

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 2

READT 015/16

UNDER THE REAL ESTATE AGENTS ACT 2008
IN THE MATTER OF AN APPEAL UNDER SECTION 111 OF
THE ACT
BETWEEN JOHN BURNETT (For Investor Business
Brokers Ltd)
Applicant
AND THE REAL ESTATE AGENTS AUTHORITY
(CAC 404)
First respondent
AND ALAN SOO
Second respondent

Hearing: 6 December 2016

Tribunal: Ms K Davenport QC – Chairperson
Mr J Gaukrodger – Member
Ms C Sandelin - Member

Appearances: Mr Burnett for the appellant
Mr Mortimer for the first respondent

Decision: 24 January 2017

ORAL DECISION OF THE TRIBUNAL

[1] On 22 December 2015 the Complaints Assessment Committee found the appellant guilty of unsatisfactory conduct because of its breaches of r 15 of the Real Estate Agents (Audit) Regulations 2009.

[2] The particulars of the failure of the appellant company to discharge its obligations are that for the period of 48 months between April 2011 and March 2015 the licensee was late in complying with its obligations to file its monthly audit return

on time. Mr Burnett accepts on behalf of the company that there were significant delays in filing the audit reports. He received a letter from his auditors on 9 July 2012. That letter said:

We draw to your attention our audit report that noted the list of trust account balances were received late for 11 out of the 12 months in question. Regulation 15(3) requires every agency to provide its auditor of such a list by 27 January and on the 20th day of every other month.

[3] A similar letter was received on 4 July 2014 (should be dated 4 July 2013). Mr Burnett also received the letter on 16 July 2014 from the Real Estate Agents Authority drawing to his attention that his monthly reconciliations were not provided within the required timeframe for the months listed in that letter. He was reminded to comply with them.

[4] Unfortunately Mr Burnett [on behalf of Investor Business Brokers Limited] did not comply with the Audit Regulations until a complaint was received. This was an own motion investigation by the Real Estate Agents Authority after having received the auditor's report. At that time Mr Burnett discovered that he could utilise the services of the Real Estate Trust Account run by the Public Trust. His trust account has been managed by them since that time.

[5] The Complaints Assessment Committee found him guilty of unsatisfactory conduct. On 11 March 2016 they imposed the following penalty upon him pursuant to s 93 of the Act:

[a] They censured the licensee; and

[b] They ordered that the licensee pay a fine of \$2,000 by Wednesday, 13 April 2016.

[6] That penalty decision is appealed. Mr Burnett makes submissions on behalf of the appellant. He says in summary, that he acknowledges that he failed to file returns and cannot really give an explanation of why he did not file his returns. He regrets his failure and with hindsight acknowledges that for most of that time all that was required was a nil return. He acknowledges that the CAC made a correct decision

but says his agency name will be published and he will be censured. He submits this should be sufficient penalty. He points to his 34 years unblemished record. He advised the Tribunal that he is able to pay the fine but because of this appeal has not yet paid it.

[7] The Tribunal considers an appeal from a penalty order not by re-examining all the facts but on a much more limited basis. The High Court in *Morton-Jones v Real Estate Agents Authority*¹ reiterated at [86] that the Court of Appeal's decision in *May v May*² should apply. In that decision the Court said that appeals from penalty decisions [which are the exercise of a discretion] should not be overturned on appeal unless it can be said that the Committee has made an error of principle, considered irrelevant matters, failed to consider relevant matters or was plainly wrong.

[8] The Tribunal have asked Mr Burnett to advise whether he considers there was any error of principle, whether the Complaints Assessment Committee considered irrelevant matters, failed to consider relevant matters or was plainly wrong.

[9] With respect to the irrelevant matters Mr Burnett drew to our attention to an email dated 27 January 2016 [at page 2 of the bundle of documents] to the CAC from the REAA. In that email Ms Margaret Steel from the REAA said that it was only when the complaint was put before the Complaints Assessment Committee that the agency transferred its trust account to New Zealand Real Estate Trust and that she would "like to see some sort of censure applied to the agency". Mr Burnett advises that he only transferred it to the New Zealand Real Estate Trust because he was not aware that that organisation existed before the complaint. He considered that Ms Steel's comments indicated an intention to make an example out of him.

[10] We have considered that submission fully and do not consider that that is an irrelevant matter for the Complaints Assessment Committee. As part of the factual matrix the length of time that the irregularities continued is a relevant factor as is her comment that the irregularities continued until the complaint was made. The Tribunal do not read into the comment "I would like to see some sort of censure

¹ [2016] NZHC 1804

² [1982] 21 NZFLR 165

applied to the agency” any particular malice or ill will or expression of an intention to make an example of the agency.

[11] The agency’s failure to comply with r 15 went on for four years. Mr Burnett as the officer of the company was reminded of his obligations on three occasions by his auditors and on one occasion by the Real Estate Agents Authority. Thus the breach is somewhat more serious than Mr Burnett accepts.

[12] We add that there is no suggestion that there has been any fraud and the conduct was simply an administrative failure. However, we concur with Mr Mortimer’s submissions that failure to comply with audit regulations is a potentially serious matter because the requirements to report as to the trust account on a monthly basis exist for the protection of the public. This reason is a very important aspect of the disciplinary process. If the public lose confidence in a real estate agent’s ability to hold their money appropriately and in a well-regulated manner then the whole industry will suffer. It is therefore appropriate that these breaches are treated seriously by the Committee and by the Tribunal.

[13] If the Tribunal itself had been making the penalty decision we may have reached a different decision about the level of fine or whether a fine was appropriate in all the circumstances. But that is not the basis on which we must approach this appeal. The Tribunal must consider it in the much narrower way laid down by the Court of Appeal in *May and May*. Having carefully listened to Mr Burnett’s submissions, read his written submissions and the evidence we do not find that the Complaints Assessment Committee made an error of principle, considered irrelevant matters, failed to consider relevant matters or was plainly wrong.

[14] We therefore dismiss the appeal. We draw to the parties attention a right of appeal under s 116 of the Real Estate Agents Act. And we thank both Mr Burnett and Mr Mortimer for their careful submissions to this matter.

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Ms K Davenport QC
Chairperson

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J Gaukrodger
Member

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C Sandelin
Member