

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2024] NZREADT 12

Reference No: READT 015/2023

IN THE MATTER OF

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

BROUGHT BY

**COMPLAINTS ASSESSMENT
COMMITTEE 2106**

AGAINST

CITY REALTY LIMITED
Defendant

Hearing on the papers

Tribunal:

Ms C Sandelin, Deputy Chairperson
Mr G Denley, Member
Ms F Mathieson, Member

Appearances:

Counsel for the Committee:
The Defendant:

S Farnell and C Wilkinson
T Rea

DECISION OF THE TRIBUNAL
(Charge and Penalty)
Dated 24 April 2024

INTRODUCTION

[1] On 8 August 2023, Complaints Assessment Committee 2106 (the Committee) charged City Realty Ltd (City Realty) with misconduct under s 73(c)(iii) (wilful or reckless contravention of s 122 of the Real Estate Agents Act 2008 (the Act) and/or one or more of regs 7, 14, 15, 16 and 17 of the Real Estate Agents (Audit) Regulations 2009 (Audit Regulations)) (Charge1). In the alternative, it charged City Realty with misconduct under s 73(b) of the Act (seriously negligent or seriously incompetent work by failing to meet the standards set by s 122 of the Act and/or reg 7 of the Audit Regulations) (Charge 2).

[2] On 20 December 2023, the parties filed a joint memorandum confirming that a resolution had been reached and that City Realty admitted Charge 2.

[3] An amended charge was filed by the Committee on 20 December 2023.

[4] An agreed summary of facts was filed by the parties on 20 December 2023.

BACKGROUND

[5] The background facts are set out in the agreed summary of facts and are summarised below.

[6] City Realty is a licensed company agent under the Act. It operates a trust account (the trust account) and a Chartered Accountant was its appointed auditor (the auditor).

[7] Over the course of three financial years, City Realty breached the Act and the Audit Regulations on numerous occasions. Significantly:

- (a) City Realty failed to hold money and only pay it to those persons entitled to it;
- (b) City Realty failed to ensure that the deposits of trust monies were correctly recorded in or paid from the trust account. In particular, errors occurred on eight separate occasions in the financial year ending 31 March 2020 and nine in the financial year ending 31 March 2021;
- (c) as at 31 March 2020 the trust account was calculated to be overdrawn by \$11,575. This amount was paid by City Realty to the trust account on 30 October 2020;
- (d) as at 31 March 2021 the trust account was calculated to be in surplus, however, that was only due to a commission of \$33,623.13 being held in

the trust account in error, and this was eventually transferred out of the trust account on 22 March 2022;

- (e) as at 31 March 2022 the trust account was calculated as being in surplus of \$428.58. This was withdrawn from the trust account on 4 April 2022;
- (f) City Realty failed to provide its monthly reconciliations on time for a total of 27 months across the years 2020, 2021 and 2022 and specifically:
 - (i) 10 months in 2020;
 - (ii) 11 months in 2021; and
 - (iii) 6 months in 2022.
- (g) some reconciliations were provided over a year late. Most reconciliations for the year ending 31 March 2020 were provided on 12 October 2020 meaning that June 2019's reconciliation, due on 20 July, was provided 449 days late. Similarly, all reconciliations for the year ending 31 March 2021 were provided on 12 July 2021 meaning that April 2020's reconciliation, due May 2020, was provided 418 days late; and
- (h) City Realty failed to provide its Auditor a list of the trust accounts operated by City Realty during the years of 2020, 2021 and 2022.

[8] Overall, City Realty failed to ensure that its trust account was compliant with the Audit Regulations, which exist for the protection of the public, and to ensure that the errors set out above, did not occur.

CHARGE

[9] Section 73(b) states as follows:

73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

...

- (b) constitutes seriously incompetent or seriously negligent real estate agency work ...

[10] The Committee alleged that City Realty's conduct, in failing to meet its obligations under the Act and the Audit Regulations, amounted to seriously negligent or seriously incompetent real estate agency work.

[11] City Realty breached s 122 of the Act and regulations 7, 14, 15, 16 and 17 of the Audit Regulations over three financial years, ending 31 March 2020, 31 March 2021 and 31 March 2022.

[12] City Realty have pleaded guilty Charge 2 and it has admitted that its conduct that is the subject of the charge constitutes seriously negligent or seriously incompetent real estate agency work.

[13] *Complaints Assessment Committee 20003 v Jhagroo* remains the leading authority on what constitutes an offence under s 73(b) of the Act:¹

[49] The words of s 73(b) must be given their plain meaning. Whether serious negligence or serious incompetence has occurred is a question to be assessed in the circumstance of each case ... the Tribunal is well placed to draw a line between what constitutes serious negligence or incompetence or mere negligence or incompetence, the Tribunal having considerable expertise and being able to draw on significant experience in dealing with complaints under the Act.

[14] We are satisfied that City Realty's conduct as set out above was in breach of s 73(b) of the Act and find City Realty guilty of misconduct under s 73(b) of the Act.

PENALTY JURISDICTION AND PRINCIPLES

[15] The Tribunal's jurisdiction to impose penalty orders if misconduct is proven is set out in the Act:

110 Determination of charges and orders that may be made if charge proved

- (1) If the Disciplinary Tribunal, after hearing any charge against a licensee, is satisfied that it has been proved on the balance of probabilities that the licensee has been guilty of misconduct, it may, if it thinks fit, make 1 or more of the orders specified in subsection (2).
- (2) The orders are as follows:
 - (a) 1 or more of the orders that can be made by a Committee under section 93 (except under section 93(1) (ha)):
 - (b) an order cancelling the licence of the licensee and, in the case of a licensee that is a company, also cancelling the licence of any officer of the company:
 - (c) an order suspending the licence of the licensee for a period not exceeding 24 months and, in the case of a licensee that is a company, also suspending the licence of any officer of the company for a period not exceeding 24 months:

¹ *Complaints Assessment Committee 20003 v Jhagroo* [2014] NZHC 2077.

- (d) an order that a licensee not perform any supervisory functions until authorised by the Board to do so:
- (e) an order, in the case of a licensee who is an employee or independent contractor, or former employee or former independent contractor, that any current employment or engagement of that person by a licensee be terminated and that no agent employ or engage that person in connection with real estate agency work:
- (f) an order that a licensee who is an individual pay a fine not exceeding \$15,000 and order a licensee that is a company pay a fine not exceeding \$30,000:
- (g) where it appears to the Tribunal that any person has suffered loss by reason of the licensee's misconduct and the order is one that a court of competent jurisdiction could make in relation to a similar claim in accordance with principles of law, an order that the licensee pay to that person a sum by way of compensation as is specified in the order, being a sum not exceeding \$100,000.

[16] In determining the appropriate penalty, it is relevant to note the purpose 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.

[17] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:²

...It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

...

The purpose of 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.

² *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] and [151].

...

Lord Diplock pointed out in *Zideman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[18] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the collective reputation and public confidence in the profession itself.³

[19] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.⁴

[20] The most appropriate penalty is that which:⁵

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

³ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 and 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) at 492; and *Z*, above n 2, at [151].

⁴ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

⁵ *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633, [2013] NZAR 320 at [49].

SUBMISSIONS

[21] An affidavit was filed by the sole director and shareholder of City Realty, Daniel Horrobin, on 16 February 2024. Submissions were filed by the Committee on 25 March 2024 and on behalf of City Realty on 26 March 2024.

The Committee

[22] The Committee seeks the following by way of penalty:

- (a) that City Realty be censured; and
- (b) a fine in the vicinity of \$15,000 to \$20,000 be imposed.

[23] The Committee submitted that failure to comply with the Audit Regulations is a potentially serious matter as the reporting requirements for a trust account on a monthly basis exist for the protection of the public.

[24] The Committee submitted that due to the length, extent and seriousness of the non-compliance, the conduct is at the high end of misconduct under s 73(b) of the Act.

[25] The Committee submitted that the following aggravating factors are relevant:

- (a) The length and extent of the offending which occurred over three financial years, despite receiving compliance advice from the Real Estate Agents Authority (the Authority) in November 2020, warning of the consequences for non-compliance. The breaches were not one-off isolated incidents.
- (b) The position of trust and the seriousness of the misconduct in operating a trust account. The Committee submitted that operating a trust account on behalf of customers is a position of privilege and that by failing to put in place appropriate systems, City Realty mishandled its customers' money held on trust. This was of significant risk to the public and the exact situation the Audit Regulations are designed to protect against.

[26] The Committee submitted that whilst City Realty attributes its failures to human error and faulty systems, it has misused money held by it on trust. It submitted that the most egregious aspect of the offending was that City Realty used monies for other purposes than those for which it was received.

[27] It was submitted by the Committee that it is not a mitigating factor that City Realty has stated that the length of time it took to reconcile the trust account was due to the

nature of the errors identified, which contributed to further breaches that were again left unresolved. It submitted that City Realty should have put in place measures to stop breaches occurring from the outset. It was reminded of its obligations by the Authority and did not rectify those for a period of three years.

[28] The Committee accepts that since the 2022 audit report, no further breaches or reports of non-compliance have been made and steps have been undertaken to ensure the proper maintenance of the trust account. However, the point of compliance should have been at the end of 2020 when contacted by the Authority, not 2022.

[29] Counsel for the Committee referred to *AJS Rental Realty*,⁶ where AJS Rental was charged with misconduct under s 73(c)(iii) of the Act on the grounds that it breached reg 15 of the Audit Regulations. In that case, the Tribunal referred to *Burnett v Real Estate Agents Authority* and cited as follows:⁷

[12] ... 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'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.

[30] In *AJS Rental Realty*, the Tribunal ordered the agency to pay a fine of \$14,000 and censured the agency.⁸ In that case the agency had failed to provide reconciliations over a seven month period and when it did provide reconciliations, they were consistently provided one month late.

[31] The Committee submitted that a penalty similar, if not higher, to that of *AJS Rental Realty* is appropriate. It submitted that the conduct of City Realty went on for longer and was more serious in that its errors were not only limited to a failure to provide monthly reconciliations but also a failure to record deposits received and in paying out incorrect amounts from the trust account.

[32] It was submitted by the Committee that an appropriate fine in the vicinity of \$15,000 to \$20,000 is warranted to deter others in the industry from committing similar breaches. It would also account for the maximum fine that may be ordered against corporate defendants as opposed to individuals.⁹

⁶ *Complaints Assessment Committee 520 v AJS Rental Realty Ltd* [2020] NZREADT 3.

⁷ *Burnett v Real Estate Agents Authority* [2017] NZREADT 2.

⁸ *Complaints Assessment Committee 520 v AJS Rental Realty Ltd* [2020] NZREADT 20.

⁹ Real Estate Agents Act 2008, s 110(2)(f).

City Realty

[33] Counsel for City Realty, Mr Rea, submitted that the appropriate penalty is a fine of \$7,500 to \$9,000.

[34] Mr Rea submitted that the duration of the breaches by City Realty was over a long period and that this is an aggravating feature. However, he submitted that the breaches were inadvertent, there was no misappropriation of funds, and no loss was suffered by a member of the public. He submitted that City Realty has not sought to deny any of the breaches or to conceal any conduct.

[35] Mr Rea referred to the affidavit filed by Daniel Horrobin and the attached amended addendum which provided detailed information by way of further background as to certain staff issues and changes with the day-to-day running of the trust account throughout the period between 2018 to 2022.

[36] Mr Rea submitted that due to staff changes and disruption by the COVID-19 pandemic, City Realty was required to undertake a detailed and time-consuming task of restructuring past trust account transactions with limited information available due to difficulties with a former staff member. He submitted that many attempts were made to rectify the situation throughout the relevant time period but due to a lack of expertise available this was initially unsuccessful.

[37] Mr Rea referred to the case of *Burnett* as being, in his submission, the most similar case regarding a failure to provide monthly reconciliations. The number of late reconciliations was greater in *Burnett* than in the case of City Realty and *Burnett* had no explanation for the late reconciliations. However, he submitted that there were additional breaches involving errors in trust account transactions on the part of City Realty which, he submitted, were not surprising given the scale of City Realty's operation, engaging 100 salespeople.

[38] In *Burnett* the penalty was a fine of \$2,000 but for a lesser finding of unsatisfactory conduct, where the maximum available fine was \$20,000. Mr Rea submitted that this supported his submission that City Realty's misconduct is no more than mid-level misconduct.

[39] Mr Rea submitted that *AJS Rental Realty* involved a more serious level of misconduct in that AJS Rental's conduct involved reckless breaches of the Act and Audit Regulations. He submitted that in contrast, City Realty's conduct was seriously negligent or seriously incompetent, but not wilful or reckless.

[40] Mr Rea submitted that in the case of City Realty there has been no reckless indifference and furthermore City Realty admitted misconduct, whereas AJS Rental opposed the charges, leading the Tribunal to comment that no discount for an admission was applicable.

[41] It was submitted by Mr Rea that as, in his opinion, the conduct of City Realty is less serious than AJS Rental, the starting point for consideration of penalty should be less than \$14,000 and that an appropriate fine should be in the vicinity of \$10,000 to \$12,000 with a discount of 25% for the guilty plea and cooperation with the Committee, resulting in a fine of \$7,500 to \$9,000.

DISCUSSION

[42] Both counsel have referred to other penalty decisions, being *Burnett*, *Optimize Realty*¹⁰ and *AJS Rental Realty*.

[43] In *Burnett*, the Tribunal considered an appeal against a fine of \$2,000, ordered by a Complaints Assessment Committee against Mr Burnett's company, following the Committee's finding of unsatisfactory conduct. Mr Burnett's company had failed to provide monthly reconciliations over a period of four years, despite three reminders.

[44] The Tribunal observed that the breaches involved were more serious than Mr Burnett accepted, and noted that failure to comply with the Audit Regulations is a serious matter, given the public protection nature of the requirement to provide reconciliations. It recorded that if it had been making the penalty decision it may have reached a different decision as to the level of the fine, but that its jurisdiction on an appeal against penalty was limited.

[45] We consider that, because of its particular circumstances (in particular because it was an appeal against the penalty ordered following a finding of unsatisfactory conduct, where the maximum fine that may be ordered is \$20,000 rather than \$30,000), *Burnett* is of limited assistance.

[46] In *Optimize Realty*, the agency concerned was found to have engaged in unsatisfactory conduct for breaches of the Audit Regulations and s 122 of the Act, over a four month period. The Tribunal imposed a fine of \$7,500.

¹⁰ *Real Estate Agents Authority (CAC 403) v Optimize Realty Ltd* [2019] NZREADT 23.

[47] Once again, as the penalty imposed in *Optimize Realty* followed a finding of unsatisfactory conduct, it is of limited assistance in determining penalty in the present case.

[48] In *AJS Rental Realty*, the agency concerned failed to provide reconciliations of its trust account on 12 occasions over a period of 14 months. All of the reconciliations were provided late, with the delay varying from one month to seven months late. The Tribunal found that AJS Rental's offending must be regarded as very serious and placed it at the upper end of the range of misconduct.¹¹

[49] The Tribunal in its substantive decision in *AJS Rental* stated that compliance with the Audit Regulations was not something that is "nice to have". Instead, compliance was mandatory, and breaches would be taken seriously. In reaching its decision, as to penalty, the Tribunal was satisfied that AJS Rental knew that the Audit Regulations required it to provide monthly regulations to its auditor by the 20th of each month, and had been advised by the auditor on several occasions. The Tribunal also took into account an earlier disciplinary finding against AJS Realty in imposing the fine of \$14,000.

[50] We agree with the Committee that due to the length, extent and seriousness of non-compliance, City Realty's conduct is at the higher end of misconduct under s 73(b) of the Act.

[51] Whilst we note Mr Rea's submissions that the conduct in AJS Rental involved a "reckless" contravention of the Audit Regulations, the period of time over which the offending by City Realty took place was concerning, particularly given the compliance advice received by the Authority in November 2020. It also failed to record deposits received and paid out incorrect amounts from the trust account.

[52] Whilst City Realty faced staff issues and a change over of the eligible officer, it should have put in place measures to ensure that breaches (which it had been notified about) did not continue to occur.

[53] However, we take into account that City Realty admitted liability and cooperated with the Authority. City Realty has no previous disciplinary history and we acknowledge that there have been no reports of any subsequent breaches of the Audit Regulations. We also consider that some acknowledgement of the difficulties arising from COVID-19 is appropriate.

¹¹ *AJS Rental Realty Ltd*, above n 8, at [34].

[54] Having taken all of the above matters into account, and the principles as to penalty set out earlier in this decision, we have concluded that the fine ordered against City Realty must be placed at the mid to upper level of the available penalty.

[55] We have concluded that an appropriate fine is \$15,000.

ORDERS

[56] City Realty is:

- (1) Censured.
- (2) Ordered to pay a fine of \$15,000 to the Authority within 20 working days of this decision.

[57] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, setting out the right of appeal to the High Court.

Ms C Sandelin
Deputy Chairperson

Mr G Denley
Member

Ms F Mathieson
Member