

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 23

READT 017/18

IN THE MATTER OF

Charges laid under section 91 of the Real Estate Agents Act 2008

BETWEEN

THE REAL ESTATE AGENTS
AUTHORITY (CAC 403)

AND

OPTIMIZE REALTY LIMITED
(T/A HARCOURTS WHANGAREI)
Defendant

Tribunal:

Mr J Doogue, Deputy Chairperson
Mr G Denley, Member
Ms N Dangen, Member

Appearances:

Mr M Mortimer, counsel for the Authority
Mr K Perry, counsel for the defendant

Hearing:

On the papers

Date of Decision:

6 June 2019

DECISION OF THE TRIBUNAL

[1] The Real Estate Agents Authority at the instance of Complaints Assessment Committee 403 (CAC) has brought charges against Optimize Realty Limited, trading as Harcourts, Whangarei. We shall refer to Optimise Realty Ltd in the course of this decision as “the Licensee”. We shall refer to the Real Estate Agents Authority as “the Authority”.

[2] The charge against the Licensee was initially one alleging misconduct under s 73(b) of the Real Estate Agents Act 2008 (the Act). However, following negotiations between counsel for each party respectively it was eventually resolved that the Licensee would deny the charge of misconduct but would be amenable to admitting a charge of the lesser offence of unsatisfactory conduct laid under s 72 of the Act. Mr. Perry, Counsel for the licensee, has informed the Tribunal that his client would not oppose a finding of unsatisfactory conduct being made. Counsel for the Authority said that the parties had reached a “proposed resolution of these proceedings” whereby:

- (a) The Committee withdraws the charge of misconduct; and
- (b) Optimize accepts the charge at the level of unsatisfactory conduct.

[3] Counsel then continued:

- 1.3 The parties recognise that the Tribunal will need to independently satisfy itself that Optimize’s conduct is at the level of unsatisfactory conduct.

[4] The position then is that the Tribunal must consider whether it agrees that the evidence discloses breaches of the Act and Regulations constituting unsatisfactory conduct under s 72 of the Act. If it does, it is then the responsibility of the Tribunal to fix the penalty.

[5] The current decision will, therefore, deal first with the question of whether there has been unsatisfactory conduct. Determining that matter can be disposed of relatively briefly for reasons to be explained shortly.

[6] Mr. Mortimer for the Authority summarised the charges in the following manner

2.2 *The essence of the conduct is that over the course of a four month period in 2016, Optimize breached the Act and the Real Estate Agents Act (Audit) Regulations 2009. The precise breaches were:*

2. *During the period April 2016 to July 2016 the Defendant breached the Act and the Real Estate Agents Act (Audit) Regulations 2009 (**Regulations**) in the operation of its trust account in the following ways:*

(a) Regs 6(b)(ii) and 7(3) of the Regulations – the Defendant received \$2,183.08 on 19 April 2016 and failed to record the receipt of those funds in the trust ledger under 2 May 2016.

(b) Reg 15(1) of the Regulations – as a result of the error set out at para (a) above, the Defendant's trust account did not reconcile at the end of April 2016.

(c) Section 122 of the Act – a payment of \$1,305.29 was incorrectly taken from the trust account on 3 June 2016 and was not repaid until 6 June 2016.

(d) Section 122 of the Act – on 7 June 2016 the Defendant paid \$17,062.50 to the wrong solicitor. The solicitor returned the incorrectly paid amount on 8 June 2016.

(e) Section 122 of the Act – on 5 July 2016 the Defendant overpaid commission from its trust account to its general account by \$709. The incorrect payment was refunded on 6 July 2016.

(f) Section 122 of the Act – on 14 July 2016 a finance company deducted \$24,900 from the Defendant's trust account because the Defendant had given the finance company the wrong account from which to deduct funds. The wrongly deducted funds were returned to the trust account on 15 July 2016.

(g) Section 122 of the Act – the Defendant overpaid a solicitor by \$50 on 26 July 2016. The overpayment was returned on 27 July 2017.

[7] The discussion which follows considers a sample of the offences will provide an understanding of the general nature of the offending and how it came about.

The deposit of the amount of \$2,183.08 into the Licensee's trust account on 19 April 2016.

[8] A receipt was issued on the day the payment was made, 19 April, but the payment was not entered in the appropriate trust account ledger because the lease agreement had not been signed off by one of the lessors' directors and therefore it was not in force. It took some time for this last step to be taken and in the meantime, the money was held in the Licensee's bank trust account but without any recording of the payment to the trust account ledger. During the period up until when it was so entered, the trust account records were not in compliance with the Real Estate Agents (Audit) Regulations 2009, 6(1)(b)(ii).

[9] By its failure to promptly record the payment¹ the Licensee was in breach of its obligations concerning the trust account. Their failure to do so apparently came about because of uncertainty on the part of the trust account administrator as to how the firm should deal with a deposit made in the circumstances which have just been outlined.

[10] The failure to record the payment of the deposit in the Trust Account ledger then had a secondary effect which was that the bank account did not reconcile with the Trust Account records as is required by Regulation 15.

The finance company withdrawal from the trust account, 14.07.16

[11] A further illustration of the Licensee's failure to comply with its obligations regarding the trust account is provided by particular (f).

[12] On 14 July 2016 a finance company which had no entitlement to a payment out of the trust account extracted \$24,900 from that account. The explanation which has been provided by the Licensee is that while it was indeed indebted to the finance company, UDC Finance, and intended to pay the sum of \$24,900 to UDC, the incorrect bank account number was given to UDC so that the payment was made from clients' funds and not, as it should have been, from the operating funds of the real estate company. The position was corrected the following day when the funds which had been removed from the trust account were replaced.

¹ Regulation 6(1)(b)(i) requires the Trust account records be up-to-date.

[13] The Licensee accepts that all of the particulars of charge involved a breach of the relevant statutory and regulatory requirements.

Conclusion on unsatisfactory conduct

[14] It is necessary for the Authority to persuade the Tribunal that the conduct of the Licensee, in this case, amounted to unsatisfactory conduct. The two sample particulars of charge to which we have referred make it clear that such a charge is clearly sustainable against the Licensee. We are satisfied that the remaining charges which we have not made specific comment on also involved breaches of the audit regulations to which the licensee was subject².

[15] We consider that the Licensee's conduct amounted to unsatisfactory conduct in that, in terms of s 92 of the Act, because it was conduct which:

(b) Contravenes a provision of this Act or of any Regulations or Rules made under the Act;

[16] The Licensee admits that the operation of the trust account in all the particulars of charge was an aspect of the carrying out of real estate agency work which is a necessary element of the charge of unsatisfactory conduct.

[17] For all of these reasons, it is clear that Optimize has engaged in unsatisfactory conduct for the purposes of s 72 of the Act.

[18] In the next part of our decision we will consider matters relevant to the penalty that should be imposed.

Penalty

[19] The starting point is that there is available to the Tribunal a maximum penalty of \$20,000 which can be imposed where there has been unsatisfactory conduct. We shall next briefly consider the gravity of the offending, having regard to the nature of the errors and omissions on the part of the Licensee.

² Real Estate Agents (Audit) Regulations 2009

[20] Mr Mortimer on behalf of the Committee submitted as follows:

3.11 *As the Tribunal has previously observed:*³

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.

The Committee submits the same comments apply, with equal strength, to a licensee's obligations under s 122 of the Act.

[21] Mr Mortimer referred to the decision of the Tribunal in *Jenner Real Estate Limited v CAC & Richwhite* that it would not tolerate a casual approach by agents to their obligations in relation to trust accounts.⁴ The Tribunal in that case said:

[61] ... we emphasise that we expect meticulous compliance with ss 122 and 123. Also we regard real estate agents as in a position of strict and privileged trust at all times when handling other person's money. Indeed the relevant monies were held in a trust bank account.

[22] The foregoing passages speak for themselves concerning the seriousness of conduct of the nature which the Licensee engaged in.

The purpose of imposing penalties under the Act

[23] The purposes of disciplinary proceedings have been described in *Z v Dental Complaints Assessment Committee*⁵ as follows:

[128] It is accordingly appropriate to consider further the nature of, and public interest involved in, the disciplinary process, including the framework within which the Act provides for that process. The purpose of

³ *Burnett v Real Estate Agents Authority* [2017] NZREADT 2 at [12]. That case involved failure to provide information to auditors, which of course is not the conduct alleged here. The Authority submits the comments are of general application.

⁴ *Jenner Real Estate Limited v CAC & Richwhite* [2011] NZ READT 35.

⁵ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1. Footnotes omitted and emphasis added.

disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus. Protection is a less prominent factor in the criminal process. One consequence of this difference is that the disciplinary process may cover much wider ground than that litigated at the criminal trial.

[24] The concern with encouraging behaviour that meets the required standard must be matched with the obverse objective of discouraging conduct which is inimical to the public interest. For that reason, it is clear that deterring unacceptable conduct by imposing meaningful penalties is important.

[25] The deterrent that is required is not just that of the individual licensee who has infringed the regulatory provisions governing the industry, but also other licensees generally. Even if the Tribunal assessed the prospects of reoffending by the Licensee as being minimal, there is still to be considered the effect of any sentence and reinforcing acceptable standards amongst those engaged in the industry generally.

[26] The Licensee, through counsel, has said that it has taken steps to ensure that there is no repetition of the events that led to its current appearance before the Tribunal. While it is to be hoped that this is so, the Tribunal notes with concern that there had been previous breaches of the trust account standards. In the financial year ending 31 March 2014 “irregularities” were reported on by the auditor.

[27] On 17 March 2016 the Authority wrote to Optimize Realty⁶ requiring it to inform the Authority what precautions it would be implementing in order to prevent errors which had been noted by the auditor from occurring again in the future. That required a plan to be sent to it setting out how Optimize Realty proposed to change its business processes for this purpose. The defendant explained the errors on the basis of human error.

[28] The explanation of human error does not take matters any further. It is plain that there were human errors. The real issue is how the Licensee, as the employer of the

⁶ BD 53

persons who were responsible for the errors, intends by practical measures to prevent reoccurrence of the mistakes which have led to its appearance.

[29] The CAC agreed that the Licensee has cooperated with the Committee and has set out the steps it has taken in relation to the breaches to try to improve its systems.⁷ It appears that around the time of the current breaches, there may have been a change of personnel at Optimize with the new person having control of the relevant processes displaying competence and initiative in ensuring that the regulations were complied with. As well there have been internal instructions adopted which require double-checking of the calculations involved where the real estate company is taking commissions from money held in the trust account.

[30] While it does not have an informed grasp of what the exact new procedures involved and whether they are likely to be effective, the view of the Tribunal is that the Licensee has shown some appreciation of its obligations to comply with the trust account and related Regulations, and to adopt systems that will prevent recurrences. It has not, for example, demonstrated a lack of concern about ensuring that in future there is compliance. These are the matters that we take into account when considering the adequacy of the penalty which the CAC through counsel has sought in this case.

Conclusion

[31] Given that there has been a breach of s 72(b), the Licensee must be found to have engaged in unsatisfactory conduct. There will be a finding of unsatisfactory conduct against Optimize.

[32] Because the CAC withdrew the charge of misconduct under s 73, that charge does not require to be considered further. Whether such a charge would have been sustainable on the facts of this case is not a matter that we therefore need to consider. The charge that is before the Tribunal is one of unsatisfactory conduct and we are satisfied that the evidence establishes the required elements of such an offence.

⁷ Paragraph 3.10 of Committee submissions dated 12 November 2018.

[33] The penalty which the Committee has recommended, which is supported by counsel for Optimize, is a fine of \$7,500. In our judgment, the Tribunal would not have been able to consider imposing any lesser penalty. But equally, having regard to the fact that Optimize has apparently cooperated with the REA and has put in place some proposals to prevent recurrence of breaches, we are content to adopt that level of penalty as being acceptable in the context of the present case. We regard this as a lenient penalty. The Licensee should understand that any recurrence is likely to result in greater firmness.

[34] There will be an order pursuant to S 93(1)(g) that the Licensee is to pay to the Authority a fine of \$7,500.

[35] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

Mr J Doogue
Deputy Chairperson

Mr G Denley
Member

Ms N Dangen
Member