BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 92

READT 036/15

IN THE MATTER OF	a charge laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE (CAC 406)**
	Prosecution
AND	**TONY SCHEIRLINCK AND IHAB EL-GHALAYINI**
	Respondent

MEMBERS OF TRIBUNAL

Ms K Davenport QC – Chairperson
Ms N Dangen – Member
Ms C Sandelin – Member

HEARD at AUCKLAND on 27 November 2015

DATE OF DECISION 18 December 2015

APPEARANCES

Ms Lawson-Bradshaw – Counsel for the respondent
The agents in person

DECISION OF THE TRIBUNAL

[1] Mr Scheirlinck and Mr El-Ghalayini face a charge arising out of their management of a property management company for Ray White. The charge provides:

*Following a complaint made by Carey Smith, Complaints Assessment Committee 406 (**Committee**) charges Antonius Scheirlinck and Ihab El-Ghalayini with misconduct under s 73(a) of the Real Estate Agents Act 2008 (**Act**). Both the defendants are charged with disgraceful conduct, in that their conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.*

Particulars

1.1 The defendants used client funds which should have been paid over as bond to the Department of Building and Housing, or otherwise held by Dynamic Management Limited on behalf of its clients, to benefit a separate company, namely Dynamic Realty Limited.

1.2 Dynamic Realty Limited (DRL) carries out real estate agency work, and Mr Scheirlinck is the sole director and signatory for the company.

1.3 Dynamic Management Limited (DML) managed rental properties. Mr Scheirlinck and Mr El-Ghalayini were co-directors and Mr El-Ghalayini was the sole signatory for the company.

1.4 During the relevant period, Mr Scheirlinck held an agent's licence, and Mr El-Ghalayini held a salesperson's licence.

1.5 DML operated three bank accounts:

(a) An account labelled 'Trust Account" with the account number 06-0294-0169804-01;

(b) An account labelled "Trading Account", with the account number 06-0294-0169804-00; and

(c) An account labelled "Bond Account", with the account number 06-0294-0169804-02.

1.6 The Trust Account and Bond Account held money from clients for, among other things, rent, bond, water and letting fees.

1.7 During 2013 DRL owed a debt to the Inland Revenue Department (IRD) and was making regular payments towards this debt from its trading account.

1.8 On or around 22 July 2013, $9,010.19 was paid from DML's Bond Account to the IRD to satisfy DRL's debt (DML/IRD payment).

1.9 When the DML/IRD payment was made, DRL's trading bank account was in overdraft by approximately $48,168.88.

1.10 The DML/IRD payment was made with funds that DML either owed to the Department of Building and Housing as unlodged bonds, or that DML was obliged to hold for the benefit of its clients.

1.11 Mr Scheirlinck and Mr El-Ghalayini knew or should have known, that they were required to lodge the funds as bond with Department of Building and Housing, or were otherwise required to hold the funds for the benefit of DML's clients, but they allowed the DML/IRD payment to be made anyway.

1.12 After the DML/IRD payment was made, approximately $402.14 remained in DML's Bond Account, meaning that DML was unable to lodge required funds as bond with the Department of Building and Housing, or pay the money held for the benefit of its clients if called upon from its Bond Account.

1.13 At the same time, there were insufficient funds in the total of DML's three bank accounts to satisfy all of its obligations to all of its clients.

1.14 On or around 27 August 2013, the remaining balance from DML's Bond Account (approximately, $402.14) was transferred to DRL's Trading Account (06-0294-0169951-00).

1.15 On 23 June 2014, DML was struck off the Companies Register. DRL is currently still trading.

[2] At the time of these events Mr Scheirlinck was the licensed agent for Dynamic Realty Limited, a franchisee of Ray White. Dynamic Realty Limited operated in Sunnynook in Auckland. Mr Ihab El-Ghalayini was a licensed salesperson but worked at Dynamic Management Limited – the property management arm of Dynamic Realty. Mr El-Ghalayini was the property manager and was a co-director with Mr Scheirlinck of Dynamic Management Limited. Neither Mr Scheirlinck or Mr El-Ghalayini had had any experience in running a property management business at the time that Mr Scheirlinck entered into a franchise agreement with Ray White. Mr Scheirlinck was to run the real estate agent side of the business and Mr El-Ghalayini was to run the property management side of the business. Both acknowledge that the property management side of the business was not particularly well run. While Mr El-Ghalayini had some assistance in the form of part time workers he had never run a property management business before. He was really not certain of all his obligations and responsibilities.

[3] Dynamic Management Limited opened three bank accounts. They were labelled "Bond" Account, "Trading" Account and "Trust" Account. There is no requirement in the Real Estate Agents Act for property managers to have a trust account, and so the account labelled in this way was not an actual trust account.

[4] The trust account and the bond account seemed to hold money for clients which included payments in for rent, bond, water and letting fees.

[5] The bond account was opened in September 2012. Monies were transferred from the Trust account on 15 November 2012 with the notation "Bonds Held". Payments were made into and out of this account including payments for rates, water rates and to landlords. From the copies of the accounts before the Tribunal there were no cheques written for payment of bonds received to the Department of Building and Housing from the 'Bond Account'. It appears that cheques for this purpose were written from the account labelled "Trust Account".

[6] As at July 2013 the bond account had approximately $9,400 in it. Mr El-Ghalayini told Mr Scheirlinck that they had these monies in the bond account. Mr Scheirlinck asked what the money was for? Mr El-Ghalayini said they were profit.

Mr Scheirlinck asked Mr El-Ghalayini to make a payment to the IRD on his behalf for the sum of $9,010.19. The company's trading account did not have sufficient funds to make this payment.

[7] At a later date it was discovered that in fact the money was not profit but the accumulation of additional monies paid by tenants over and above their rent as a contribution towards their bond payments. Some tenants were unable to pay full bond at the time the lease was entered into and would make an additional payment to cover part of the bond when paying rent. These Mr El-Ghalayini and Mr Scheirlinck called 'partial bonds'. Mr El-Ghalayini had either forgotten that these monies had not been paid to the Department of Building and Housing or was unaware that a partial bond was supposed to be paid to the Department of Building and Housing. The error was drawn to the attention of Mr Scheirlinck and Mr El-Ghalayini in February 2014. At this time Dynamic Realty was losing money. However Mr Scheirlinck stressed to the Tribunal he had available to him further funds from his son to support the existing Dynamic overdraft facility. He also said that his mortgage was capable of being extended.

[8] However during February 2014 he decided that he did not wish to own the business any longer. He arranged to meet with Mr Carey Smith, managing director of Ray White. They discussed the potential sale of the franchise back to Ray White and by agreement it was advertised for sale within the Ray White group. Mr Scheirlinck said that it was also agreed that the business would be offered for sale outside the Ray White group. On 18 February he met with representatives of Cooper and Co, (a Harcourts) franchise. Cooper and Co reviewed the books and on 19 February advised Mr El-Ghalayini he had outstanding bonds to pay to the Department of Building and Housing. Mr Scheirlinck and Mr El-Ghalayini both say that they were unaware of this situation until this time. They say that the bonds were paid the following week to the Department.

[9] The five properties for which bonds had not been paid were 2G/83 New North Road, 66 Bond Crescent, 11B Kupari Place, 48 Lauderdale Road and 286 Lake Road. These were all properties where tenants paid partial bonds.

[10] Mr Scheirlinck advised Ray White of this situation. Ray White had also identified that there were outstanding bonds to be paid when they reviewed the records of the property management side of the business. Mr Smith said that their national property manager checked the records and identified that there were problems with the bonds.

[11] On or about 22 February 2014 Ray White were advised that Mr Scheirlinck had sold his business to Coopers. Ray White immediately arranged to discontinue the access that Mr Scheirlinck and Mr El-Ghalayini had to the Ray White system computer. On 24 February Mr Smith reported Mr Scheirlinck and Mr El-Ghalayini to the Real Estate Agents Authority for misconduct relating to the non-payment of the bonds.

[12] The charge provides that Mr El-Ghalayini and Mr Scheirlinck were guilty of misconduct because the $9,000 paid from the bond account to satisfy the IRD debt, was a payment from funds which should have been paid to the Department of Building and Housing. The effect of making the IRD payment from the bond account was that the bonds were unpaid. Further the company could not have paid the IRD the $9,010.19 owing and remained with their current banking facilities.

[13] The issue is whether these two facts together constitute misconduct. Mr Carey Smith alleged in his complaint of 24 February 2014: *"I had a meeting with Tony Scheirlinck last Friday afternoon, 21 February 2014, wherein Tony advised me he was under extreme financial pressure and that he had been utilising bonds from his property management portfolio for his personal cash flow.*"

[14] Both Mr Scheirlinck and Mr El-Ghalayini deny that they used the bonds for personal cash flow. They say that it was a genuine error and while they acknowledge that the bonds ought to have been paid to the Department of Building and Housing they say they were immediately paid the money when they discovered their error.

[15] In the record of his interview with Mr Gallacher on 27 February 2014 the contents of Mr Smith's letter of complaint were read by the investigator to Mr Scheirlinck. He denied misusing funds in any way. In his interview on 5 March Mr Scheirlinck again denied that he had used the bonds money inappropriately and said that he had not been using the bond money for personal reasons. He said that he told Carey Smith at the first meeting on 17 February that there were a few bills in the Realty business which were unpaid but there was nothing major. With respect to the bonds he said he told Mr Smith that:

> *"Eli has found a few bonds. They're late. We've got to get those tidied up as well. Eli rang Building and Housing and said that we are late on these bonds. Eli said he didn't realise what had to be done in regard to those bonds. His understanding was partial bonds were something that didn't have to be lodged. I basically let Eli run the PM (Property Management) business completely separate to the realty business. DHB said you may be up for fines depending on how it's affected the landlords or tenants which it hasn't done."*

[16] Mr El-Ghalayini also told the investigator on 5 March 2014 that he had never been a property manager or a business owner and he did not realise that he had to pay the partial bonds over to the DHB. At this meeting Mr El-Ghalayini told the investigator that they had closed the bond account because it was "messy".

[17] In their statements to the Tribunal Mr Scheirlinck and Mr El-Ghalayini said that they thought that the money in the bond account was profit. Mr El-Ghalayini had recorded this in a letter to the Complaints Assessment Committee (Exhibit C) dated 5 May 2015. He said that at the time of the discussion about closing the bond account "*Tony asked whose money it was*" and Mr El-Ghalayini had said that "*it was money that was profit*". Both have agreed that Mr Scheirlinck had asked Mr El-Ghalayini to make the payment to the IRD directly.

Discussion

[18] Having heard both Mr Scheirlinck and Mr El-Ghalayini, as well as the evidence of Mr Carey Smith and Mr Gallacher, the Tribunal have reached the following factual conclusions. In reaching the conclusion the Tribunal have taken into account the following material:

1. The bank statements.

2. The contemporaneous written material, namely the statements given to the investigator in March 2014.

3. The file note written by Mr Carey Smith in February 2014.

4. The letters written by the parties to the Investigator.

5. Our assessment of the evidence that was given by Mr Scheirlinck and Mr El-Ghalayini at the hearing.

We find that:

1. The accounts of the Dynamic Property Management business were in some disarray.

2. The lack of regulation of the property management businesses mean that there is no requirement for property managers to hold the rent and other payments that they receive on trust for the property owners. They could simply have paid them into a general trading account from which payments could have been made for all liabilities of the property management business including accounting for rent to landlords and payment of bonds to the Department of Building and Housing.

3. The money paid into the bond account which accumulated from the time of opening the account in 2012 until it was closed in July 2013 had not been identified by Mr El-Ghalayini as money that was clearly tagged to pay bonds to the Department of Building and Housing. The reason was that the five bond payments were not paid in one lump sum but accumulated over time.

4. Mr El-Ghalayini's records and systems were not sufficiently well managed to enable him to identify that bonds for five properties being managed had not been paid to the Department of Building and Housing.

5. While the payment to the IRD using money that was in the bond account was bad business practice it was not fraudulent or improper because there was no requirement that bond money be kept separately or in a trust account.

6. The Dynamic Property Management team should have clearly identified what bonds had been paid and what had not been paid and ensured that they were paid in a timely fashion as received. They failed to do this.

7. We accept Mr El-Ghalayini's and Mr Scheirlinck's evidence that this failure and the use of the money for other purposes was because of an oversight or negligent business practices but was not reckless trading. Mr El-Ghalayini and Mr Scheirlinck have been consistent in the evidence as to how this event happened since they were first questioned.

8. As a business they were not routinely using clients' money to support the drawings that they were taking from the property management business. There is simply no evidence to support this allegation by Mr Smith. After a thorough investigation by the Real Estate Agents Authority the evidence has remained consistent that there were only these five bonds in arrears.

9. We accept that it was inadvertency and inexperience that led Mr El-Ghalayini to a situation in which he was able to wrongly assure Mr Scheirlinck that the money in the bond account was profit.

[19] The Tribunal must now consider on the basis of these findings of fact whether or not this conduct is disgraceful conduct in terms of s 73(a) of the Real Estate Agents Act and whether the conduct would be reasonably regarded by agents of good standing or reasonable members of the public as disgraceful.

[20] We have reached the conclusion that this is not disgraceful conduct. "*Disgraceful conduct*" is not a term of art but as the Tribunal found in *CAC v Downtown Apartments Limited.*[1]

> "[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*.
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> [56] The use of those words by way of qualification to the ordinary meaning of the word disgraceful makes 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].
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> [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.
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> [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.
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> [59] So, in summary, the Tribunal must find on 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*."
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> (Emphasis added).

[21] In *CAC v Cui*, the Tribunal said as follows:[2]

> [50] We have previously applied the well known dicta in *Pillai v Messiter (No 2)* (1989) 16 NSWLR 197 (CA) ..., namely "Departures from elementary and generally accepted standards, of which a ... practitioner could scarcely be heard to say that he or she was ignorant, could amount to such professional misconduct ... But the statutory test (misconduct in a professional respect) is not met by mere professional incompetence or by deficiencies in the practice of the profession, something more is required, it includes a deliberate departure from accepted standards *or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration ...*" This dicta applies in s.73(a) cases (disgraceful conduct).[3]

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1 *CAC v Downtown Apartments Limited* [2010] NZREADT 06.
2 *CAC v Cui* [2015] NZREADT 1.
3 The Tribunal went on to hold that it is, however, duplicative to apply the *Pillai v Messiter* test in s 73(b) Cases (seriously negligent or incompetent real estate agency work).

> Section 73(a) requires the Tribunal to assess whether conduct of any licensed agent 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 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.

[22] Property management work is not governed by the Real Estate Agents Act but work done by an agent in this may still fall within s 73.

In *CAC v Hume*, the Tribunal said:[4]

> [44] It is settled law that misconduct under s.73(a) need not involve real estate agency work as defined in s.4 of the Act, although there will need to be sufficient nexus between the conduct alleged and the licensee's fitness to perform real estate agency work for a finding of misconduct to be appropriate ...

[23] In *REAA v Brankin*, confirmed the application of the sufficient nexus test:[5]

> [73] ... There are, therefore, two important considerations in applying s.73(a) to non-real estate agency work, namely, is there a sufficient nexus with the fitness of the licensee to conduct real estate agency work; and is the conduct a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public?

[24] Having considered all of the evidence carefully and considered the legal test the Tribunal concludes that the conduct complained of amounts to negligent business practice but is not disgraceful conduct. Our reasons are that the second arm has not been met – i.e. the conduct is not disgraceful. The Act does not require property managers to be regulated as agents, nor does it require property managers to operate a trust account. Therefore, property managers are free to manage their finances in any way that they want. For a property manager to overdraw their trading account, or inadvertently to pay their own personal debts before accounting to the Department of Building and Housing for money received from clients, could amount to unsatisfactory conduct were this real estate agency work. However, it is not. The question which the Tribunal must answer is whether the conduct is serious enough to be labelled disgraceful. Ms Lawson-Bradshaw submitted that the Tribunal could find that the agent's conduct was so seriously negligent as to amount to misconduct as *Pillai v Messiter* provides. However the Tribunal have found that Mr Scheirlinck and Mr El-Ghalayini were sloppy not reckless and it cannot be said "*that their conduct was a deliberate departure from accepted standards or such serious negligence as portrays indifference and an abuse of the privileges which accompany registration*". The facts simply do not support any evidence of such level of misconduct.

[25] Therefore the Tribunal do not find that the charge under s 73 has been made out to the required level.

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4 *CAC v Hume* [2013] NZREADT 91.
5 *REAA v Brankin* [2013] NZREADT 32.

[26] For this reason we dismiss the charges against Mr Scheirlinck and Mr El-Ghalayini.

[27] The Tribunal reminds parties of the appeal provisions in s 116 of the Real Estate Agents Act 2008.

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Ms K Davenport QC
Chairperson

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Ms N Dangen
Member

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Ms C Sandelin
Member