

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 30

READT 007/2021

IN THE MATTER OF a charge laid under s 91 of the Real Estate Agents
Act 2008

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE
1901

AGAINST DESMOND KAN
Defendant

Hearing: 15 June 2021, at Auckland

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

Appearances: Mr T Wheeler, on behalf of the Committee
No appearance by or on behalf of Mr Kan

Date of Decision: 17 June 2021

DECISION OF THE TRIBUNAL

Introduction

[1] Complaints Assessment Committee 1901 (“the Committee”) has charged Mr Kan with misconduct under s 73(a) (disgraceful conduct) of the Real Estate Agents Act 2008 (“the Act”).

Background facts

[2] At the time of the relevant events Mr Kan was a licensed agent under the Act, engaged in property management as “D Kan Property Management (incorporating Danaher & Associates)” (“DKPM”).

[3] For a number of years up until April 2019 Mr Kan was the property manager of a property at Browns Bay, Auckland (“the property”). The owners of the property live in the United States of America. Mr Kan’s property management included the collection of rent (which was paid fortnightly by the tenants), payment of outgoings, and organising repairs and maintenance. The balance of rent following outgoings was then paid to the owners’ solicitors, Stephenson Campbell.

[4] In early April 2019 the owners contacted their solicitor to advise that they had not heard anything from Mr Kan for about 18 months despite requests for information and were concerned about the rental payments and whether the property was being properly looked after.

[5] Stephenson Campbell’s trust account ledger for the owners of the property showed that rental payments were made into the trust account up until 19 April 2016, then ceased. The owners’ solicitor contacted Mr Kan, who provided statements for the period from March 2016 to December 2016. Although the statements referred to sums paid to Stephenson Campbell’s trust account, those sums were not in fact paid. On 17 April 2019, shortly after the statements were provided, the sum of \$10,390.48 was deposited by DKPM into Stephenson Campbell’s trust account. Mr Kan did not explain how that sum was made up. The solicitor estimated that as at 19 April 2019 there was a shortfall of about \$42,000 in the accounting for rent collected by Mr Kan, after deduction of fees and expenses paid by him out of the rent held.

[6] In May 2019, the solicitor made a complaint about Mr Kan to the Real Estate Authority (“the complaint”). On 26 June 2019 the solicitor reported Mr Kan to the Police. Both the Police and the solicitor investigated the shortfall further.

[7] In a letter dated 6 February 2020, the solicitor advised Mr Kan that the sum owing to the owners was \$52,796.99. This was calculated from the rental income for the period from 1 April 2016 to 17 April 2019, less invoices paid by Mr Kan and distributions to the owners, together with interest and an allowance for costs. Mr Kan agreed to pay this sum to the owners, on the basis that they would withdraw the Police complaint. It was made clear to Mr Kan that the owners’ complaint to the Authority was still proceeding.

[8] On 3 June 2020 the solicitor confirmed to the Police, Mr Kan, and the Authority that Mr Kan had completed payment to the owners, that the Police complaint was to be withdrawn, and that the complaint to the Authority was still proceeding. On 4 June 2020 the Police confirmed that Mr Kan had admitted to taking the rental money and that as a result of the alternative resolution arranged by the solicitor, the Police complaint had been withdrawn and the Police would take no further action against Mr Kan.

[9] The complaint to the Authority was assigned to an investigator, Ms Stevens, in December 2019. She met with Mr Kan in December 2019 and discussed the progress of his providing a response to the solicitor’s complaint. Mr Kan did not provide a response to the complaint until 18 February 2020. He said that when he took over the property management business he did so as an individual, not as a licensee, and that at no time was real estate agency work involved. He further stated that all requests by the solicitor had been complied with, and an amicable agreement had been reached, such that the matter was now at an end. He did not address the core issue of the complaint, that he had misappropriated rental payments.

[10] Ms Stevens responded to Mr Kan on 19 February 2019 that he had not addressed the issues raised by the Committee and that it was for the Committee to determine if he had breached any of his obligations as a licensee. Ms Stevens set out the issues

raised by the solicitor, and the specific questions asked, and documents requested by the Committee.

[11] Mr Kan advised Ms Stevens by email on 14 February 2020 that he had decided to relinquish his involvement in real estate. In an email to Mr Kan on 25 February 2020 Ms Stevens summarised the Authority's contact with him in relation to the complaint and advised that it was serious, alleging misappropriation of funds. She recorded that Mr Kan had supplied minimal responses to the complaint and declined requests for an interview. She also recorded that Mr Kan's decision to withdraw from selling or leasing real estate was a matter for him, personally, and that the complaint process would continue regardless.

[12] The Tribunal was advised that Mr Kan's current licence expired on 31 March 2020 and was not renewed.

The charge

[13] The Committee laid the charge against Mr Kan on 26 March 2021. The particulars set out in the charge reflect the narration of background facts set out earlier, including Mr Kan's admission to the Police that he had taken \$52,796.99 of rental money, and that he had paid back the sum of \$72,796.99 (accounting for money taken, refund of fees, interest and costs). The Committee alleged that Mr Kan's conduct in misappropriating rent money generated from the property he managed would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful, and was therefore misconduct under s 73(a) of the Act.

[14] Pursuant to reg 7 of the Real Estate Agents (Complaints and Discipline) Regulations 2009, Mr Kan was required to provide a written response to the charge within ten working days of being given notice of the charge, that is, by 13 April 2021. Mr Kan did not file a response to the charge within that period, or at all. On 16 April 2021 the Tribunal's case manager sent Mr Kan an email reminding him of his obligation to file a response to the charge, and advising him that a telephone conference would be convened for the purpose of making timetable directions to progress the matter.

[15] On 3 May 2021 Mr Kan responded to the Tribunal as follows:

To whom it may concern

Firstly, if there has been indiscretion that has occurred, I truly and fully apologise. Any complaint made by [the solicitor] was withdrawn on 03 June 2020.

[Mr Kan referred to the death of his partner, and his own health issues.]

I do not wish to participate in your phone conference as it may cause me extreme distress and anxiety. I am unable to afford any professional advice which may be required.

Again, I truly apologise for any indiscretion that may have occurred.

[16] Mr Kan did not attend the telephone conference held on 7 May 2021. A copy of the Chairperson's Minute of the conference was emailed to Mr Kan the same day. The Chairperson directed that if Mr Kan decided to participate in the hearing, he was to file and serve any statements of evidence by him or on his behalf, and any additional documents relied on, no later than 11 June 2021. The Minute recorded that unless Mr Kan advised that he wished to participate in the proceeding, the hearing of the charge would proceed in his absence, by way of formal proof. Mr Kan did not advise that he wished to participate in the hearing, and he did not file any statements of evidence.

[17] The charge was set down for hearing on 15 June 2021. Mr Kan was advised of the date, time and venue for the hearing by way of a Notice of Hearing, emailed to him on 1 June 2021. Mr Kan did not appear at the hearing. The matter was called at the start of the hearing but there was no response.

[18] The Tribunal is satisfied that Mr Kan had proper notice of the charge and of the hearing, and that it is appropriate to determine the charge in his absence, by way of formal proof, on the basis of written statements of evidence by the investigator, Ms Stevens, the solicitor, and the tenant of the property, and submissions for the Committee.

Submissions

[19] On behalf of the Committee, Mr Wheeler submitted that the evidence before the Tribunal is sufficient to prove each of the particulars of the charge. He also submitted that Mr Kan's admission to the Police and his agreement to the solicitor's claim

(including interest and costs) provided further evidence to support the charge. He further submitted that if the Tribunal finds the particulars proved, the charge of misconduct under s 73(a) of the Act (disgraceful conduct) is established.

[20] Mr Wheeler referred to two cases in which licensees were found guilty of disgraceful conduct on the grounds that they had failed to pass on rent paid by tenants: *Morton-Jones v Real Estate Agents Authority*,¹ and *Real Estate Agents Authority (CAC 521) v Wright*.² He submitted that Mr Kan’s conduct in the present case was directly analogous to that of the licensees in those cases.

[21] He submitted that Mr Kan’s misappropriation was repetitive and persistent, spanning multiple years, and that he used the opportunity presented by his trusted role as property manager to exploit both the tenants and the owners.

Discussion

[22] We refer first to s 71, the first section in Part 4 “Complaints and Discipline” of the Act, which provides:

71 Meaning of licensee in this Part

In this Part, unless the context otherwise required, **licensee** has the meaning given to it by s 4 and includes–

(a) A former licensee; and ...

[23] In s 4 of the Act, “licensee” is defined as “an agent, a branch manager, or a salesperson”. Mr Kan held a licence under the Act at all times while he was acting a property manager of the property. He is now a former licensee. He is subject to the disciplinary provisions of the Act, notwithstanding that he does not hold a current licence.

[24] Section 73(a) of the Act provides:

73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee’s conduct–

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

² *Real Estate Agents Authority (CAC 521) v Wright* [2019] NZREADT 49.

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or ...

[25] As the Tribunal said in *Complaints Assessment Committee 10024 v Downtown Apartments Ltd (In Liq)*:³

“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.”

[26] In his discussion of disgraceful conduct under s 73(a) of the Act in *Morton-Jones v Real Estate Agents Authority*, where his Honour Justice Woodhouse said:⁴

[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.

His Honour went on to say that:⁵

If the work was not real estate agency work, but the person doing the work was a licensee, the appropriate provision for a charge would be s.73(a).

[27] His Honour concluded:⁶

I am satisfied that there can be misconduct under s 73 in respect of conduct that does not relate to real estate agency work...

... in certain circumstances, conduct by a licensee when carrying out work that is not real estate agency work may nevertheless constitute misconduct bearing on the fitness of the person to be a licensee. This conclusion is consistent with statutory provisions governing the conduct of other professions: misconduct which may justify disciplinary action is not confined to conduct in the course of the particular profession.

[28] Thus, conduct charged against a licensee or former 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 whether the

³ *Complaints Assessment Committee 10024 v Downtown Apartments Ltd (In Liq)* [2010] NZREADT 6, at [55].

⁴ *Morton-Jones v Real Estate Agents Authority* fn 1, above, at [29].

⁵ At [30].

⁶ At [38] and [40].

licensee's conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful. It is not necessary that the conduct that is the subject of the charge is within the definition of real estate agency work, or that there be any nexus or connection to real estate agency work.

[29] When making the determination whether a licensee's conduct was disgraceful, the Tribunal takes into consideration the standards that an agent of good standing should aspire to, including 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.⁷

[30] In *Morton-Jones*, the licensee short-paid rent (amounting to approximately \$42,853) to three landlords (involving eight properties) between 2009 and 2013. Approximately \$37,169 was eventually paid to the landlords. His Honour Justice Woodhouse upheld the Tribunal's finding that the licensee's conduct was disgraceful.

[31] In *Wright*, the Tribunal found that in relation to five separate properties, over the period from October 2016 to January 2018, the licensee 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, the licensee 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.

[32] In the present case, Mr Kan received rental payments for the property over a period of approximately three years, from April 2016 to April 2019, yet made no payments to the owners over that period. As at 6 February 2020, when the solicitor calculated the amount owing to the owners, Mr Kan had received rental payments of \$77,155.89 but had paid invoices for or distributed only \$56,890.90 (including a payment of \$20,000 made on 28 January 2020) leaving a balance owing to the owners (before interest and costs) of \$20,264.99. Interest and costs took the amount owing to the owners to \$52,796.99.

⁷ Pursuant to s 110(1) of the Act.

[33] We are satisfied that the evidence before the Tribunal establishes that Mr Kan failed to pass on rental payments to the owners of the property, over a lengthy period of time. Such conduct can only be characterised as disgraceful conduct.

Orders

[34] The Tribunal finds Mr Kan guilty of misconduct under s 73(a) of the Act (disgraceful conduct).

[35] The Tribunal will receive submissions as to penalty. Submissions by or on behalf of the Committee are to be filed in the Tribunal and served on Mr Kan within 15 working days of the date of this decision. Mr Kan may file submissions in response (which must be copied to Mr Wheeler, as counsel for the Committee) within a further 15 working days of the date of the Committee's submissions. The Tribunal will then determine penalty on the papers.

[36] 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 N O'Connor
Member

Ms F Mathieson
Member