

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2020] NZREADT 03**

**READT 024/19**

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

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE 520

AGAINST AJS RENTAL REALTY LIMITED  
Defendant

Hearing 3 February 2020, at Auckland

Tribunal: Hon P J Andrews, Chairperson  
Mr G Denley, Member  
Ms C Sandelin, Member

Appearances: Ms E Woolley, on behalf of the Committee  
Ms T Hwang, on behalf of the Defendant

Date of Decision: 14 February 2020

---

**DECISION OF THE TRIBUNAL**

---

## **Introduction**

[1] The defendant, AJS Rental Realty Ltd (“the Agency”), is charged with misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008 (“the Act”), on the grounds that it breached reg 15 of the Real Estate Agents (Audit) Regulations 2009 (“the audit regulations”) on 12 occasions between May 2016 and July 2017, by failing to provide monthly reconciliations of its trust account by the required date (in each case, the 20<sup>th</sup> of the month following the month to which the reconciliation applied).

[2] The Agency accepts that it breached the audit regulations by not providing the reconciliations by the due date. However, it denies that it wilfully or recklessly contravened the regulations.

## **Facts**

[3] The Agency is a licensed company agent under the Act, trading as AJ Stevenson. It was incorporated on 23 September 2004. Mr Steve Wu is the sole director and shareholder of the Agency. He has held an agent’s licence since 25 June 2010.

[4] Pursuant to s 122 of the Act, all money received by an agency in respect of any transaction in in the agency’s capacity as an agent must be held by the agent in a general or separate trust account, pending payment to the person lawfully entitled to it or at that person’s direction. Regs 5 to 8 of the audit regulations set out provisions regarding the operation of trust accounts, records required to be kept of trust accounts, and the receipt and payment of trust account money. Regs 9 to 13 set out the requirements as to the audit of agencies’ trust accounts. Regs 14 to 18 set out agencies’ duties in relation to the audits of trust accounts.

[5] Reg 15 of the audit regulations provides as follows:

**15 Duty to provide monthly list of balances and reconciliation statement**

- (1) Every agency must at the end of each month, reconcile the balance of the agency’s trust accounts to–
  - (a) the balance of the agency’s cash book; and

- (b) the total of the balances in the list required under subclause (3)(a)
- (2) Every agency must keep the reconciliation statements prepared in accordance with subclause (1) in the agency’s cash book, or in any other appropriate manner.
- (3) Unless subclause (4) applies, every agency must, by 27 January and the 20<sup>th</sup> day of every other month, give to the agency’s auditor–
  - (a) a list of the balances in each client ledger account, and of the amount of money (if any) in each trust account, as at the end of the last preceding month or balance period; and
  - (b) the reconciliation statement referred to in subclause (1) for that month.
- (4) If there is no money in any of the agency’s trust accounts at the end of any month, the agency must give to the auditor a “nil” return.

[6] During the period from April 2016 to May 2017, the Agency’s auditor was UHY Haines Norton (“the auditor”). In reports to the Authority dated 21 June 2018 (in respect of the period to 31 March 2017) and 16 July 2018 (in respect of the further period to 31 August 2017) the auditor reported that the Agency had failed to provide trust account reconciliations by the specified time, as follows:<sup>1</sup>

<b>Month</b>	<b>Reconciliation required to be provided to auditor by:</b>	<b>Reconciliation provided to auditor on:</b>
April 2016	20 May 2016	8 June 2016
May 2016	20 June 2016	11 August 2016
June 2016	20 July 2016	21 August 2016
August 2016	20 September 2016	10 March 2017
September 2016	20 October 2016	10 March 2017
October 2016	20 November 2016	10 March 2017
November 2016	20 December 2016	10 March 2017

<sup>1</sup> The reconciliations for the months of July 2016 and February 2017 were provided to the Agency’s auditors by the required time (on 11 August 2016 and 10 March 2017, respectively).

December 2016	27 January 2017	10 March 2017
January 2017	29 February 2017	10 March 2017
March 2017	20 April 2017	5 July 2017
April 2017	20 May 2017	5 July 2017
May 2017	20 June 2017	5 July 2017

**Agency’s response to the charge**

[7] The Agency accepted that it had not provided the reconciliations to the auditor in each of the months referred to in the above table, and that reg 15 of the audit regulations was “not strictly complied with between May 2016 and July 2017”. It submitted that it was not wilful or reckless in breaching the regulations.

[8] The Agency said that its main business is residential property management, although it undertakes sales of real estate for its VIP clients. From 2005, it employed an accounts person who competently managed its trust account. That person “unexpectedly” went on maternity leave in March 2016, and the Agency appointed Mr Cello as account administrator. In about April 2016, the Agency discovered that Mr Cello was struggling with managing the trust account.

[9] The Agency said that it had contracted an external auditor to manage the trust account, but the contracted auditor eventually advised that he was unable to provide audit services. It said that during this period, reconciliations were provided to its auditor, albeit late. The Agency further said that as from 1 September 2017, it had appointed Public Trust to fully manage its trust account, and no issues had arisen since that time.

[10] The Agency said that it deeply regretted its failure to comply with the audit regulations. However, it said that the breaches were not a result of it being wilful or

reckless, as it had not “flagrantly disregarded” the audit regulations, but had “persistently tried to rectify the string of unfortunate appointments”.

## **Submissions**

[11] On behalf of the Committee, Ms Woolley did not submit that the Agency’s failure to comply with the audit regulations was “wilful” (that is, a deliberate contravention of the regulations), but submitted that it was “reckless”, in that the Agency knew that it was required to provide the monthly reconciliations to its auditor by the 20<sup>th</sup> of the following month, and would possibly be in breach of the regulations if it did not do so, but it did not provide the reconciliations to its auditor for each of the 12 months referred to in the charge. She submitted that the Agency was well aware of the requirement to provide the reconciliations to its auditor, but failed to do so.

[12] Ms Woolley submitted that compliance with the audit regulations is not in the category of “something that is nice to have”. Rather, she submitted, compliance is mandatory, and an essential part of the consumer-protection function of the Act. She further submitted that the Agency had been put on notice by its auditor that its practices fell significantly short of the regulatory requirements, and that those shortcomings could lead to a breach of the audit regulations.<sup>2</sup> Ms Woolley also noted that the Agency acknowledged that it was on notice as to the importance of compliance with the audit regulations, as a result of a finding of unsatisfactory conduct against it dated 14 October 2015 for a breach of reg 15 of the audit regulations and two breaches of s 123 of the Act (concerning holding of deposit moneys in its trust account).

[13] Ms Woolley submitted that it is relevant to take into account that the Agency must have had time to plan for the departure of the staff member on maternity leave, and training of her replacement, before she left, but failed to do so. She also referred to evidence that while the Agency made enquiries with the external contractor in May 2016, it did not confirm instructions, and did not provide the contractor with documents requested by it, and the contractor advised that it could not do the work in August 2016. Ms Woolley further noted that it was not until September 2017 that the Agency appointed Public Trust to manage its trust account.

---

<sup>2</sup> For example, in a review of the Agency’s trust account operations dated 22 September 2016.

[14] Finally, Ms Woolley referred to evidence that while the Agency advised the auditor in July 2016 that it intended to appoint a new auditor, it did not take any of the necessary clearance steps, and did not contact the auditor again until February 2017.

[15] Ms Hwang submitted for the Agency that it could not be said that its failure to provide monthly reconciliations on time was either wilful or reckless. She submitted that while steps were taken to try to address the on-going issues over the period from April 2016 to May 2017, there was a “technical non-compliance” that at its worst amounted to carelessness or negligence. She submitted that the Agency’s delay was evidence that the Agency intended to comply with the audit regulations, and was taking steps to do so, albeit falling short of the requirements due to delays.

[16] Ms Hwang also submitted that the auditor’s comments in its reviews were contradictory, in that its reports for the 12 months to 31 March 2017,<sup>3</sup> and the subsequent five months to 31 August 2017,<sup>4</sup> each stated that the Agency had “complied, in all material respects, with the requirements of the Act and the Regulations...” and then said that it had “forwarded to us, each month, a list of trust account balances for the previous month as required by regulation 15 of the Regulations; except for [the 12 instances set out in the Table at paragraph [6], above] which were received late”.

[17] Ms Hwang submitted that the Agency is not trying to hide behind ignorance, and fully accepts that it had a duty to comply with the audit regulations. She submitted that the Agency used its best endeavours to comply, but fell short of the requisite standards. She submitted that when the Authority contacted the Agency about the auditor’s reports, the Agency responded proactively, and has now rectified the issues, and is completely committed to ensuring full compliance in the future. She noted that there had been no complaints from the public.

[18] Ms Hwang acknowledged the Agency’s prior contravention of reg 15, which the Agency regarded as unfortunate, but submitted that there would be no deterrence

---

<sup>3</sup> Dated 21 June 2018.

<sup>4</sup> Dated 16 July 2018.

element or public interest in convicting the Agency, when it has now taken steps to rectify its breaches.

[19] Ms Hwang further submitted that the Agency accepted that its failure to provide monthly reconciliations might amount to careless or negligent conduct, but fell short of the standard of a wilful or reckless contravention of the audit regulations, under s 73(c)(iii) of the Act.

## **Discussion**

[20] We record, first, that the charge laid by the Committee did not include an alternative charge that the Agency's failure to provide monthly reconciliations constituted "seriously incompetent or seriously negligent real estate agency work" under s 73(b) of the Act, or a reference to the Tribunal's power under s 110(4) of the Act to make any of the orders that a Complaints Assessment Committee could make against the Agency if it were satisfied that although not guilty of misconduct, the Agency had engaged in unsatisfactory conduct.

[21] At the hearing, Ms Woolley referred the Tribunal to its power to amend or add to a charge, under reg 13 of the Real Estate Agents (Complaints and Discipline) Regulations 2009):

### **13 Amendment or addition of charge**

- (1) At the hearing of a charge, the Disciplinary Tribunal may, of its own motion or on the application of any party, amend or add to the charge if the Tribunal considers it appropriate to do so:
- (2) The Disciplinary Tribunal must adjourn the hearing if it considers that the amendment or addition would—
  - (a) take the person charged by surprise; or
  - (b) prejudice the conduct of the case.

[22] Despite Ms Hwang's submission that the Agency's failure to provide monthly reconciliations could amount to careless or negligent conduct, she asked the Tribunal to give her the opportunity to make further submissions, if the Tribunal were minded to amend the charge.

[23] Compliance with the audit regulations, through the timely provision of monthly reconciliations to an agency’s auditors, is a fundamental element of achieving the consumer-protection purposes of the Act, as set out in s 3 of the Act:

**3 Purpose of Act**

- (1) The purpose of this 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.
- (2) The Act achieves its purpose by—
  - (a) regulating agents, branch managers, and salespersons:
  - (b) raising industry standards:
  - (c) providing accountability through a disciplinary process that is independent, transparent, and effective.

[24] We accept Ms Woolley’s submission that compliance with the audit regulations is not something that is “nice to have”. Compliance is mandatory. The Tribunal expressed the importance of the regulations in its decision in *Burnett v Real Estate Agents Authority (CAC 404)* as follows:<sup>5</sup>

... we concur ... 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.

[25] Counsel referred us to previous decisions of the Tribunal on charges of “wilful or reckless contravention” under s 73(c) of the Act:

- [a] *Real Estate Agents Authority (CAC 20004) v Clark*:<sup>6</sup> The defendants were charged with contravening s 136 of the Act (as to disclosure of a potential financial benefit from a transaction) and r 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (as to not misleading a customer, providing false information, or withholding

---

<sup>5</sup> *Burnett v Real Estate Agents Authority (CAC 404)* [2017] NZREADT 2, at [12].

<sup>6</sup> *Real Estate Agents Authority (CAC 20004) v Clark*, [2013] NZREADT 62.

information). The Tribunal found that misconduct was not proved, but found that the defendants had engaged in unsatisfactory conduct.

[b] *Burnett*:<sup>7</sup> The defendant was found guilty by a Complaints Assessment Committee of unsatisfactory conduct, for breaches of reg 15 of the Audit Regulations, having failed to provide monthly trust account reconciliations in time, over a period of 48 months. The Tribunal dismissed the defendant's appeal against the Committee's penalty orders.

[c] *Complaints Assessment Committee 414 v Goyal*:<sup>8</sup> The defendant was charged under s 73(c) of the Act with contravening s 134 of the Act (acquiring a client's property without obtaining their informed consent in the proper form), s 135 of the Act (failing to provide an independent valuation before acquiring a client's property), and rr 6.1 (failing to comply with fiduciary obligations), 6.3 (engaging in conduct likely to bring the industry into disrepute), 6.4. and 9.1 (failing to act in a client's best interests). He was charged in the alternative with misconduct under s 73(b) of the Act (seriously incompetent or seriously negligent real estate agency work). The Tribunal found him guilty on the alternative charge.

[26] Only *Burnett* has any factual similarity to the present case. However, that was an appeal against penalty, and the Committee's substantive finding of unsatisfactory conduct is not binding on the Tribunal. The Tribunal must consider the particular facts and circumstances of the case before us and reach its own conclusion as to whether the charge of misconduct under s 73(c)(iii) is made out.

[27] We are satisfied that the Committee has established the charge of misconduct in this case. There is no doubt that the Agency knew that the audit regulations required it to provide monthly trust account reconciliations to its auditor by the 20<sup>th</sup> of each month. It knew that it would possibly be in breach of the audit regulations if it did not comply with the regulations. Yet, over a period of just over one year, it did not do so. It consistently provided reconciliations one month late, and (as is evident from the

---

<sup>7</sup> See fn 3, above.

<sup>8</sup> *Complaints Assessment Committee 414 v Goyal* [2017] NZREADT 58.

Table at paragraph [6], above) did not provide any reconciliations, at all, in the period from 21 August 2016 to 10 March 2017, with the result that reconciliations were provided up to seven months late.

[28] We do not accept that the Agency's wish to change its auditor excuses its failure to provide reconciliations. Until such time as it had a new auditor in place, the Agency was required to provide reconciliations to its existing auditor. Although the Agency knew that it was required to do this, and would possibly be in breach of the audit regulations if it failed to, it did not do so. After advising the auditor in July 2016 of its intention to appoint a new auditor, it did not provide the intended new auditor with necessary documentation, and did not complete the process of appointing a new auditor.

[29] Nor does it excuse the Agency that a staff member went on maternity leave, and her replacement was said to be struggling with the requirements of the audit regulations. It was the Agency's responsibility to take immediate steps to deal with the situation. The proper response, if the replacement staff member was not coping with complying with the regulations was to seek advice from the Agency's auditor, then follow that advice. In this case, the Agency did not do so.

[30] We accept Ms Woolley's submission that the Agency knew that it was obliged under the audit regulations to provide monthly trust account reconciliations, and was aware of the possibility that it would be breaching the regulations if it did not provide them, but continued to operate the trust account without complying with the regulations. We accept her submission that such conduct is properly regarded as a reckless contravention of the audit regulations, and we reject Ms Hwang's submission to the contrary.

[31] Accordingly, we find the charge of misconduct under s 73(c) of the Act proved.

[32] In the light of that finding, we are not required to consider a possible alternative charge of misconduct under s 73(b) of the Act, or unsatisfactory conduct under s 72. It has not, therefore, been necessary or appropriate to call for further submissions.

## **Orders**

[33] We find the Agency guilty of misconduct under s 73(c)(iii) of the Act.

[34] Submissions as to penalty are to be filed and served as follows:

[a] On behalf of the Committee, within 20 working days of the date of this decision; and

[b] On behalf of the Agency, within 20 working days of receipt of the Committee's submissions.

[35] Counsel are to confer and advise the Tribunal if an oral hearing is sought as to penalty.

[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 G Denley  
Member

---

Ms C Sandelin  
Member