BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 47

READT 051/17

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 412
AGAINST	GURPREET GREWAL First Defendant
AND	PREET & CO REAL ESTATE LIMITED Second Defendant
AND	JOSEPH VOORDOUW Third Defendant
AND	GARRY MASON Fourth Defendant
Hearing	13 July 2018, at Auckland
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms N Dangen, Member
Appearances:	Mr S Waalkens, on behalf of the Committee Mr T Rea, on behalf of the Mr Voordouw Mr R Hern and Ms S Woods, on behalf of Mr Mason
Date of Decision:	7 September 2018

DECISION OF THE TRIBUNAL
(Charges against 3rd and 4th Defendants)

Introduction

[1] On 21 December 2017, Complaints Assessment Committee 412 ("the Committee") laid six charges of misconduct under s 73 of the Real Estate Agents Act 2008 ("the Act") against the four abovenamed defendants.

[2] The charges against the first defendant, Mr Grewal, (Charges 1 and 2) have been stayed pending completion of other proceedings. The charge against the second defendant, Preet & Co Real Estate Limited, trading as Harcourts Preet & Co ("the Agency") (Charge 3), was withdrawn following the Agency being put into liquidation. This decision is concerned only with the charges against the third defendant, Mr Voordouw (Charges 4 and 5), and the fourth defendant, Mr Mason (Charge 6).

[3] Mr Voordouw faces two charges:

[a] a charge under s 73(b) of the Act (charge 4), alleging seriously incompetent or seriously negligent real estate agency work, in that as "eligible officer" of the Agency[1] he signed trust account reconciliations that were incorrect; and

[b] a charge under s 73(c) of the Act (charge 5), alleging a wilful or reckless breach of r 7.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), in that he failed to make a report to the Real Estate Agents Authority ("the Authority") when he had reasonable grounds to suspect that Mr Grewal had been guilty of misconduct. In the alternative, Mr Voordouw is charged with misconduct under s 73(b) of the Act: that his failure to make a report to the Authority constituted seriously incompetent or seriously negligent real estate agency work.

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[1] The Tribunal was not referred to any definition of, or other reference to, the appellation "eligible officer", or the role of an "eligible officer" in the Act, or any Rules or Regulations made under the Act.

[4] We record that at the start of the hearing counsel for Mr Voordouw (Mr Rea) advised the Tribunal that Mr Voordouw admitted that he is guilty of misconduct on charge 4.

[5] Mr Mason faces one charge, under s 73(c) of the Act (charge 6), alleging a wilful or reckless breach of r 7.2 of the Rules: that he failed to make a report to the Authority when he had reasonable grounds to suspect that Mr Grewal had been guilty of misconduct. In the alternative, Mr Mason is charged with misconduct under s 73(b) of the Act: that his failure to make a report to the Authority constituted seriously incompetent or seriously negligent real estate agency work.

[6] We record that pursuant to s 110(4) of the Act, if the Tribunal is satisfied that a licensee, although not guilty of misconduct, has engaged in unsatisfactory conduct, the Tribunal may make any of the orders that a Complaints Assessment Committee may make following a finding of unsatisfactory conduct.

Facts

[7] An agreed summary of facts was provided to the Tribunal, and an agreed list of issues. We record that the Committee recognised that the charges against Mr Voordouw and Mr Mason do not allege any misuse of client funds by either of them.

[8] The agreed summary of facts is as follows (for convenience, we have referred to the parties by name, rather than their position as defendants):

> 1 Introduction
>
> 1.1 At all relevant times, Mr Voordouw and Mr Mason were employed by the Agency, which is now in liquidation.
>
> 2 Charge 4 (Mr Voordouw)
>
> 2.1 Mr Voordouw is a licensed agent under the Act. At all material times he was the eligible officer of the Agency.
>
> 2.2 On 13 June 2017, Mr Voordouw signed a trust account statutory declaration declaring that as at 31 March 2017 all bank balances and cash books reconciled and that the Agency's Sales trust account (trust account) balance was $2,671,208.
>
> 2.3 Mr Voordouw says that at the time he signed the statutory declaration he was not provided with, and did not check, the bank statements.

2.4 Mr Voordouw's statutory declaration was incorrect, in that the actual balance of the trust account as at 31 March 2017 was $2,351,737.50

2.5 On 4 August 2017, Mr Voordouw declared on a monthly trust account reconciliation statement for June 2017 that the balance of the trust account as at 30 June 2017 was $1,334,067.56.

2.6 Mr Voordouw's declaration was incorrect, in that the actual balance of the trust account as at 30 June 2017 was $334,067.56.

2.7 On 4 August 2017, Mr Voordouw signed a monthly trust account reconciliation statement for July 2017, declaring that as at 31 July 2017 the balance of the trust account was $1,339,070.

2.8 Mr Voordouw says that at the time he signed the statutory declarations he was not provided with, and did not check, the bank statements.

2.9 Mr Voordouw's declaration was incorrect, in that the actual balance of the trust account was $399,059.28.

2.10 Mr Voordouw says that at all times he relied in good faith on the experienced and competent accounting staff engaged by the second defendant to ensure that documents presented to him for signature reflected the status of the relevant account.

3 Charge 5 (Mr Voordouw)

3.1 On 4 August 2017, Mr Voordouw was made aware that up to $1,000,000 in monies had been transferred out of the trust account incorrectly.

3.2 On 8 September 2017, Mr Voordouw was made aware that up to a further $200,000 in monies had been transferred out of the trust account incorrectly.

3.3 As at the time of the Authority's intervention on 28 September 2017, the $1,200,000 in monies had not been returned to the trust account.

3.4 Mr Voordouw did not at any time prior to 28 September 2017 make a report to the Authority notifying it of the above matters.

4 Charge 6 (Mr Mason)

4.1 Mr Mason is a licensed agent under the Act. At all material times he was the Chief Operating Officer of the Agency.

4.2 On 4 August 2017, Mr Mason was made aware that up to $1,000,000 in monies had been transferred out of the trust account.

4.3 On 8 September 2017, Mr Mason was made aware that up to a further $200,000 in monies had been transferred out of the trust account.

4.4 As at the time of the Authority's intervention on 28 September 2017, the $1,200,000 in monies transferred out of the trust account had not been returned to the trust account.

4.5 Mr Mason did not at any time prior to 28 September make a report to the Authority notifying it of the above.

[9] In addition to the agreed facts set out above, the Tribunal received written evidence, and heard oral evidence, as to the chronology of events between 4 August

and 28 September 2017. The evidence provided to us included email correspondence, statements made by Mr Voordouw and Mr Mason to the Authority's investigator, and formal statements made by each of them. Mr Voordouw and Mr Mason were cross-examined as to their evidence. We find as set out in the following paragraphs.

[10] Mr Voordouw was told on 4 August that two deposits totalling $63,750 had been paid into the wrong accounts of the Agency, and that $1 million had been transferred from the trust account into another account. Mr Voordouw was concerned and spoke with Mr Mason. They agreed that this was serious, and that an immediate explanation was required. Later the same day, Mr Voordouw sent an email to Mr Grewal, stating that the way in which the trust account was being administered was "completely unacceptable", and Mr Grewal needed to confirm to him that $1 million and the two deposits had been deposited into the trust account that day.

[11] Mr Voordouw and Mr Mason met with Mr Grewal on 7 August 2017. Following the meeting, Mr Mason recorded that there was potentially a breach of s 122 of the Act and rr 7.1 and 7.2 of the Rules, there could be misconduct under s 73 of the Act, and there was "potentially fraud". He also recorded that Mr Grewal had agreed to investigate and report back, that Mr Voordouw needed to inform the Agency's auditor and a proactive approach had to be taken, and that the auditor would determine what reporting obligations to the Authority had to be met.

[12] On 8 August 2017, Mr Voordouw sent an email to the Agency's auditor:

> It has come to my attention while signing off the monthly trust account reconciliation that there are three withdrawals that I don't understand. Two of these occurred before the end of the financial year so you may already be aware of them. In addition, I am unable to find the deposits for [two sales]. I would be grateful if you would have a look at the trust account and report back to me. I am also looking into this as well.
>
> I am also concerned that I may have signed off the reconciliation report for June and July incorrectly.
>
> If you require further information please email me.

[13] On 10 August the auditor responded to Mr Voordouw that the transactions were selected on a random basis and he would have to see if those referred to by Mr Voordouw were in the samples. He also said that the June/July records would be

reviewed that month. Mr Voordouw asked the auditor to keep him informed and to let him know if he needed anything further.

[14] On 17 August, Mr Voordouw emailed the auditor "checking in" as to progress on the review of the trust account. The auditor responded that he was not due for a visit to the Agency until the 24th of the month, and would be investigating then.

[15] Mr Voordouw, Mr Mason, Mr Grewal and the general manager of the Agency, Ms Wright, met on 24 August, before the scheduled meeting with the auditor. After the meeting Mr Mason recorded that he and Mr Voordouw had reiterated their concern that "this could be deemed misconduct", and they would then have an obligation to report. Mr Mason also recorded that Mr Grewal had said the money would be back in the trust account by "Thursday", and he would be able to explain what had happened.

[16] Mr Mason also recorded that Mr Voordouw had advised Mr Grewal that it might be prudent for him to seek advice from the Agency's solicitor with respect to what obligations he had, and that Mr Grewal reported that the solicitor had confirmed that "we were all doing the right thing investigating the discrepancies".

[17] Mr Grewal, Mr Voordouw, Mr Mason, and Ms Wright met with the auditor the same day. In his draft management letter dated 25 August, the auditor stated:

> As you are aware, there is $1,000,000 used out of the trust account to finance the purchase of some branches. We understand that this was only a temporary arrangement and will be rectified ASAP. We expect this reconciling amount of $1,000,000 to be cleared by the end of August.

[18] Both Mr Voordouw and Mr Mason said at the hearing that this was in conflict with their understanding of what was discussed at the meeting, which was that Mr Grewal had talked about "transfer errors".

[19] On 25 and 28 August, and 1 September, Mr Voordouw emailed Mr Grewal, noting his concern that the $1 million had not been deposited into the trust account. He stated on 28 August that Mr Grewal needed to organise this urgently and if the money were not deposited, the auditor would have no alternative but to report to the Authority. On 1 September, Mr Voordouw said to Mr Grewal that time was "really critical".

[20] In an email to Mr Voordouw on 5 September, Mr Mason noted that while the Authority might inquire into the withdrawals depending on their own checking process, it might only act where an auditor had highlighted an error, but this depended on the disclosure obligations imposed on auditors. He further noted that while Mr Grewal's intentions may have been genuine, the longer it took to address the situation, the worse it became for him.

[21] On 8 September, Mr Voordouw learned, and informed Mr Mason, that there had been a further $200,000 transferred out of the trust account on the 1st or 2nd of August, thus not shown in the July reconciliation. Mr Grewal could not explain the transfer.

[22] In an email to Mr Voordouw on 11 September, Mr Mason noted that while the auditor had agreed to issue a warning in respect of the current unauthorised trust account withdrawals, the Authority might still pick up and investigate the issue following receipt of the monthly trust reconciliations. In an email to Mr Grewal the same day, Mr Voordouw said that the situation needed to be tidied up quickly, and needed "an explanation that better protects the company".

[23] Emails from Mr Voordouw to Mr Grewal and Mr Mason on 18 and 25 September stressed the urgency of Mr Grewal addressing and rectifying the situation. As at 25 September, Mr Grewal was overseas. He returned on 27 September and the matter was reported to the Harcourts Franchisor for New Zealand. A report pursuant to r 7.2 of the Rules was made to the Authority on 28 September.

Issues to be determined

[24] The parties provided the Tribunal with an agreed list of the issues to be determined by the Tribunal:

> 1. Introduction
>
> 1.1 This list of issues should be read in conjunction with the agreed statement of facts between the Committee and Mr Voordouw and Mr Mason .
>
> 1.2 In relation to charge 4:
>
> [This issue does not need to be considered, in the light of Mr Voordouw's admission of misconduct on charge 4.]

1.3 In relation to charge 5:

(a) The Committee says that on all the available information Mr Voordouw had reasonable grounds to suspect that another licensee was guilty of misconduct, and that he therefore should have made a report to the Authority as required under r 7.2 of the Rules.

(b) Mr Voordouw denies this

1.4 In relation to charge 6:

(a) The Committee says that on all the available information Mr Mason had reasonable grounds to suspect that another licensee was guilty of misconduct, and that he therefore should have made a report to the Authority under rule 7.2 of the rules.

(b) Mr Mason denies this.

2 Issues between the parties

2.1 In relation to charges 4 to 6 the issues are as follows:

(a) Charge 4:

[This issue does not need to be considered, in the light of Mr Voordouw's admission of misconduct on charge 4.]

(b) Charge 5: whether Mr Voordouw had reasonable grounds to suspect prior to 28 September 2017 that another licensee was guilty of misconduct, and that he therefore should have made a report to the Authority as required under rule 7.2 of the Rules.

(c) Charge 6: whether Mr Mason had reasonable grounds to suspect prior to 28 September 2017 that another licensee was guilty of misconduct, and that he should therefore have made a report to the Authority as required under rule 7.2 of the Rules.

Submissions

[25] Mr Waalkens submitted for the Committee that r 7.2 must be interpreted in the context of the consumer protection purposes of the Act (as they are set out in s 3 of the Act), and it is consistent with these purposes that a licensee must make a report as soon as there are reasonable grounds to suspect misconduct by another licensee. He submitted that the fact that such a report is mandatory addresses any awkwardness or conflict of interest as between the licensee with the obligation to report and the licensee in respect of whom the report must be made. This was because once a report is made, it is up to the Authority to take any appropriate action.

[26] Mr Waalkens also submitted that the obligation to report is personal to the licensee and cannot be abdicated to the auditor; that is, a licensee cannot leave it to the agency's auditor to advise, or direct, when a report should be made. He submitted that

for licensees to wait for an auditor to confirm that money has been stolen, or until they were "almost certain" that there had been misconduct, would undermine the purpose of r 7.2 as a "warning system" for consumer protection.

[27] Mr Waalkens submitted that there were a number of features which in this case would alert a reasonable licensee to the potential for misconduct. He submitted that $1million being missing from the agency's trust account, without explanation, was a serious matter which in itself raised the potentiality of misconduct. He submitted that even if there were an explanation, removal of any money from a trust account is serious and could attract a misconduct finding. He also referred to the auditor's statement in his draft management letter that "As you are aware, there is $1,000,000 used out of the trust account to finance the purchase of some branches" as being grounds for a reasonable suspicion of misconduct.

[28] Regarding Mr Voordouw, Mr Waalkens submitted that such explanations as Mr Grewal gave were not reasonable, and did not excuse potential misconduct. He referred to Mr Voordouw's evidence of discussions with Mr Grewal as to the possibility that the money had been stolen, or that it had been transferred inadvertently to another of the Agency's accounts. He submitted that it did not matter if there were other "possibilities"; what mattered was whether there whether reasonable grounds to suspect misconduct.

[29] Mr Waalkens referred to Mr Voordouw's statement to the Authority's investigator that "absolutely [misconduct] was a possibility". He also referred to Mr Voordouw's statement to the investigator that Mr Grewal had told him that he had transferred the sum of $450,000 out of the trust account to cover the purchase of a business, and there was money coming in from the bank to cover it.

[30] Mr Waalkens also referred to Mr Voordouw having been told on 8 September that a further $200,000 had been removed from the trust account, in August. He told the investigator that Mr Grewal could not explain the further missing money, but said that it had "been swallowed up paying accounts for the company".

[31] Mr Waalkens submitted that Mr Voordouw's obligation under r 7.2 was independent of any action the Agency's auditor might take. He submitted that for a licensee to wait until an auditor confirmed that money had been stolen would undermine the purpose of r 7.2 as a "warning system" for consumer protection. He submitted that Mr Voordouw had far more than reasonable grounds to suspect that Mr Grewal may be guilty of misconduct.

[32] Mr Waalkens submitted that his submissions in respect of Mr Voordouw were equally applicable to Mr Mason. In addition, he referred to Mr Mason's statement to the Authority's investigator that he and Mr Voordouw had told Mr Grewal (regarding Mr Grewal's attempts to obtain funds to pay back to the trust account) that "you can't just do this, it's not yours to whatever you've done, the move around or whatever but it's not yours to do that with". He also referred to Mr Mason's statement of evidence, in which he conceded that it was likely that he saw the auditor's draft management letter, which referred to $1million having been "used to finance the purchase of some branches".

[33] Mr Waalkens submitted that the Tribunal should reject Mr Mason's evidence of his (subjective) view that the funds shown to be missing from the trust account resulted from an inadvertent error. He submitted that this was inconsistent with the auditor's draft management letter, and that any supposed "inadvertent error" was, when it related to using $1million of trust account for non-trust purposes, indicative of serious negligence, and therefore misconduct. He further submitted that the test under r 7.2 is objective, not subjective, and there were clear warning bells that required Mr Mason to make a report to the Authority.

[34] Mr Rea submitted that Mr Voordouw and Mr Mason had reasonably taken the stance that they were faced with a major problem, and went ahead to do what needed to be done. He submitted that they took the issue seriously, they contacted the auditor and sought his advice, and pressed the auditor for progress. He also noted that Mr Grewal was not obstructive in the process.

[35] Mr Rea submitted that Mr Voordouw and Mr Mason were both experienced agents, and they had worked together, and considered all the options. He submitted that it was clear from the email correspondence and notes that they thought they were doing the right thing, and what they did was not unreasonable.

[36] Regarding Mr Voordouw in particular, Mr Rea submitted that he had immediately instigated an investigation by the auditor, conscious that referral to the Authority might be required depending on the outcome. He submitted that there was nothing illegitimate in Mr Voordouw's desire to avoid a report being made to the Authority by the auditor. He submitted that he could not be said to have been wilful or reckless, or seriously negligent or incompetent, even if his decision as to how to deal with the matter was in fact wrong.

[37] Mr Rea also submitted that a belief as to a "mere possibility" of misconduct does not equate to the existence of reasonable grounds to suspect misconduct, which is a very serious allegation. He also submitted that in the absence of any prior Tribunal decisions on the rule, and guidance or training by the Authority as to the ambit of r 7.2, while in the end Mr Voordouw may have taken the wrong course, his conduct was not unreasonable.

[38] Mr Rea further submitted that r 7.2 does not specify the time within which a report must be made, but accepted that a report should be made to Authority as soon as a licensee concludes there are reasonable grounds to suspect misconduct. He submitted that the rule is silent as to when a licensee should reach the "reasonable grounds to suspect" conclusion, and it does not preclude a licensee from ensuring that a thorough investigation is done, or advising the franchisor, before making a report to the Authority.

[39] Finally, Mr Rea submitted that even if the Tribunal were to conclude that Mr Voordouw had breached r 7.2, the involvement of the auditor should lead to the conclusion that his breach was not at such a serious level as to amount to unsatisfactory conduct. He further submitted that if the Tribunal were, however, to make an adverse finding against Mr Voordouw, it should not be misconduct, but one of unsatisfactory

conduct, at a relatively low level, because of the way Mr Voordouw and Mr Mason conducted their enquiries, giving Mr Grewal a fair chance to address the missing funds.

[40] Mr Hern submitted that while Mr Mason was made aware on 4 August of transfers out of the trust account of $1million, and a further transfer on 8 September of a further $200,000, he did not have reasonable grounds to suspect misconduct prior to the point when he was contacted by the Authority, and it was reasonable for him to conclude that 7.2 had not been engaged.

[41] He submitted that Mr Mason is well aware of the r 7.2 obligation, but believed Mr Grewal's assurances that it must have been an administrative error. On that basis, although a report to the Authority was "always on his radar" as something that might eventually become necessary, Mr Mason thought it was necessary to carry out a full investigation before deciding whether to make a report.

[42] Mr Hern further submitted that the limited case law recognises that there are situations in which it would be appropriate to make further enquiries and undertake an investigation before notifying the Authority. He submitted that in the decision of Complaints Assessment Committee 10058 in *Wallbutton*,[2] it was accepted that for the first few weeks, attention should be focussed on returning the funds and investigating the matter to establish the full extent of the offending. He submitted that Mr Mason's conduct was akin to the early period of the *Wallbutton* decision where there was an obligation to investigate, but as yet no obligation to report.

[43] Mr Hern also submitted that there was no delay in informing the auditor of the unexplained transfers, and that the auditor's responses, coupled with what he said at the meeting on 24 August, gave Mr Mason the impression that the auditor was not overly concerned about the matter. He submitted that at that meeting, the auditor accepted Mr Grewal's explanation (that the transfers must have been a mistake) and said that "errors do happen".

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[2] CA4011267, *J Wallbutton*: Decision of Complaints Assessment Committee 10058, 17 December 2010. The Tribunal discusses the *Wallbutton* decision later in this decision.

[44] Mr Hern submitted that Mr Mason was justified in taking advice from qualified professionals in deciding whether to make a report to the Authority. He further submitted that Mr Mason now appreciates that the auditor's attitude and responses to the unexplained transfers was rather blasé.

[45] Mr Hern also submitted that Mr Mason had insisted that Mr Grewal report the matters to the Harcourts Franchisor, and consult a lawyer. He submitted that it was reasonable for Mr Mason to accept Mr Grewal's advice that he had done both of these. He further submitted that Mr Mason was repeatedly assured by Mr Grewal that the misappropriation of funds was a mistake, and that the transfers had been made in error. He submitted that Mr Grewal was very persuasive and believable in his assertions that the funds would be returned, and there was no reason at the time for Mr Mason to distrust his word.

[46] In summary, Mr Hern submitted that up until the time that Mr Grewal returned from overseas (on 27 September) Mr Mason and Mr Voordouw reasonably and genuinely believed they were undertaking a thorough investigation, proper steps had been taken as to obtaining advice, and they had no reason to believe that Mr Grewal was dishonest. He submitted that Mr Mason did not consider that r 7.2 was engaged, and that a reasonable licensee would not have suspected misconduct on Mr Grewal's part prior to the Authority's intervention on 28 September.

[47] Mr Hern submitted that Mr Mason did not deliberately or recklessly fail to make a report under r 7.2, and that he would have been "reckless" to have made a report to the Authority without having made an investigation. He also submitted that if the Tribunal were minded to find that Mr Mason had breached r 7.2, his approach to the issue before him was not such a marked or serious departure from acceptable standards[3] as to constitute seriously incompetent or seriously negligent real estate agency work; rather, it was negligence at the level of unsatisfactory conduct, only.

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[3] See *Morton-Jones v The Real Estate Agents Authority (CAC 20005)* [2016] NZHC 1804, at paragraph [29].

Discussion

Agencies' trust accounts

[48] Sections 122 to 125 of the Act (in Part 5 of the Act "Duties relating to real estate agency work") set out agents' duties with respect to money received in respect of any transaction in their capacity as agents. Section 122 provides (as relevant in the present case) that the money must be paid to the person lawfully entitled to it (s122(1)); the money must be paid into a general or separate trust account and may not be drawn upon except for payment to the person entitled to it or as that person may direct in writing (s122(3)); and no money to which s 122 applies is available for payment of the agent's debts (s122(4)).

[49] Section 123 provides that money received in respect of a transaction must not be paid for a period of ten working days after it was received. Section 124 provides that an agent must account to the person entitled to the money, in writing, no later than 28 days after the money was received. Section 125 provides that agents' trust accounts must be audited.

[50] The importance of agents' meticulous compliance with these provisions of the Act were stressed by the Tribunal in its decision in *Jenner Real Estate Limited v Complaints Assessment Committee 10163*.[4]

[51] The Real Estate Agents (Audit) Regulations 2009 set out agencies' and auditors' duties in relation to trust accounts. The purposes of the audit regulations are set out in reg 3. As relevant in the present case, they are to provide for the appointment of auditors, and that agents must facilitate audits by ensuring that all trust accounts are easily identifiable and operated in a manner that generates appropriate and auditable records; and to prescribe the duties of agents in relation to the audit of their accounts, and the powers and duties of auditors.

[52] Regulation 23 of the audit regulations includes provisions that auditors must promptly report to the Authority when trust account records do not clearly show the

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4 *Jenner Real Estate Limited v Complaints Assessment Committee 10163* [2011] NZREADT 35.

trust account balances of each client; any error, misstatement, or irregularity in the trust account that the auditor believes should be reported; any matter of dishonesty or breach of the law on the part of the agency whose trust account is being audited; or a loss or deficiency of trust account money, or a failure by the agency to account for any trust money.

Rule 7.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012

[53] Rule 7 of the Rules provides:

> 7. Duty to report misconduct or unsatisfactory conduct
>
> 7.1 A licensee who has reasonable grounds to suspect that another licensee has been guilty of unsatisfactory conduct may make a report to the Authority.
>
> 7.2 A licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct must make a report to the Authority.

[54] The Tribunal was advised at the hearing that r 7.2 has not previously been the subject of a Tribunal decision, although, as discussed later, it has been considered in the decisions of two Complaints Assessment Committees. Counsel submitted that it would be appropriate for the Tribunal to set out what r 7.2 requires of licensees.

[55] We accept Mr Waalkens' submission that the purpose of r 7.2 is to assist the Authority in its regulatory and disciplinary functions, to contribute to the consumer protection focus of the Act, and to deter misconduct by licensees.

[56] Rule 7.2 is not couched in terms that appear likely to cause confusion or difficulty in understanding. It is, as Complaints Assessment Committee 10058 said in *Wallbutton*, "absolutely clear" that a report must be made if a licensee has reasonable grounds to suspect another licensee is guilty of misconduct. However, as the circumstances of any one case will differ from those of another case, it is not possible to set a "bright line" as to what is required before a licensee can be said to have "reasonable grounds to suspect", and the requirement to make a report arises. The determination of whether there has been a breach of r 7.2 must be made against the particular circumstances of the case.

[57] The word "reasonable" in "reasonable grounds to suspect" imposes an objective test, which must be interpreted as applying both to the licensee on whom the obligation lies ("licensee A"), and to the assessment of the conduct of the "other licensee" whose conduct is being considered ("licensee B"). In the present case both Mr Voordouw and Mr Mason said that they did not think there were reasonable grounds to suspect that Mr Grewal was guilty of misconduct before the Authority intervened on 28 September. However, the question is not whether licensee A himself or herself considered there were reasonable grounds to suspect that licensee B was guilty of misconduct. The test must be whether a reasonable licensee in the position of licensee A would have considered there were reasonable grounds to suspect that licensee B was guilty of misconduct.

[58] There may be cases where a reasonable licensee would have reasonable grounds to suspect misconduct immediately upon becoming aware of an issue. There may be cases where a reasonable licensee might not have reasonable grounds to suspect misconduct immediately, but will do so shortly thereafter, and there may be cases where it may take some time before a reasonable licensee would have reasonable grounds to suspect misconduct. It will depend on the circumstances of the particular case and, in particular, the information available to the reasonable licensee.

[59] The Tribunal was referred to two decisions of a Complaints Assessment Committee, concerning breaches of r 7.2.

[60] In *Wallbutton*, the Authority received a complaint on 24 August 2010 from "Person X", that a licensee had stolen money from funds held by an agency on behalf of clients. Complaints Assessment Committee 10058 undertook an "own motion" investigation[5] into Ms Wallbutton, a co-director of the agency. It found that she had become aware of the misappropriation of client funds by a licensee on 12 July 2010.

[61] The Committee said that Ms Wallbutton "took immediate action to remove the individual from their position and to begin the task of assessing the extent of the funds and ensuring the funds were replaced." It said that Ms Wallbutton interviewed staff, contacted her accountant, her auditor, her franchisor, banker, and solicitor. The

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5 Under s 78(b) of the Act.

Committee further said that over the next six weeks she had "carefully and tirelessly ensured that all the client funds held by her business were recouped and correct". However, she did not report the matter to the Authority.

[62] The Committee considered it was "understandable and commendable" that Ms Wallbutton did not want to accuse the other licensee without having the full facts, and that the priority was to ensure that the public did not suffer any loss. However, the Committee stated that once the extent of the offending became clear, she had an obligation to inform the Authority, and this should have been done "as a matter of course". The Committee observed that "Rule 7.2 is absolutely clear on this…".

[63] The Committee also noted that if Ms Wallbutton had decided to report the matter to the Authority, the Authority would determine what, if any, action would be appropriate to take against the licensee. Further, the period of six weeks between the problem becoming evident and the complaint to Authority had given Ms Wallbutton ample time to make a report. The Committee found that she had engaged in unsatisfactory conduct.

[64] We reject Mr Hern's submission that the Committee said in *Wallbutton* that there was "an obligation to investigate but as yet no obligation to report". What the Committee said was that in the circumstances of that case, once the extent of the offending became clear, she had an "obligation to report". We note, further, that in *Wallbutton* the Committee recorded that when the licensee became aware of the misappropriation of client funds, she took immediate steps, which included the removal of the individual from their position and ensuring that the funds were recouped. *Wallbutton* is an illustration of assessing compliance with s 7.2 against the particular circumstances of the case. Notwithstanding the steps that were taken by the licensee, Ms Wallbutton was held to have engaged in unsatisfactory conduct because she did not make a report to the Authority.

[65] In *Bayleys Real Estate Limited*,[6] the Authority received an anonymous complaint against a salesperson engaged by the agency, that the salesperson had forged or

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6 *C08765, Bayleys Real Estate Limited*, Decision of Complaints Assessment Committee 403, 26 July 2016.

falsified a rental appraisal (by altering a genuine appraisal prepared by another salesperson, in respect of a different property) and presented it to prospective purchasers in order for them to arrange finance to bid at an auction. On its own motion, Complaints Assessment Committee 403 undertook an investigation into the conduct of the agency.

[66] The conduct was discovered by the prospective purchasers when they attempted to contact the person who had prepared the appraisal, and were told that that person had left the agency some time earlier. They complained to the agency, which investigated the matter. The salesperson admitted the falsification. The agency imposed sanctions on the salesperson but did not make a report to the Authority. The agency said it had decided on legal advice that the salesperson's conduct did not amount to misconduct, but rather to unsatisfactory conduct, in respect of which under r 7.1 a report to the Authority was available but not mandatory.

[67] The Committee found there were reasonable grounds to suspect that the salesperson was guilty of misconduct, in that he had admitted falsifying a document that was to be presented to a financial institution. There were serious potential repercussions from his conduct. The Committee found that the agency had engaged in unsatisfactory conduct, on the basis that it had obtained legal advice (although also finding that the legal advice had not been in relation to whether the salesperson's conduct had amounted to misconduct).

[68] The Committee's reasoning in *Bayleys* is also an illustration of applying the objective test of whether "a reasonable licensee in the position of licensee A would have considered there were reasonable grounds to suspect that licensee B was guilty of misconduct". The Committee noted the agency's own view that the offending was unsatisfactory conduct, but said that it had:[7]

> … no doubt that the salesperson's conduct was potentially misconduct in terms of the Act. While ultimately such determinations are made by the Tribunal, the Committee considers that any instance of deliberate falsification of a document such as this must potentially constitute misconduct.

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7 *Bayleys*, at paragraph 3.11.

[69] Thus, a reasonable agency in the position of Bayleys would have concluded that it had reasonable grounds to suspect that the salesperson was guilty of misconduct.

[70] Decisions of Complaints Assessment Committees are not binding on the Tribunal, but those in *Wallbutton* and *Bayleys* have been of some assistance. We observe that the relevant Committee did not appear to have any difficulty, in either case, in determining that there were "reasonable grounds to suspect that another licensee was guilty of misconduct".

[71] We do not accept the submissions for Mr Voordouw and Mr Mason that in the absence of any prior Tribunal decisions on rr 7.1 and 7.2, and guidance and training by the Authority as to the ambit of r 7.2, while in the end they may have taken the wrong course, their conduct was not unreasonable. Licensees are required to be aware of and understand the Act, and rules and regulations made under the Act. A Tribunal decision, or Authority guidance and training, is not necessary to enable a reasonable licensee to assess particular circumstances and determine whether there are reasonable grounds to suspect misconduct. The absence of a Tribunal decision, or Agency guidance and training, does not ameliorate the reasonableness of a licensee's conduct.

The issue in the present case

[72] The Tribunal is required in this case to determine whether Mr Voordouw and/or Mr Mason failed to comply with the mandatory provisions of r 7.2: that is, to make a report to the Authority if and when there were reasonable grounds to suspect that another licensee was guilty of misconduct. The focus of the Committee's case was on whether Mr Voordouw and Mr Mason had reasonable grounds to suspect that Mr Grewal was guilty of misconduct.

[73] Misconduct is defined in s 73 of the Act as follows:

> 73 Misconduct
>
> For the purposes of the 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.

[74] The Committee did not specify the nature of the misconduct it alleged that Mr Voordouw and/or Mr Mason had reasonable grounds to suspect of Mr Grewal. The submissions of all counsel referred simply to "misconduct".

Reliance on auditor

[75] We referred in paragraph [52], above, to reg 23 of the audit regulations, which imposes an obligation on an agency's auditor to make a report to the Authority in certain specified circumstances. It was submitted on behalf of both Mr Voordouw and Mr Mason that they relied on the agency's auditor for advice, and that as the auditor did not seem to be "overly concerned", they reasonably concluded that they did not need to be. We do not accept that submission.

[76] The fact that auditors are required to report matters to the Authority does not absolve licensees from complying with r 7.2. The obligation is personal to the licensee, and reporting is mandatory when the licensee has reasonable grounds to suspect that another licensee is guilty of misconduct. Neither Mr Voordouw nor Mr Mason could leave it to the auditor to decide if and when a matter must be reported to the Authority, and then to make that report. Referring a matter to the Agency's auditor does not constitute compliance with a licensee's obligation under r 7.2.

[77] Secondly, there was no justification in this case to rely on the auditor to investigate the issue of the missing $1 million, then the further missing $200,000, in the detail and with the urgency that was required.

[78] It is clear from the correspondence that if the auditor appeared "blasé" (as Mr Hern put it) that would not have been surprising, given the understated way in which the auditor's advice was sought:

> It has come to my attention while signing off the monthly trust account reconciliation that there are three withdrawals that I don't understand. Two of these occurred before the end of the financial year so you may already be aware of them. In addition, I am unable to find the deposits for [two sales]. I would be grateful if you would have a look at the trust account and report back to me. I am also looking into this as well.
>
> I am also concerned that I may have have signed off the reconciliation report for June and July incorrectly.
>
> If you require further information please email me.

[79] First, the auditor was not asked to "investigate" anything. The email refers to three withdrawals that Mr Voordouw did not understand, and the fact that he was not able to find the deposits from two sales. The auditor is asked only to "have a look at the trust account" and report back to Mr Voordouw. Secondly, there is no mention of $1 million being missing from the Agency's trust account, which would have alerted the auditor to the fact that something very serious was amiss. Thirdly, there was no statement or indication that an urgent investigation was required, either in the email set out above, or in any of Mr Voordouw's later emails when he was "chasing up" the auditor for a response.

[80] Fourthly, both Mr Voordouw and Mr Mason said they were constrained in making a conclusion as to misconduct by the "conflict" between the auditor's statement in his draft management letter sent after the meeting on 24 August:

> As you are aware, there is $1,000,000 used out of the trust account to finance the purchase of some branches. We understand that this was only a temporary arrangement and will be rectified ASAP. We expect this reconciling amount of $1,000,000 to be cleared by the end of August.

and their evidence that they understood that at the meeting the auditor had accepted Mr Grewal's explanation that the transfers were the result of a mistake. However, there is no evidence that either or both of them queried the auditor as to his reference to the $1 million having been "used out of the Trust account to finance the purchase of some branches", or whether they should make a report to the Authority.

[81] Effectively, both Mr Voordouw and Mr Mason delegated their personal obligations under r 7.2 to the auditor. That does not constitute compliance with r 7.2.

Investigation of the missing $1 million was left to Mr Grewal

[82] Notwithstanding that both Mr Voordouw and Mr Mason considered that there was a potential breach of s 122 of the Act, and that Mr Grewal (who had previously signed the trust account declarations, and was sole signatory for the release of funds) was a possible suspect for responsibility of the money being missing, it is evident that as from 7 August, they left it to Mr Grewal to investigate the missing $1 million, to seek advice from the Agency's solicitor, and to advise the Harcourts franchisor.

[83] Given the amount missing, the proper course would have been for Mr Voordouw and/or Mr Mason to notify the auditor and report to the Authority, immediately, under r 7.1 or r 7.2. It would then have been up to the Authority to take such action as it considered appropriate. They did not have to conclude they had reasonable grounds to suspect fraud: the fact that there was $1 million missing from the trust account in itself raised a question whether the administration of the trust account had been incompetent or negligent or, in either case, seriously so.

Trigger points for reasonable grounds to suspect

[84] After learning on 4 August that there was $1 million missing from the trust account, there were clear points at which a reasonable licensee would have concluded that there were reasonable grounds to suspect misconduct in this case.

[85] The first of these was the meeting on 7 August involving Mr Grewal, Mr Voordouw, and Mr Mason, at which Mr Mason referred to a potential breach of s 122 of the Act (as to agents' duties with respect of money received in real estate agency transactions), licensees' obligations under r 7.1 and 7.2, the possibility of misconduct under s 73 of the Act, and potential fraud.

[86] The second was after the meeting on 24 August when Mr Voordouw and Mr Mason, with Ms Wright, met with Mr Grewal. Mr Mason and Mr Voordouw reiterated

their concern expressed at their earlier meeting, and referred to "deemed misconduct" and that they would then have an obligation to report to the Authority. Mr Grewal's response (as recorded in Mr Mason's notes) that "by Thursday money would be back in and he would be able to explain where it had gone" would not have given a reasonable licensee grounds for comfort.

[87] We refer next to the auditor's draft management letter, dated 25 August 2017, stating that "as you are aware" $1m had been used out of the trust account to finance the purchase of some branches. Although the draft management letter was addressed to Mr Grewal, it is clear that Mr Voordouw and Mr Mason saw it, as it was referred to in email correspondence. This letter raised two issues for them: first, because their understanding of the meeting was different, and secondly (and more importantly) because of the reference to trust account money having used for a purpose expressly prohibited by s 122 of the Act. A reasonable licensee would have concluded that a breach of s 122 gave reasonable grounds to suspect misconduct.

[88] The "grounds to suspect" could only have increased after 25 August. Increasingly urgent emails sent to Mr Grewal did not elicit a satisfactory response. Mr Voordouw and Mr Mason appear to have relied on the auditor, but such reliance did not constitute compliance with their mandatory obligation to make a report to the Authority, even if they were reluctant to do so.

[89] A further trigger point was on 8 September, when they were told that there was a further $200,000 missing from the trust account. Whether that resulted from dishonesty, or serious negligence or serious incompetence, a reasonable licensee would have concluded at that time, if not before, that there were reasonable grounds to suspect misconduct.

[90] As we said earlier, Mr Voordouw's and Mr Mason's failure to make a report to the Authority cannot be justified on the basis that they were waiting for the auditor to take some action. Nor could it have been justified on the basis that they wanted to "give Mr Grewal a chance" to remedy the position. Even if the money had been repaid into the trust account, that would not have negated the fact that trust account money had been used in a prohibited way.

[91] Further, their delay in reporting could not be justified on the basis of wanting to advise the Harcourts franchisor, or having received legal advice (as reported by Mr Grewal) that they were "doing the right thing". While it is appropriate to advise the franchisor, as a matter of courtesy, that could not take precedence over making a report to the Authority. Nor could obtaining legal advice, even if they had done so directly. Ultimately, a report under r 7.2 is the licensee's own responsibility.

[92] We find that a reasonable licensee would have concluded that there were reasonable grounds to suspect misconduct, at the latest, on receiving the auditor's draft management letter. At that time, if not before, a reasonable licensee would have made a report to the Authority under r 7.2. In breach of r 7.2, neither Mr Voordouw nor Mr Mason did so.

Misconduct or unsatisfactory conduct?

[93] The charges against each of Mr Voordouw and Mr Mason alleged misconduct under s 73(c) of the Act (a reckless or wilful breach of the Act or Rules) and in the alternative, misconduct under s 73(b) (seriously incompetent or seriously negligent real estate agency work. We are mindful of the Tribunal's power to make a finding of misconduct if we are not satisfied that the Committee has proved that their breach of r 7.2 constituted misconduct.

[94] We have considered the circumstances considered by the Complaints Assessment Committees in *Wallbutton* and *Bayleys*. In both cases, while there were some similarities, the circumstances are not the same. In *Wallbutton*, the licensee herself undertook a comprehensive investigation, contacting her franchisor, banks, and the agency's solicitor. Further, she "took immediate action to remove the individual from their position". In *Bayleys* sanctions were imposed on the salesperson concerned, and the agency itself obtained legal advice (albeit not directly on point).

[95] As stated earlier, there is no "bright line" point between unsatisfactory conduct and misconduct. That issue can only be determined after considering all the circumstances of the particular case. In this case, we are satisfied that the combination of:

[a] the number of trigger points for concluding there were reasonable grounds to suspect misconduct which were not acted on;

[b] leaving all investigation, obtaining legal advice, and contact with the agency's bank to Mr Grewal; and

[c] relying on the auditor's direction and advice while not giving him adequate instructions;

leads to a finding of misconduct against Mr Voordouw and Mr Mason.

[96] We are not satisfied that the Committee has proved the charges of misconduct under s 73(c). However, we find the charges of misconduct under s 73(b) proved.

Outcome

[97] We find both Mr Voordouw and Mr Mason guilty of misconduct under s 73(b) of the Act. Counsel are to confer and advise the Tribunal whether penalty may be determined on the papers. The Tribunal will then make any necessary timetable orders.

[98] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews
Chairperson

_____
Mr G Denley
Member

_____
Ms N Dangen
Member