BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 49

READT 061/18

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 521
AGAINST	CHRISTOPHER WRIGHT Defendant
Hearing	9 and 10 September 2019, at New Plymouth (Written penalty submissions received 4 October 2019)
Tribunal:	Hon P J Andrews, Chairperson Mr J Doogue, Member Mr N O'Connor, Member
Appearances:	Mr R W Belcher, on behalf of the Committee No appearance by or on behalf of the Defendant
Date of Decision:	13 November 2019

DECISION OF THE TRIBUNAL
(Charge and penalty)

Introduction

[1] On 28 December 2018, Complaints Assessment Committee 521 ("the Committee") charged Mr Wright with misconduct, pursuant to s 73(a) (disgraceful conduct) of the Real Estate Agents Act 2008 ("the charge").

[2] At the time of the events which are the subject of the charge, Mr Wright was contracted to a real estate agency, Century 21 ("the Agency"), to undertake property management. Mr Wright is charged that in the course of being the property manager of five residential properties in New Plymouth he received bond and/or rent moneys from tenants and failed to ensure that the moneys were passed on to the intended recipients, as follows:

[a] Property at Pohutukawa Place: Mr Wright received a $1,600 bond and failed to ensure that it was lodged with Tenancy Services;

[b] Property at Tiromoana Crescent: Mr Wright received a $1,700 bond and failed to ensure that it was lodged with Tenancy Services;

[c] Property at George Street:

[i] Mr Wright received a $1,800 bond and failed to ensure that it was lodged with Tenancy Services, and

[ii] received an initial rent payment of $450, and failed to ensure that it was passed on to the landlord;

[d] Property at Tothill Street:

[i] Mr Wright received a $1,400 bond, and failed to ensure that it was lodged with Tenancy Services, and

[ii] received an initial rent payment of $350 and 13 weekly rental payments of $350 (totalling $4,900), and failed to ensure that the payments were passed on to the landlord; and

[e] Property at Paynters Avenue: Mr Wright received a bond payment of $1,640 and failed to ensure that it was lodged with Tenancy Services.

[3] Despite indicating to the Real Estate Agents Authority (in a communication to the Authority's investigator) that he was "guilty of theft from Century 21", and indicating to the Tribunal (in a telephone conference) that he would admit the charge, Mr Wright subsequently advised that he intended to defend the charge, and both give evidence himself and call evidence. Accordingly, the charge was set down for hearing, in the District Court at New Plymouth.

[4] Mr Wright did not comply with a direction that he was to file and serve statements of evidence by 12 July 2019. In an email to the Tribunal on 26 July 2019 Mr Wright advised that "at this stage I will not be attending the hearing in New Plymouth … If things change I will advise you straight away."

[5] In the Chairperson's Minute (9) issued on 14 August 2019, the parties were advised that in the event that Mr Wright did not appear at the hearing of the charge, it would be determined by formal proof (that is, on the basis of confirmed statements of evidence, and submissions by or on behalf of the parties), and in the event that Mr Wright did appear at the hearing, he could present oral submissions but could not, except by leave of the Tribunal (which was to be sought in advance of the hearing), question witnesses.

[6] Mr Wright did not advise the Tribunal of any intention to attend the hearing, or seek leave to question witnesses. Mr Wright did not appear at the start of the hearing in the New Plymouth District Court. He entered the courtroom towards the end of the first hearing day, but when asked if he wished to participate in the hearing advised that he did not.

Evidence received

[7] The Tribunal received evidence from Mr Timothy Kearins and Ms Wai Johnson, the owners of By The Lake Realty Limited, which operates two franchise branches of Century 21, in Turangi and Palmerston North. Their evidence was that Mr Wright

began work for the Agency as an independent contractor, in 2013. Mr Wright mainly worked in New Plymouth, but was offered additional work in the Turangi office in 2016. Prior to receiving a complaint in January 2018 from the landlord of a property for which he was acting as property manager, Mr Kearins and Ms Johnson had no issues with Mr Wright's work.

[8] The Tribunal also received evidence from the landlords and tenants of the five properties referred to in the charge. Having read the statements of evidence, and having had the opportunity to ask questions of the witnesses who gave oral evidence, we make the findings set out below.

Factual findings

Mr Wright's engagement with the Agency

[9] Mr Wright's work included both sales and property management. His property management work was carried out either:

[a] under a property management agreement between the Agency (through Mr Wright) and the relevant landlord. In these cases, Mr Wright would market the property and secure tenants (including entering into a tenancy agreement on behalf of the landlord), the tenant would be required to pay any letting fee, bond, and initial rental payments to the Agency, and the Agency would collect weekly rent in its rental trust account; or

[b] on a "casual rental" basis, in which Mr Wright would manage a property under an oral or written agreement between himself and the landlord. This usually involved Mr Wright marketing the property, securing tenants, and arranging bond and initial rental payments and charging a letting and administration fee. The bond would either be paid into the Agency's trust account to lodge with Tenancy Services, or paid directly to the landlord.

[10] Because the "casual rental" agreements were under varying terms, the Agency often did not know about them. Ms Johnson's evidence was that if anything came

through the Agency's trust account, it would usually be a one-off payment of the bond and sometimes the first lot of rent. The Agency relied on Mr Wright to provide relevant information and documentation if it was required to lodge bonds with Tenancy Services, or to disburse rent to landlords.

Properties owned by the Porotene Trust

[11] The properties at Pohutukawa Place, Tiromoana Crescent, and George Street, are owned by the Porotene Trust, administered by Mr and Mrs Broughton. Pursuant to an oral agreement, Mr Wright was engaged to market the properties, place tenants, arrange for tenancy agreements to be signed, obtain bond payments from tenants and lodge the bonds with Tenancy Services, and collect the tenants' first week's rent on behalf of the Trust. Once a new tenant had been placed, Mr Wright would pass control back to Mr and Mrs Broughton.

(a) Pohutukawa Place

[12] This property was let pursuant to a tenancy agreement dated 18 October 2016, prepared by Mr Wright. The tenancy agreement included a receipt, signed by Mr Wright, for an initial rent payment of $1,600 and a bond payment of $1,600 (in total, $3,200). Mr Wright also signed a separate receipt, dated 17 October 2016, recording the receipt of the initial rent and bond payments, together with a payment of $350 for "balance of letting fee" (in total, $3,550).

[13] The tenant paid Mr Wright $200 (a portion of the letting fee) to secure the property when she first viewed it. She withdrew $3,550 in cash from her bank account on 17 October 2016, which she then paid to Mr Wright at his office, for the balance of the letting fee, the initial rent, and the bond. Mr Broughton received the initial rent payment from Mr Wright, and subsequent rental payments directly from the tenant but did not receive the bond payment.

[14] The tenant, and Mr and Mrs Broughton, assumed that Mr Wright had lodged the bond with Tenancy Services. However, Mr Broughton was advised by Tenancy Services on 12 February 2018 that no bond was held for the property. The Agency did

not receive any bond payment for Pohutukawa Place from Mr Wright, for lodging with Tenancy Services.

[15] We find that the tenant paid the bond to Mr Wright, and he was required to ensure that it was lodged with Tenancy Services. We find that he did not pay it to Tenancy Services, and did not pass it to the Agency to pay to Tenancy Services. We find that Mr Wright failed to ensure that the bond payment was lodged with Tenancy Services.

(b) Tiromoana Crescent

[16] This property was let under a tenancy agreement for a fixed-term tenancy for two years, prepared by Mr Wright. The tenancy commenced on 30 June 2017.

[17] The tenancy agreement was signed on 28 May 2017. At Mr Wright's request, the tenant made a direct credit payment of $2,675 into Mr Wright's personal bank account, comprising an initial payment of rent of $425, a bond payment of $1,700, and a letting fee of $550. Mr Wright gave the tenant a receipt for this payment, and signed the receipt portion of the tenancy agreement recording the payment.

[18] About one week before the tenant was due to move into the property, Mr Wright told him that the landlord only wanted to let the property for six months, but would agree to the two-year term if the rent were $460 per week rather than $425. Mr Wright said he would personally pay the $35 per week difference between the two rental figures for the first year of the tenancy. Mr Wright then amended the tenancy agreement to record rental at $460 per week, and receipt of an initial rent payment of $460, and a bond of $1,840. Mr Wright continued to deposit $35 into the tenant's bank account each week up until January 2018.

[19] Mr Broughton received the initial rental payment. Both he and the tenant assumed that Mr Wright would lodge the bond payment with Tenancy Services. Mr Broughton was advised on 12 February 2018 that no bond was held by Tenancy Services. The Agency did not receive the bond payment to lodge with Tenancy Services.

[20] We find that Mr Wright received the bond payment for Tirimoana Crescent from the tenant, and that he was required to ensure that it was lodged with Tenancy Services. We find that Mr Wright failed to pay the bond to Tenancy Services, and did not pass it to the Agency to lodge it. We find that Mr Wright failed to ensure that the bond payment was lodged with Tenancy Service.

(c) George Street

[21] On 4 January 2018, the tenant completed a pre-tenancy application form for the George Street property. On 5 January 2018, at Mr Wright's request, he deposited $2,850 into Mr Wright's personal bank account, comprising a letting fee of $600, a bond of $1,800, and the initial rent payment of $450. On 7 January 2018, the tenant signed a tenancy agreement, prepared by Mr Wright. The tenancy agreement included a record that Mr Wright had received the payment made by the tenant.

[22] The initial rent payment was not received by the Porotene Trust. On 2 February 2018, Mr Broughton emailed Mr Wright, asking whether the new tenant had moved into the property. He received no reply, and subsequently tried to contact him by telephone calls, text messages, and email. He was advised by Mr Kearins on 12 February 2018 that Mr Wright had resigned from the Agency. Mr Broughton then contacted Tenancy Services, and was informed that day (confirmed by email on 10 April 2018) that no bond had been lodged for the George Street property, or for the Pohutukawa Place or Tirimoana Crescent properties.

[23] We find that Mr Wright received payments of the initial rent and bond for the George Street property, and he was required to pass the rent onto the Porotene Trust, and to ensure that the bond was lodged with Tenancy Services. We find that Mr Wright failed to pass the initial rent on to the Trust, and failed to lodge the bond with Tenancy Services, or pass it on to the Agency to lodge. We find that Mr Wright failed to ensure that the bond payment was lodged with Tenancy Services, and failed to pass the initial rent on to the Trust.

Property owned by the McCourt & Rozgon Family Trust

[24] Ms Rozgon is the sole trustee of the McCourt & Rozgon Family Trust, which is the owner of 19 rental properties. Mr Wright started working for her as property manager of the Trust's properties. On 6 June 2017, she entered into a Property Management Agreement with the Agency (through Mr Wright) in respect of a property at Tothill Street.

[25] This property was let pursuant to a tenancy agreement dated 20 April 2017, prepared by Mr Wright. The tenancy agreement recorded that the tenant had paid Mr Wright $1,750, comprising an initial rental payment of $350 and a bond of $1,400. This was paid by the tenant into Mr Wright's personal bank account the same day. Thereafter, the tenant paid weekly rental payments of $350 into Mr Wright's bank account, up to July 2017, totalling $4,550. On 2 August 2017, Mr Wright advised the tenants of a new bank account number for rental payments. This was the number of the trust account for the Agency. The tenants paid rent into the Agency's trust account up until December 2017.

[26] Mr Wright did not lodge the bond payment with Tenancy Services, and did not pass it on to the Agency to lodge. Further, he did not pass on any rental payments made by the tenants before 2 August 2017, totalling (inclusive of the initial rent) $4,900. Ms Rozgon made email enquiries of Mr Wright as to the rental payments, and he told her that the money was "all there on my account", but he needed to tidy up payments within the Agency's systems. She met Mr Wright at one of the Trust's properties in October 2017, and asked him again about the missing rent money. He admitted to her that he had "pocketed it", and had been collecting money into his personal bank account. Ms Rozgon agreed to give him the opportunity to pay the money back. She was not aware at that time that the bond had not been lodged with Tenancy Services.

[27] Ms Rozgon terminated the agreement with the Agency on 5 January 2018. She then became aware that the bond for Tothill Street had not been lodged with Tenancy Services.

[28] We find that Mr Wright received payment of the bond for Tothill Street, and he was required to ensure that the bond was lodged with Tenancy Services. We find that Mr Wright failed to lodge the bond with Tenancy Services. We further find that Mr Wright did not pass the bond on to the Agency to lodge it. We find that Mr Wright failed to ensure that the bond payment was lodged with Tenancy Services. We also find that Mr Wright received payments of rent for the property between April and August 2017, totalling $4,900 and failed to pass the rent on to the Trust.

Property owned by Mr and Mrs Smallman

[29] Mr and Mrs Smallman own the Paynters Avenue property. On 15 February 2015, they entered into a Property Management Agreement with the Agency (through Mr Wright) for the property. The property was let pursuant to a tenancy agreement dated 17 April 2017. The tenancy agreement recorded the receipt by Mr Wright of an initial rent payment of $410 and a bond of $1,640. This was paid by the tenant by way of a direct deposit into Mr Wright's personal bank account. When she paid the initial rent and bond, the tenant also paid a letting fee of $550.

[30] In early February 2018, the tenant gave notice that she would be moving out of the property. Mr Smallman then became aware that no bond had ever been lodged with Tenancy Services. He refunded the missing bond money to the tenant.

[31] We find that Mr Wright received the bond payment for Paynters Avenue from the tenant and that he was required to ensure that it was lodged with Tenancy Services. We find that Mr Wright failed to pay the bond to Tenancy Services, and did not pass it to the Agency to lodge it. We find that Mr Wright failed to ensure that the bond payment was lodged with Tenancy Service.

Summary of factual findings

[32] We find that the Committee has proved each of the particulars of the charge against Mr Wright. Mr Wright admitted to Ms Rozgon that he had "pocketed" the rent, and he admitted to the Authority's investigator that he was guilty of theft. We are satisfied that we can reasonably infer that in respect of each property Mr Wright

misappropriated, for his own purposes, the money paid to him but not (in the case of bonds) lodged with Tenancy Services or (in the case of rental payments) passed on to the relevant landlord.

[33] We turn to consider whether the Committee has established that Mr Wright is guilty of misconduct under s 73(a) of the Act (disgraceful conduct).

Relevant statutory provisions

Mr Wright is subject to the disciplinary provisions of the Act

[34] Mr Wright voluntarily surrendered his salesperson's licence on 30 December 2017. However, as a former licensee, he remains subject to the disciplinary provisions of the Act. Part 4 of the Act is headed "Complaints and Discipline", and comprises ss 71 to 120. Section 71 provides:

> **71 Meaning of licensee in this Part**
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> In this Part, unless the context otherwise requires, **licensee** has the meaning given to it by section 4 and includes–
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> (a) A former licensee; and
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> (b) A person who is or has been a licensee of a company that is, or has been, a licensee.

Misconduct in relation to property management work

[35] Section 73 of the Act provides that a licensee can be found guilty of misconduct as follows:

> **73 Misconduct**
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> For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct–
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> (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
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> (b) constitutes seriously incompetent or seriously negligent real estate agency work; or
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> (c) constitutes a wilful or reckless contravention of
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> (i) this Act; or
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> (ii) other Acts that apply to the conduct of licensees; or
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> (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.

[36] "Real estate agency work", as defined in s 4 of the Act, means "any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction". As relevant to this proceeding, "transaction" is defined in s 4 as meaning "the grant, sale, purchase, or other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies)". In the present case, therefore, in carrying out residential property management, Mr Wright was not carrying out real estate agency work.

[37] That does not mean that Mr Wright is not subject to the disciplinary provisions of the Act in respect of property management work. While s 72 of the Act, which is concerned with unsatisfactory conduct, is confined to conduct that constitutes real estate agency work, s 73, as to misconduct, has a wider application.

[38] His Honour Justice Woodhouse's judgment in *Morton-Jones v Real Estate Agents Authority* concerned a licensee who contended that the residential property management work he had carried out was not "real estate agency work", and for that reason he could not be subject to charges under s 73 of the Act. His Honour rejected that argument. He said:[1]

> I am satisfied that there can be misconduct by a licensee under s 73 in respect of conduct that does not relate to real estate agency work. The structure of s 73, by itself, makes that sufficiently clear. There is, for example, the express reference to real estate agency work in paragraph (b), and the absence of that qualification in paragraph (a). There is the same difference between paragraph (b) and paragraph (d). Paragraph (d) plainly may apply to conduct unrelated to real estate agency work, but of a nature which, as paragraph (d) says, "reflects adversely on the licensee's fitness to be a licensee". An obvious example is theft. The short point is that s 73, in some provisions, is directed only to conduct in the course of agency work, but other provisions do not have that limitation. This analysis is supported by s 72. Section 72 is directed to "unsatisfactory conduct", and is expressly confined to real estate agency work.

[39] In its decision in *Mosley v Real Estate Agents Authority (CAC 409)*, the Tribunal was concerned with a Complaints Assessment Committee's decision to take no further

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1 *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804, at [38].

action on a complaint against a licensee who had carried out property management work relating to a residential property.[2] The Tribunal noted that where a licensee carries out residential property management work, the disciplinary provisions of the Act have no application unless the licensee has engaged in conduct which would reasonably be regarded by agents of good standing, and reasonable members of the public, as disgraceful.[3]

Disgraceful conduct

[40] As the Tribunal said in *Complaints Assessment Committee 10024 v Downtown Apartments Ltd (In Liq)*:[4]

> The word disgraceful is in no sense a term of art. In accordance with the usual rules it is to be given its natural and popular meaning in the ordinary sense of the word.

[41] In his discussion of disgraceful conduct under s 73(a) of the Act in *Morton-Jones*, his Honour Justice Woodhouse said:[5]

> [29] … If the charge is under s 73(a) the critical enquiry is whether the conduct is "disgraceful". Conduct which involves a marked and serious departure from the requisite standards must be assessed as "disgraceful", rather than some other form of misconduct which may also involve a marked and serious departure from the standards. The point is more than one of semantics because s 73 refers to more than one type of misconduct. In particular, s 73(b) refers to "seriously incompetent or negligent real estate agency work". Work of that nature would also involve a marked and serious departure from particular standards; the standards to which s 73(b) is directed are those relating to competence and care in conducting real estate work.

[42] In summary, conduct charged against a licensee under s 73(a) may be found to be disgraceful (whether or not it is in the course of, or related to, real estate agency work) if it meets the ordinary meaning of "disgraceful", that is if the licensee's conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful. When making this determination, the Tribunal takes into consideration the standards that an agent of good standing should aspire to, including

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2 *Mosley v Real Estate Agents Authority (CAC 409)* [2017] NZREADT 62.
3 At [28].
4 *Complaints Assessment Committee 10024 v Downtown Apartments Ltd (In Liq)* [2010] NZREADT 6, at [55].
5 *Morton-Jones*, fn 1, above, at [29].

any special knowledge, skill, training or experience such person may have. The standard of proof required before the Tribunal can find a charge under s 73(a) proved is the balance of probabilities.[6]

Discussion

[43] We have been referred to a decision of the Tribunal concerning Mr Wright, issued on 14 April 2015.[7] Mr Wright was charged with two charges of misconduct under s 73(a) of the Act (disgraceful conduct) in connection with residential property management work: he had misled landlord clients about who would be occupying their property (and in particular, had not advised them that he was renting the garage on the property), and he produced retrospective rental statements and misled a Complaints Assessment Committee in statements he made regarding rental records.

[44] The Tribunal found that Mr Wright's conduct was unsatisfactory, but not at the level of being disgraceful. Accordingly, the charge under s 73(a) was dismissed. However, the Tribunal went on to say:[8]

> Accordingly, we dismiss the charges, but express the wish that the defendant undergo an appropriate educational course explaining the principles of ethics applying to real estate practice. If we had jurisdiction we would order that educational course, but because the defendant's concerning conduct is not real estate work, we have no jurisdiction to find, or penalise for, unsatisfactory conduct.

[45] We have found in respect of the present charge that in relation to five separate properties, over the period from October 2016 to January 2018, Mr Wright received bond payments and failed to ensure that they were lodged with Tenancy Services, and (in two cases) received rent payments and failed to pass them on to landlords. The sums involved totalled $13,490. In each case, Mr Wright knew that he was not entitled to retain the payments. He received the payments solely for the purpose of passing them on to another entity or person, and was holding them in trust, but he misappropriated them.

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6 Pursuant to s 110(1) of the Act.
7 *Real Estate Agents Authority (CAC 20003) v Wright* [2015] NZREADT 25.
8 At [82].

[46] Mr Wright's conduct is analogous to that of Mr Morton-Jones, who was charged with having short-paid rent (amounting to approximately $42,853) to landlords between 2009 and 2013, of which approximately $37,169 was eventually paid to the landlords. While the amount involved in Mr Wright's conduct was less than that involved in Mr Morton-Jones's offending, that does not make the nature of Mr Wright's conduct any less serious.

[47] Mr Wright's conduct in misappropriating money paid to him affected both tenants and landlords. His failure to lodge bonds with Tenancy Services meant that at the end of a tenancy, the bond paid by the tenant could not be refunded (as happened with the tenant of Paynters Avenue). His failure to pass on rent payments meant that landlords lost rent.

[48] As a result of the earlier charges under s 73(a), Mr Wright was well aware of his ethical obligations as a licensee. He cannot reasonably have believed that he was not required to ensure that the bond payments were lodged with Tenancy Services, and that he was not obliged to pass rent on to the landlords.

[49] We are satisfied that Mr Wright's conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful. We find that the Committee has proved the charge of misconduct conduct under s 73(a) of the Act.

Finding

[50] We find Mr Wright guilty of misconduct under s 73(a) of the Act (disgraceful conduct).

Penalty

[51] At the end of the hearing, we indicated that we would find Mr Wright guilty of the charge of misconduct under s 73(a) of the Act. We gave Mr Belcher leave to file written submissions as to penalty. These were received on 4 October 2019.

Penalty principles

[52] The principal purpose of the Act is to "promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work."[9] The Act achieves these purposes by regulating agents, branch managers, and salespersons, raising industry standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.[10] These purposes are best met by penalties for misconduct and unsatisfactory conduct being determined in accordance with the need to maintain a high standard of conduct in the industry, the need for consumer protection, the maintenance of confidence in the industry, and the need for deterrence.

[53] A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The Tribunal should impose the least punitive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.[11]

[54] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As relevant to the present case the Tribunal may:

[a] Make any of the orders that a Complaints Assessment Committee may impose under s 93 of the Act (these include censuring or reprimanding the licensee, and ordering the licensee to undergo training or education);

[b] Impose a fine of up to $15,000;

[c] Order cancellation or suspension of the licensee's licence;

[55] In determining the appropriate penalty for misconduct, the nature of the misconduct will be considered along with other factors. In *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* (in relation to a lawyer), the High Court

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9 Section 3(1) of the Act.

10 Section 3(2).

11 See *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30, *Morton-Jones v The Real Estate Agents Authority* [2016] NZHC 1804, at [128] and *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, at [97].

noted that the "ultimate issue" is as to the practitioner's fitness to practise, and factors which will inform this decision include the nature and gravity of the charges, the manner in which the practitioner has responded to the charges (such as the practitioner's willingness to co-operate in the investigation, to acknowledge error or wrongdoing, and to accept responsibility for the conduct), and the practitioner's previous disciplinary history.[12]

Submissions

[56] Mr Belcher submitted that Mr Wright's offending involved significant dishonesty, in that he had misappropriated rent and/or bond money received from tenants, totalling $13,490. He submitted that the offending was premeditated, methodical, and repetitive, and constituted an abuse of the opportunity presented to Mr Wright as a trusted agent, to exploit landlords and tenants. He submitted that the fact that Mr Wright arranged for payments to be made into his personal bank account meant that he was able to bypass the Agency's trust account, and conceal the misappropriation from the Agency.

[57] Mr Belcher submitted that an order to cancel a licence is the starting point for penalty after a finding of dishonesty. He referred to the Tribunal's statement in *Complaints Assessment Committee v Zhou*, that "the highest standards of honesty are fundamental in the real estate industry",[13] and to the judgment of his Honour Justice Woodhouse in *Morton-Jones*, in which his Honour emphasised the seriousness of conduct involving dishonesty, in particular the mishandling of clients' money.[14]

[58] Mr Belcher further submitted that Mr Wright was on notice, as a result of the previous disciplinary proceeding against him,[15] as to the need for a real estate person to always be open and honest. He submitted that Mr Wright had displayed no remorse or acceptance of his wrongdoing, and gave no indication of having any insight into his actions.

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12 *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* [2013] NZHC 83; [2013] 3 NZLR 103, at [185]–[189].
13 *Complaints Assessment Committee 306 v Zhou* [2016] NZREADT 12, at [57].
14 *Morton-Jones*, fn 1, above, at [87]–[93].
15 See [43]–[44], above.

[59] Mr Belcher submitted that as Mr Wright has voluntarily surrendered his licence, it is not open to us to order cancellation of his licence. That has already occurred, pursuant to s 61(3) of the Act. He sought a ruling from the Tribunal that had it been available to us, we would have ordered cancellation of Mr Wright's licence, as such an indication could be taken into account in the event of Mr Wright's ever seeking to re-enter the industry.

Discussion

[60] We accept Mr Belcher's submissions that Mr Wright's offending was serious, involving the misappropriation of landlords' and tenants' money. Mr Wright retained bonds he should have lodged with Tenancy Services (or paid to the Agency so that it could do so), and he retained rental payments he should have passed on to the landlord.

[61] The Tribunal's statement in its decision in *Complaints Assessment Committee 306 v Zhou*, although made in the context of the particular case, has general application, and bears repeating:[16]

> The highest standards of honesty are fundamental in the real estate industry.

[62] At paragraph [44], above, we set out the Tribunal's statement in the earlier proceeding against him. Earlier in that decision the Tribunal expressed concern that this was:[17]

> … another case where a real estate salesperson does not seem to understand that his (or her) activities which are not real estate work may, nevertheless, be so reprehensible (or disgraceful in terms of s 73(a)) as to amount to misconduct under the Real Estate Agents Act 2008. Perhaps a simpler way of expressing our concern is that such an agent's non-real estate work activities, whether business or private and, as in the present case, involving residential property management, may show that the agent is unfit to be a real estate agent and/or requires to be disciplined as an agent in terms of the standards set out in ss 72 and 73 of the Act and its Regulations.

[63] Mr Wright appears not to have gained any insight into his conduct as a result of the Tribunal's statements in the earlier decision. That is a relevant factor in

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16 *Complaints Assessment Committee 306 v Zhou*, fn 8, above, at [57]. (

17 *Wright*, fn 7, above, at [78].

determining the appropriate penalty in respect of the offending on which we have made the finding of disgraceful conduct.

[64] An order for cancellation of licence is the appropriate response to Mr Wright's offending. As Mr Belcher submitted, that order is not available to us, as Mr Wright has surrendered his licence. However, we record that had it been open to us to do so, we would have ordered that Mr Wright's licence be cancelled. We note that cancellation was ordered in the case of Mr Morton-Jones, pursuant to the judgment in the High Court.

[65] Mr Belcher did not submit that Mr Wright should be ordered to pay a fine. In the light of our indication that cancellation of licence is the appropriate response to his offending, and the orders for compensation we intend to make, we do not consider it necessary for the purposes of the Act to impose a fine in this case.

Compensation

[66] Section 110(2)(g) of the Act provides (in relation to the orders that may be made by the Tribunal if a charge of misconduct is proved) that the Tribunal may make an order, as follows:

> (g) where it appears to the Tribunal that any person has suffered loss by reason of the licensee's misconduct, an order that the licensee pay to that person a sum by way of compensation as is specified in the order, being a sum not exceeding $100,000.

[67] Pursuant to s 114 of the Act, an order for compensation made by the Tribunal may be enforced in all respects as if it were an order of the District Court.

[68] Mr Belcher submitted that in the present case, Mr Wright received bond payments as agent for the landlord for each property. The landlords were liable to the tenants for the bond payments, and were required to lodge them with Tenancy Services, or repay them to the tenants. The landlords (or in one case, the Agency) subsequently repaid the tenants, or paid the bonds to Tenancy Services, and have therefore suffered loss by reason of Mr Wright's misconduct.

[69] Mr Belcher further submitted that Mr Wright also received rent as agent for one landlord, but failed to pass it to the landlord, causing the landlord to suffer loss.

[70] We accept Mr Belcher's submissions. We are satisfied that it is appropriate for an order to be made that Mr Wright is to pay compensation. We order that Mr Wright is to pay compensation, as set out below:

Properties owned by the Porotene Trust, payable to the trustees of the Porotene trust

[a] Pohutukawa Place: $1,600 (bond)

[b] Tiromoana Crescent: $1,700 (bond)

[c] George Street: $1,800 (bond) and $450 (initial rent) (Total: $2,250)

Property owned by the McCourt & Rozgon Family Trust

[d] Tothill Street: $1,400 (bond), to be paid to the Agency

[e] Tothill Street: $6,300 (rent), to be paid to Ms J A Rozgon

Property owned by Mr and Mrs Smallman, payable to Mr T H Smallman

[f] Paynters Avenue: $1,640 (bond)

[71] The compensation payable to the trustees of Porotene Trust (in total, $5,550), the McCourt & Rozgon Family Trust ($6,300), the Agency ($1,400), and to Mr and Mrs Smallman ($1,640) must be paid to the Authority (for forwarding to the respective payees), within 20 working days of the date of this decision.

Costs

Jurisdiction

[72] Section 110A of the Act provides that the Tribunal may make orders as to costs:

110A Costs

(1) In any proceedings under this Act, the Disciplinary Tribunal may make any award as to costs as it thinks fit, whether or not it grants any other remedy.

(2) Without limiting the matter that the Disciplinary Tribunal may consider in determining whether to make an award of costs under this section, the Disciplinary Tribunal may take into account whether, and to what extent, any party to the proceedings–

(a) has participated in good faith in the proceedings:

(b) has facilitated or obstructed the process of information gathering by the Disciplinary Tribunal:

(c) has acted in a manner that facilitated the resolution of the issues that were the subject of the proceedings.

(3) [Not relevant to this proceeding]

(4) A person to whom costs are awarded under this section, but who has not been paid in full, may file a copy of the order in the District Court, where it may be enforced for so much of the amount that is still owing as if it were a judgment of the District Court.

[73] Section 110A was inserted into the Act with effect from 14 November 2018, pursuant to s 244 of the Tribunals Powers and Procedures Legislation Act 2018.

[74] We accept Mr Belcher's submission that s 110A provides the Tribunal with jurisdiction to make an order as to costs in the present case. While s 110A was not in force at the time of Mr Wright's conduct (which occurred between October 2016 and January 2018), it was in force at the time the charge against Mr Wright was laid on 20 December 2018. The focus of s 110A is on the proceedings before the Tribunal, and the factors set out in s 110A(2) relate to conduct in the course of the proceedings.

Submissions

[75] Mr Belcher noted that this is the first occasion on which the Tribunal has had occasion to consider an application for costs under s 110A of the Act. He made submissions as to the general principles as to applications for orders as to costs in disciplinary proceedings under the Act, and suggested a "stepped" approach to calculating the quantum of an order, based on the costs regime for "Category 2 proceedings" ("Proceedings of average complexity requiring counsel of skill and experience considered average") under Part 14 and Schedules 4 and 5 of the District Court Rules 2014.

[76] We understand why it could be useful to streamline the process for fixing costs before the Tribunal, but we have concluded that we should not adopt such an approach. The Tribunal's powers are limited to those conferred by the Act, and we have not received submissions as to the source of any jurisdiction to adopt the approach suggested by Mr Belcher; that is, whether it would be the Tribunal's power under s 105 of the Act to regulate its procedures as it sees fit, its power to issue practice notes under s 115A, or any other provision of the Act. Nor have we received submissions as to whether we have jurisdiction to adopt the time allowances or daily recovery rates prescribed under the District Court regime, or whether they are apt for proceedings in the Tribunal.

[77] In the absence of such submissions (and we would prefer to have before us submissions on behalf of more than one party to a proceeding), it is not appropriate for the Tribunal to express any conclusions that would be of general application. The better course is to exercise the discretion conferred by s 110A of the Act in relation to the particular circumstances of the case presently before us.

[78] In addition to the factors set out in s 110A(2)(a) to (c) of the Act, we refer to the established principles as to orders for costs in professional disciplinary proceedings, as expressed by his Honour Justice Palmer in *TSM v A Professional Conduct Committee*:[18]

> (a) professional groups should not be expected to bear all the costs of the disciplinary regime;
>
> (b) members who appeared on charges should make a "proper contribution" towards costs;
>
> (c) costs are not punitive;
>
> (d) the practitioner's means, if known, are to be considered;
>
> (e) a practitioner's defence should not be deterred by the risks of a costs order; and
>
> (f) in a general way 50 percent of reasonable costs is a guide to an appropriate costs order subject to a discretion to adjust upwards or downwards.

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[18] *TSM v A Professional Conduct Committee* [2015] NZHC 3063, at [21] citing *Vatsayann v Professional Conduct Committee of the New Zealand Medical Council* [2012] NZHC 1138, at [34], per Priestley J.

[79] With reference to the S 110A(2)(a) to (c) factors, Mr Belcher submitted that Mr Wright had not "participated in good faith in the proceedings". He submitted that he had displayed a rude and dismissive attitude to the Committee and its legal representatives, failed to comply with directions of the Tribunal, and failed to follow through on assurances given in relation to steps in the proceeding. He also submitted that Mr Wright had failed to engage in the proceeding in any meaningful way, and had not filed a response to the charge, or assisted the Tribunal by way of submissions or evidence, despite indicating that he would, and being directed to do so. He noted that despite attending part of the hearing of the charge, Mr Wright had chosen not to provide submissions or evidence.

[80] Mr Belcher submitted that the matters just referred to indicated that Mr Wright had not acted in a manner that facilitated resolution of the proceeding.

[81] By reference to his suggested structure for costs awards, Mr Belcher submitted that an order for costs should be made for a total of $19,291. He submitted that it is open to the Tribunal to increase that amount, to reflect Mr Wright's conduct in the proceeding.

Discussion

[82] Mr Wright's conduct during the proceeding caused the Chairperson to record in its Minute (5), dated 27 May 2019, the following:

> …
>
> [3] Before setting out the Tribunal's directions, I record that it has been made clear to Mr Wright that the charges against him have been brought under the disciplinary provisions of the Real Estate Agents Act 2008. The charges are in relation to alleged conduct occurring at a time when Mr Wright was a licensed salesperson under the Act. While the Tribunal understands that Mr Wright has voluntarily surrendered his licence, he remains subject to the disciplinary provisions of the Act, by virtue of s 71(a) of the Act as a "former licensee".
>
> [4] Mr Wright has a professional obligation to engage with the proceeding, and to do so in a professional manner, showing respect to the Tribunal, the Authority, and any person engaged on behalf of the Authority.
>
> [5] Mr Wright's communications with the Tribunal show a complete lack of respect for the Authority and its solicitors. That attitude will not be

> tolerated. Mr Wright has consistently failed to comply with the Tribunal's directions. That, too, will not be tolerated.
>
> …

[83] Despite numerous requests to do so, Mr Wright failed to file a Response to the Charge. Despite indicating at the initial telephone conference for the proceeding that he admitted that charge, he failed to provide written confirmation. On the basis of Mr Wright's indication that he would admit the charge, timetable directions were made for the purpose of determining the proceeding by way of a penalty hearing on the papers.

[84] However, in response to submissions filed on behalf of the Committee (which outlined the Committee's evidence in respect of each of the properties referred to in the charge), Mr Wright sent an email to the Tribunal which he said was his "answer to the fake news emails received". Mr Wright did not address the matters referred to by the Committee, but appeared to indicate that he denied the Committee's factual allegations.

[85] Accordingly, the proceeding was set down for a defended hearing. Mr Wright indicated that he would both give and call evidence, but did not comply with timetable directions as to filing statements of evidence. He did not file any statements of evidence. As recorded earlier, he did not appear at the commencement of the hearing, and when he did enter the courtroom, he indicated that he did not wish to participate.

[86] We accept Mr Belcher's submission that Mr Wright did not participate in good faith in the proceeding, he obstructed the process of information gathering by the Tribunal, and he failed to act in a manner that facilitated the resolution of the issues in the proceeding. Mr Wright did not engage with the proceeding, and facilitate its resolution. Rather, his response to the proceeding, and his communications with the Tribunal and counsel for the Committee, were unprofessional and obstructive.

[87] We note Mr Belcher's submission that if the approach set out in *TSM v A Professional Conduct Committee* were followed, the Committee's claim for costs would be in the region of $25,000.

[88] Before we can consider the Committee's application for costs, we require it to provide details as to the its actual costs and disbursements in this proceeding. We will take that information into account, together with the order that Mr Wright is to pay compensation, in determining what costs order (if any) should be made against Mr Wright.

[89] We record that as a consequence of Mr Wright's decision not to participate in the proceeding, we have no information as to his financial circumstances. Such information would normally be taken into account, if available.[19]

Outcome

[90] Mr Wright is found guilty of misconduct under s 73(a) of the Act (disgraceful conduct) (see paragraph [50], above).

[91] We record that had such an order been available to us, we would have ordered cancellation of Mr Wright's licence (see paragraph [64], above).

[92] Mr Wright is ordered to pay the following amounts to the Authority, within 20 working days of the date of this decision (see paragraphs [70] and [71], above):

[a] For the Porotene Trust: $5,550

[b] For the McCourt & Rozgon Family trust: $6,300

[c] For the Agency: $1,400

[d] For Mr and Mrs Smallman: $1,640

[93] The Committee is to provide details of its costs and disbursements in relation to this proceeding, within 10 working days of the date of this decision. If Mr Wright wishes to provide submissions in relation to the Committee's application for an order for costs, he may do so within the same period of 10 working days of the date of this

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19 See *Kaye v Auckland District Law Society* (1997) 11 PRNZ 616, at 622,

decision. The Tribunal will then issue a separate decision as to the costs application, in due course.

[94] 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.

_____
Hon P J Andrews
Chairperson

_____
Mr J Doogue
Member

_____
Mr N O'Connor
Member