

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2015] NZREADT 87

READT 093/14

**IN THE MATTER OF**

of charges laid under s 91 of the  
Real Estate Agents Act 2008

**BETWEEN**

**COMPLAINTS ASSESSMENT  
COMMITTEE (CAC 20003)**

Prosecutor

**AND**

**RICKY SUE**

Defendant

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Mr J Gaukrodger - Member  
Ms C Sandelin - Member

**BY CONSENT HEARD ON THE PAPERS AS TO PENALTY**

**DATE OF THIS DECISION ON PENALTY** 9 December 2015

**REPRESENTATION**

Ms S M Earl, counsel for the prosecuting Committee of the Authority  
The defendant on his own behalf

**DECISION OF THE TRIBUNAL ON PENALTY**

***The Offending***

[1] On 12 December 2014 the defendant pleaded guilty to the following charge, namely:

*“Complaints Assessment Committee 20003 charges Ricky Sue with misconduct under s 73(a) of the Real Estate Agents Act 2008, in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.*

*Particulars:*

- 1. On 20 June 2011, Ricky Sue (defendant) entered into a property management agreement with Aboubakr Abdallah and Wei Keat Lui (clients) in respect of a property at Unit 4B, 164 The Terrace, Wellington (property).*
- 2. From 11 December 2012, the defendant collected rental monies from the tenants of the property which he failed to pay to the clients. By 4 March 2013, the outstanding payments totalled \$7,776.54 (outstanding amount).*

3. *During the period referred to at paragraph two, the clients contacted the defendant by telephone, text message and email. The defendant did not respond to the clients' attempts to communicate with him about the rental monies owed to them. On 1 March 2013, the clients requested that the defendant contact them or deposit the outstanding amount into their bank account by 7 March 2013. The defendant failed to respond.*
4. *On 8 March 2013, the clients terminated the property management agreement.*
5. *The defendant was on notice that he owed rental monies to the clients. During the period referred to at paragraph two above, the defendant had funds available to make payment of those rental monies to the clients. Instead the defendant retained the funds for his own purposes.*
6. *The defendant did not forward the rental monies owing to the clients until 9 May 2013, when he made a partial payment of \$3,000, followed by a payment of \$1,500 on 31 May 2013 and a final payment of \$3,377.69 on 9 October 2013."*

### ***Procedural Background***

[2] At a 12 December 2014 directions conference it was agreed that the prosecution provide a memorandum setting out its stance on penalty by 16 January 2015, and Ms Earl did that on behalf of the prosecution. It was also agreed that the defendant file and serve a response by 9 February 2015 but, despite being pressed for that by this Registry, his response was not received until 16 October 2015.

[3] It was also agreed, as at 12 December 2014, that our Chairperson would review the position upon receipt of submissions on penalty and decide whether it was appropriate to issue a decision on penalty or to require formal evidence (with cross-examination) from the defendant or other appropriate witnesses. We do not think it necessary to do that.

[4] Accordingly, the position is that the defendant has admitted the charge on the basis we cover in this decision so that our focus is on the matter of penalty.

### ***Factual Background***

[5] On 20 June 2011 Aboubakr Abdallah and Wei Keat Lui ("the complainants") entered into a property management agreement with the defendant in respect of a property at Unit 4B, 164 The Terrace, Wellington.

[6] From 11 December 2012, the defendant collected rental monies from the tenants at the property but failed to pay it to the complainants. By 4 March 2013, the outstanding payments totalled \$7,776.54.

[7] During that period the complainants endeavoured to contact the defendant by telephone, text message, and email about the rental monies owed to them, but the defendant did not respond. On 1 March 2013, the complainants requested that the defendant contact them or deposit the outstanding amount into the bank account by 7 March 2013. The defendant still failed to respond. The complainants terminated the property management agreement on 8 March 2013.

[8] During the above period the defendant had funds available to make payment of those rental monies to the complainants. However, the defendant retained that rental owed to the complainants for his own purposes, namely, to manage cash flow for his property management business.

[9] The defendant did not forward the rental monies to the complainants until he made partial payments of \$3,000 on 9 May 2013 and \$1,500 on 31 May 2013. He then made a final payment of \$3,777.69 on 9 October 2013.

### ***Submissions for the Prosecution***

[10] Ms Earl puts it that, by his admission of the charge, the defendant has accepted that his dealings with the client monies amounted to misconduct; that the funds which should have been provided to the complainants were knowingly retained by the defendant to maintain the cash flow within his business; and, at the same time, communications from the complainants about the money owing to them were ignored.

[11] We agree with Ms Earl that the defendant's use of the funds referred to in the charge is important to our decision on penalty.

[12] The defendant has blamed his inability to manage the size of his property management business, stating that at material times he did not have proper systems in place. In the course of the investigation, the defendant has acknowledged using rental money to cover other costs associated with his business and to pay for maintenance and repairs to rental properties, and using his account for both business and personal expenses because he did not have a proper system in place for deducting commission. Ms Earl submits that such conduct is, in and of itself, concerning given the defendant's responsibility for money received by him on behalf of clients.

[13] However, the prosecuting Committee's position is that the defendant's explanation, i.e. that he essentially lost track of things, is inadequate given that he had been made aware that a reasonably significant sum of money was owed to the complainants and funds were available to him to make payment. It is put that on 28 February 2013, the defendant had a balance of \$15,730.60 in the account into which rental payments were paid. We were provided with bank statements in that respect.

[14] It is submitted that, in a situation where clients sought payment of monies owing to them, and those requests were ignored, the defendant's conduct goes further than business incompetence as claimed by him.

[15] It is also submitted for the prosecution that the money owed to the complainants was deliberately retained by the defendant to continue to support his business. The complainants have advised the Authority that they were out of pocket for covering their apartment's expenses as a result.

[16] Accordingly, the Committee submits that material aspects of the defendant's misconduct are the fact that he was on notice that he owed rental monies to the complainants; and that he ignored those communications and failed to forward the rental payments owed to the complainants, instead retaining the funds for his own business purposes.

[17] The prosecution acknowledges that the defendant accepted responsibility for the charge at an early stage and has expressed regret for his conduct. However, Ms Earl submits that his indifferent attitude towards the handling of funds received on behalf of others and his disregard at the time for the impact on the complainants, preferring instead his own business interests, should be of significant concern to us and reflects adversely on his fitness to conduct real estate agency work. We agree.

[18] Ms Earl submits that conduct of this nature, involving as it does mismanagement of client monies, warrants suspension of the defendant's licence and, in the particular circumstances of this case, suspension for a period of three months would be appropriate to denounce the conduct involved. She observes that, in contrast to the situation where a licensee works exclusively in real estate agency work, the licensee will be able to continue with property management work while his licence is suspended. Accordingly, the Committee also seeks a fine, as a punitive element.

[19] The Committee understands that the defendant's practice involves both real estate agency work and property management work. Mr Sue explains the extent of his current property management work below. It is submitted for the Committee that, assuming that the defendant is still involved in a reasonable amount of property management work (which he is), an appropriate fine would be in the mid-range of that available.

[20] Ms Earl finished on the note that while we normally take a strict approach to cases of this type, if we consider that there are particular and unique mitigating features with regard to Mr Sue's conduct so that we decide not to suspend his licence, then a fine towards the top end of that available should be imposed.

### ***Submissions from Mr Sue***

[21] In written submissions the defendant apologised for his lengthy delay in his responding to the charge in terms of penalty. He states that these proceedings have stressed him out. Also, he states that since he pleaded guilty to the charge in December 2014, he has realised that the publication of his conduct is detrimental to him in terms of business and that our decisions become public information. He emphasises that he takes the situation very seriously but cannot afford legal representation. He does not seem to regret having pleaded guilty to the charge but notes that he did so on the basis that he felt he had not met the standard of service expected of an agent and he had let down his clients through poor judgement, service, and management of their accounts. He then stated as follows:

*"I had started the rental business in late 2011 with only several properties which it grew significantly more properties by late 2012. I began to struggle with the management of the accounts. I thought it would be easy but soon realised how time consuming the business was and decided to ask an associate to help with the accounts, this is when we decided to set up the company. Unfortunately this did not work out as expected as my business partner started a new job. We did not have a proper process for the processing of invoices and rental payments and commission deductions and managing invoice payments for work carried out on the rental properties.*

*As mentioned in the Memorandum that in February 2013 there was \$15,730.60 in the account. At times there are up to \$24,000 in the account of rental*

*receipts. The money in the account belonged to the other property owners which we had to pay into their accounts at the end of the month. If we had paid Mr Abdallah the full amount at that time the other payments in to the owner's accounts would not have balance. Therefore we had to pay the rental receipts in arrears in part payments as not to upset the other property payments. I had also put money back into the account as there was a short fall as a result of mismanaging the account payments and commission deductions and repairs and maintenance costs as identified. In the Memorandum it says that "I was blaming my inability to manage the size of the business" I am not making excuses for the way the accounts were managed. The state of the accounts is shown in the transactions in the bank statement records that there is a significant amount of transactions.*

*As we were using the account to pay for work done on the owners' properties and which had not yet been deducted from their accounts along with commission payments being taken out at irregular intervals things got into a muddle. I admit that payments and made to Mr Abdallah should have been paid earlier and better communication to keep him informed of the situation. The rental receipts were not retained for cash flow purposes of the business.*

*Currently I am only managing several rental properties for the owners which the rental payments are now paid directly into their accounts and they pay the commission to me once a month, the individual owner also take care of all maintenance and repairs costs directly. In hindsight this should have been the structure of our business in the past."*

[22] Inter alia, Mr Sue records that he has met with the owner of Unit 4B, 164 The Terrace, Wellington, and apologised to him in person and he again apologises for his conduct and for his delay in delivering his response to us observing that he was unsure how to start his explanation to us.

### **Discussion**

[23] We are conscious that property management work is not real estate agency work but the defendant's offending is "*disgraceful*" in terms of his admitting the charge.

[24] We take into account standard principles of sentencing including factors such as aggravating and mitigating features, and remorse. We accept, of course, that the principle purpose of the Act is to promote and protect the interests of consumers in respect of real estate transactions and promote public confidence in the performance of real estate agency work. One of the ways in which the Act achieves its purpose is by providing accountability through an independent, transparent, and effective disciplinary process.

[25] Professional standards must be maintained. The aspects of deterrence and denunciation must be taken into account. It is settled law that a penalty in a professional disciplinary case is primarily about the maintenance of standards and the protection of the public, but there can be an element of punishment. Disciplinary proceedings inevitably involve issues of deterrence, and penalties are designed in part to deter both the offender and others in the profession from offending in a like manner in the future. Having said all that, it is often appropriate to consider

rehabilitation of the professional, and that may involve requiring a licensee to undergo training or education.

[26] As Ms Earl noted, we have previously emphasised the scrupulous care we expect from licensees when handling money on behalf of clients and, in that respect, she referred to *CAC v Ross* [2012] NZREADT 4 where a licensee received a payment of client funds into his personal bank account in error. The funds represented a deposit on a lease. At the time, the licensee was involved in a dispute with his principal agent and decided to forward only part of that deposit to the agency. He retained the portion he considered he was due in commission, thereby placing his own interests above those of the client and his employer. We found the licensee guilty of misconduct, observing that he had, inter alia, shown “*a concerning casualness over the handling of client monies*”. We commented that:

*“[27] ... Members of the public, from time to time pay large amounts of money to real estate agents so that there must be absolute trust and integrity from the real estate industry in so dealing with the public.”*

[27] In *Ross*, we suspended the defendant’s licence for three months. The facts of the *Ross* case are somewhat different to the present matter concerning Mr Sue but the latter was entrusted with receiving money on behalf of the complainants. That money was owed to the complainants, less the commission/disbursements agreed between them. Instead, the defendant used the money for his own business purposes and failed to forward the funds to the complainants when requested by them, yet he had funds available to do so. While the funds were eventually repaid in three amounts, there was a significant delay in doing so, with the final amount not being paid until October 2013.

[28] At least Mr Sue is apologetic and remorseful. Also, he pleaded guilty to the charge of misconduct at an early stage.

[29] It seems to us that Mr Sue got into the predicament covered above through his inadequate business systems leading to business muddlement. A flaw in a licensee’s ability to handle client funds is most concerning. However, it does seem that, as well as being remorseful, Mr Sue has re-structured his property management business so that his said failures and muddlement will not re-occur. He is now mostly focused on selling real estate but manages up to 15 rental properties.

[30] Accordingly, we do not think a revocation of licence, nor even a suspension of licence, is appropriate in this particular case. We order as follows:

- [a] Mr Sue is fined \$4,000 to be paid to the Registrar of the Authority at Wellington within six weeks of the date of this decision;
- [b] Although the offending did not arise in the course of real estate agency work, over the next 12 months Mr Sue must complete the following three Open Polytechnic courses, namely:

**Block 1 – Finance**

US4699 Demonstrate knowledge of financial transactions and financial statements for real estate firms

US4700 Manage trust accounts in real estate firms

US4702 Implement internal controls and conduct internal checks and audits in real estate firms

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

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Judge P F Barber  
Chairperson

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Mr J Gaukrodger  
Member

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Ms C Sandelin  
Member