between that company and the payers which, Mr Bigio put it, would be a fundamental requirement for the imposition of a constructive trust.

[84] Mr Bigio submits that, at the moment in time when expenses were deducted from the advertising account, the defendant had no intention to deceive, defraud, or otherwise deprive clients of their monies; and those transactions were made at a time when the defendant was involved in an ongoing consideration of the future of the business, which could have led to further advances being made to the company (presumably, by the

defendant and his wife). We can accept that but consider that, at the very least, the defendant was careless in commencing to use the advertising funds for day-to-day expenses of his business.

[85] We do agree with Mr Bigio that, having made enquiry of Mr Harding of the prospects of real estate sales and facing reality, the defendant moved swiftly to protect the advertising funds as they then stood.

[86] Towards the end of his final written submissions of 31 July 2015 Mr Bigio states:

> *"25. It was open from GVA to receive the monies, market the properties and await the outcome of whether the marketing programmes were successful or not. Successful campaigns would have yielded commission income to GVA. They could have kept the company afloat. Perhaps the company could have carried on in that circumstance. If GVA had marketed the properties unsuccessfully, however, the clients' advertising monies would have been lost and not recoverable, with no claim against GRV or Mr Whisker. Mr Whisker protected clients from that much greater risk by virtue of the decision he made."*

[87] Finally, Mr Bigio put it that the actions of the defendant were not disgraceful, nor seriously negligent or incompetent although, with hindsight, one might challenge whether he failed to act soon enough to cease trading but that was an issue for a maximum period of 12 days. Mr Bigio puts it that, with hindsight, we might view the defendant as having made an error of judgment rather than behaving disgracefully or in a seriously negligent manner.

[88] We note that the concept of the receipt of money and audit of accounts for a real estate agent is dealt with over ss.122 to 125 of the Act. There are also Real Estate Agents (Audit) Regulations 2009. We recommend that the law be changed to require all monies received by a real estate agent in the course of real estate agency work to be held in a trust account.

[89] Simply put, the defendant took monies from the public at a time when he knew his business prospects were precarious and reliant on funding from his wife, in particular, and himself. He was somewhat too slow to face up to reality. He either knew, or should have known, that he had begun to use the said advertising monies in the ordinary course of company or business operations. This breaches a number of rules because it shows business carelessness or even, perhaps, incompetence and negligence, and is a breach of his fiduciary duty to the payers of the funds in question.

[90] However, in the context of the above facts, we do not find the defendant's conduct to be disgraceful or seriously incompetent or seriously negligent. We do find it unacceptable or short of proper professional standards and a breach of various of the Rules. The defendant could also be regarded as negligent in not facing up to closure of the business earlier than he did.

[91] Having said all that, we dismiss both charges, but in all the above circumstances, find unsatisfactory conduct on the part of the defendant.

[92] In the usual way we direct the Registrar to arrange that counsel participate in a telephone conference with our chairperson to establish a timetable towards penalty whether by a further hearing about penalty or, by consent, with a series of succinct submissions about penalty on the papers.

[93] 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

_____
Ms C Sandelin
Member