

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2020] NZREADT 40**

**READT 012/20**

IN THE MATTER OF

An appeal under section 111 of the Real Estate Agents Act 2008

BETWEEN

ROZANA CACHAY REAL ESTATE  
LIMITED  
Appellant

AND

THE REAL ESTATE AGENTS  
AUTHORITY (CAC 1901)  
First Respondent

On the papers

Tribunal:

Hon P J Andrews, Chairperson  
Mr N O'Connor, Member  
Ms F Mathieson, Member

Submissions received from:

Ms S A Jones, former Principal Officer of  
Rozana Cachay Real Estate Ltd  
Ms L Lim, on behalf of the Authority

Date of Decision:

7 September 2020

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**DECISION OF THE TRIBUNAL**

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## **Introduction**

[1] On 29 November 2019, Complaints Assessment Committee 1901 (“the Committee”) found that Rozana Cachay Real Estate Ltd (“the Agency”) had engaged in unsatisfactory conduct. In a penalty decision dated 16 March 2020, the Committee imposed a fine of \$5,000. The Agency has appealed against the penalty decision.

## **Background**

[2] The finding of unsatisfactory conduct followed from the Agency’s auditor having advised the Authority of breaches by the Agency of the Real Estate Agents Act 2008 (“the Act”) and the Real Estate Agents (Audit) Regulations 2009 (“the Regulations”). In particular, the auditor notified the Authority that:

- [a] The audit report for the year ended 31 March 2015 identified a breach of s 123 of the Act, for failing to hold money received in the Agency’s capacity as agent for ten working days (“early release of funds”).
- [b] The audit report for the year ended 31 March 2016 identified a further breach of s 123 of the Act, for early release of funds. The Authority sent the Agency a compliance letter, dated 13 July 2016.
- [c] The audit report for the year ended 31 March 2017 identified a further breach of s 123 of the Act, for early release of funds.
- [d] The audit report for the year ended 31 March 2018 identified two breaches of s 122 of the Act: a commission overpay withdrawn from the Agency’s trust account, and an incorrect party was paid. The audit report also identified breaches of reg 7 of the Regulations, where trust account payments were incorrectly recorded in the ledger.

[3] The Agency admitted to all breaches, except for the breaches of s 123 of the Act referred to in the audit reports for 2016 and 2017. The Agency said that in both cases the funds were released early in response to emails received from solicitors for the

parties concerned, notwithstanding that the solicitors concerned did not sign an early release authority as required by s 123.

### **The Committee's decisions**

[4] In its substantive decision, the Committee found that the Agency had breached the provisions of the Act and Regulations, and had thereby breached r 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”). It rejected the Agency’s reliance on the solicitors’ emails in relation to the early release of funds. The Committee considered that the email chains, in which permission for early release of funds was implied, but not expressed through signed authority, did not satisfy the provisions of s 123(2) of the Act, which requires a signed authority.

[5] In its penalty decision, the Committee referred to the admission by Ms Jones, the Agency’s “eligible officer”, of full responsibility for the breaches. It also noted her advice that the Agency had now been closed, and both she and Ms Cachay were engaged with other agencies, where supervision was more appropriately managed.

[6] The Committee noted that as at the time of the penalty decision, the Agency company had surrendered its licence, but it had not been removed from the Companies Register. The Committee also said that the Act and Regulations impose clear and significant requirements on licensees with respect to funds held in trust and the procedures to be followed for the disbursement of funds held. The Committee noted that the Act and Regulations exist for the protection of the public, and that breaches of them require penalty orders. The Committee ordered the Agency to pay a fine of \$5,000.

### **Appeal**

[7] Ms Jones submitted that the fine of \$5,000 is excessive, in light of the historic and overall minor nature of the Agency’s breaches. She submitted that the same breach of s 123(2) was committed in 2015, 2016, and 2017, and was a result of her understanding that that funds could be released early if there were written confirmation from both parties, which she believed was provided by way of the emails. She now

understands that those emails did not comply with the requirements of s 123(2). With respect to the overpayment of commission, she submitted that it was a small amount (\$158.12), which had been reimbursed from the Agency's general account, not its trust account. Therefore it had not been noted in the ledger.

[8] Ms Jones also noted that the complaint process had been commenced against the Agency as it was in the process of closing. She enclosed (by consent) a letter from the Agency's accountant, dated 25 May 2020. This recorded that the Agency's last sale was on 29 July 2019. Since then, it had released commissions on two previously sold properties, in September and October 2019. All bank accounts had been closed, and all assets had been sold, by 16 January 2020. The Agency had repaid all its liabilities, apart from a shareholder current account, and had no remaining assets.

[9] Ms Lim submitted for the Authority that the Committee's decision was correct on the evidence that was before it. However, she accepted that the Committee was not made aware of the Agency's financial position, and its capacity to pay a fine. She submitted that the Agency was in the process of winding down before the Committee's substantive decision was released, but accepted that Ms Jones may not (at that time) have been in a position to obtain a statement from the Agency's accountant as to its ability to pay a fine.

[10] Ms Lim accepted that ability to pay a fine is a relevant factor in the assessment of penalty orders. She submitted that the Committee correctly took into account the relevant principles as to penalty orders, including promoting and protecting the interests of consumers and the public, and the maintenance of professional standards. She submitted that the fine of \$5,000 imposed by the Committee was one quarter of the maximum finding available after a finding of unsatisfactory conduct against an Agency, was proportionate to the Agency's multiple breaches of the Act and Regulations.

[11] Ms Lim further accepted that while the penalty imposed by the Committee was appropriate at the time of the penalty decision, the Agency's position has now changed, and the accountant's statement makes it clear that the Agency does not have the ability to pay a fine, such that an order to pay it would now have a disproportionately punitive

effect. She submitted that the purposes of penalty could be met by the order to pay a fine to be replaced by an order that the Agency is censured.

### **Decision**

[12] We accept that on the information before it, the Committee did not err in imposing a fine of \$5,000. The provisions of the Act and Regulations regarding the handling of monies held on trust are vital components of the consumer-protection focus of the Act. Failure to comply with those provisions was required to be marked in the imposition of penalty. However, the information now before the Tribunal is that the Agency has no ability to pay a fine, as it has no assets. We accept that this is a factor which must be taken into account.

[13] The order that the Agency must pay a fine of \$5,000 is quashed. In place of that order, we order that the Agency is censured.

[14] 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

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Mr N O'Connor  
Member

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Ms F Mathieson  
Member