BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 20

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

On the papers

Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Submissions received from:	Ms E Woolley, on behalf of the Committee Ms T Hwang, on behalf of the Defendant
Date of Decision:	1 May 2020

DECISION OF THE TRIBUNAL
(PENALTY)

Introduction

[1] In its substantive decision issued on 14 February 2020, the Tribunal found a charge of misconduct under s 73 (c)(iii) of the Real Estate Agents Act 2008 ("the Act") proved against the defendant, AJS Rental Realty Ltd ("AJS").[1] The Tribunal has received submissions from counsel for parties as to penalty.

Facts

[2] The facts were not disputed.

[3] Reg 15 of the Real Estate Agents (Audit) Regulations 2009) ("the audit regulations") provides:

> **15 Duty to provide monthly list of balances and reconciliation statements**
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> (1) Each 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 20th 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.

[4] Between May 2016 and June 2017, AJS failed to provide monthly reconciliations of its trust account ("the monthly reconciliations") to its auditor, on 12 occasions, as set out below:

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1 *Complaints Assessment Committee 520 v AJS Rental Realty Limited* [2020] NZREADT 03.

Month	Reconciliation required to be provided to auditor by:	Reconciliation provided to auditor on:
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
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

[5] The Committee charged AJS with misconduct under s 73(c) of the Act: that is, that its failure to comply with reg 15 of the audit regulations was a "reckless or wilful contravention" of the audit regulations. The Committee did not contend that AJS's failure was "wilful", but submitted that it was "reckless". AJS accepted that it had breached the regulations by not providing monthly reconciliations by the required date. However, it denied that it had "wilfully or recklessly" contravened the regulations.

[6] In its decision, the Tribunal recorded that 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. Compliance with the audit regulations is not something that is "nice to have"; it is mandatory.

[7] The Tribunal found that AJS knew that the audit regulations required it to provide monthly reconciliations by the 20th of each month, and knew that it would possibly be in breach of the audit regulations if it did not comply with them. However, over a period of just over one year, it did not do so, but consistently provided reconciliations one month late, and did not provide any reconciliations at all during the period from 21 August 2016 to 10 March 2017, such that reconciliations were provided up to seven months late.

[8] The Tribunal rejected AJS's submission that it was excused by its wish to change its auditor and found that until such time as it had a new auditor in place, it was required to provide monthly reconciliations to the existing auditor. The Tribunal also rejected AJS's submission that it was excused by the fact that the staff member who had previously prepared the reconciliations "unexpectedly" went on maternity leave, and her replacement was said to be struggling with the requirements of the audit regulations. The Tribunal found that the proper response in that situation was for AJS to seek advice from its auditor, and follow that advice. AJS had not done that.

[9] The Tribunal accepted the Committee's submissions that AJS knew that it was required to provide monthly reconciliations, that it was aware that it would possibly be breaching the audit regulations if it did not provide them, and that AJS continued to operate the trust account without complying with the regulations. Accordingly, the Tribunal found that the charge of misconduct under s 73(c)(iii) of the Act (reckless contravention of the audit regulations) was proved.

Penalty principles

[10] The principal purpose of the 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 these purposes by regulating agents, branch managers, and salespersons, raising industry

[2] Section 3(1) of the Act.

standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.[3]

[11] In order to meet these purposes, penalties for misconduct and unsatisfactory conduct are determined bearing in mind the need to maintain a high standard of conduct in the industry, the need for consumer protection and the maintenance of confidence in the industry, and the need for deterrence.

[12] A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The Tribunal should impose the least punitive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.[4]

[13] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As relevant to the present case the Tribunal may:

[a] Make any of the orders that a Complaints Assessment Committee may impose under s 93 of the Act;

[b] Impose a fine of up to $30,000;

[c] Order cancellation or suspension of the licensee's licence;

Submissions

[14] Ms Woolley submitted for the Committee that the aim of deterrence would appropriately be met if AJS were censured, and ordered to pay a fine of between $20,000 and $25,000. She submitted that such a penalty would:

[a] reflect the finding of misconduct;

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3 Section 3(2).

4 See *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30, *Morton-Jones v The Real Estate Agents Authority* [2016] NZHC 1804, at [128] and *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, at [97].

[b] reflect the number of breaches by AJS within the period covered by the charge;

[c] take into account the higher maximum fine that may be ordered against corporate defendants ($30,000) as opposed to individuals ($15,000);

[d] reflect that AJS's auditor had drawn its attention to shortcomings with its internal processes, and advised that those shortcomings could lead to breaches of the audit regulations, but AJS had not implemented all the auditor's recommendations to address them;

[e] send a message to the industry and consumers that strict compliance is expected with trust accounting regulations, and that client funds should never be jeopardised; and

[f] send an appropriate message of specific and general deterrence to AJS and the industry.

[15] Ms Woolley also submitted that AJS has previously been found to have engaged in unsatisfactory conduct of unsatisfactory conduct by a Complaints Assessment Committee, after it failed to provide monthly reconciliations within the required timeframe, and released funds one day short of the prescribed 10-working day period.[5] Ms Woolley submitted that the level of penalty should he higher than might otherwise be appropriate for a defendant whose conduct could truly be said to be a first occurrence.

[16] Ms Woolley further submitted that the Committee is not aware of any steps taken by AJS to ensure that its staff are now trained in the trust account requirements, and to ensure that the breaches are not repeated. However, the Committee acknowledges that there have been no further reports of non-compliance since the Public Trust was appointed as AJS's auditor.

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5 Section 123 of the Act.

[17] Ms Hwang submitted for AJS that its conduct in failing to provide monthly reconciliations within the prescribed period must be regarded as mistakes, albeit mistakes which have been found to be reckless (but not wilful). She submitted that AJS has been working carefully with the Public Trust to ensure that it never makes such mistakes again.

[18] Ms Hwang acknowledged that this is not the first charge AJS has faced, but submitted that its prior failure did not involve any ill-intention or deceit. She submitted that AJS had released a deposit one day short of the prescribed period due to a miscalculation on its part.

[19] Ms Hwang further submitted that the Tribunal should take into account that AJS has limited means to pay a fine. She submitted that this is evidenced by the difficulties AJS had in engaging and paying its auditors, referred to in material placed before the Committee. She submitted that AJS's financial position has been further worsened by the impact of the Covid-19 pandemic, which has resulted in a significant detrimental effect on its business.

[20] Ms Hwang referred the Tribunal to a number of the Tribunal's penalty decisions and submitted that in keeping with the principle of maintaining consistency in penalty decisions, a fine in the vicinity of $5,000 to $7,000 would be appropriate, and would be in keeping with the principles of furthering rehabilitation, and imposing the least punitive penalty that is appropriate in the circumstances.

Discussion

[21] Both counsel referred to other penalty decisions. Those referred to by Ms Hwang included *Real Estate Agents Authority (CAC 10029) v McDonald*,[6] *Complaints Assessment Committee 414 v Goyal*,[7] *Complaints Assessment Committee (CAC 413) v Taylor*,[8] and *Complaints Assessment Committee v Kumandan*,[9] in each of which the defendant was an individual licensee. For an individual licensee the maximum fine

6 *Real Estate Agents Authority (CAC 10029) v McDonald* [2014] NZREADT 29.
7 *Complaints Assessment Committee 414 v Goyal* [2018] NZREADT 3.
8 *Complaints Assessment Committee (CAC 413) v Taylor* [2018] NZREADT 59.
9 *Complaints Assessment Committee v Kumandan* [2018] NZREADT 75.

that may be ordered following a finding of misconduct is $15,000, whereas for a corporate defendant, such as AJS, the maximum fine is $30,000.[10] As a result, the quantum of a fine ordered against an individual licensee cannot be used as a comparison point for determining the appropriate fine for a corporate defendant, except as an indication of where the licensee's conduct stood on the scale of conduct between the least serious and the most serious.

[22] Ms Hwang also referred to *Complaints Assessment Committee 409 v Brady*,[11] where the penalty was imposed following a finding of unsatisfactory conduct. Pursuant to s 93(1)(g) of the Act, the maximum fine that may be imposed following a finding of unsatisfactory conduct is $10,000 for an individual licensee, and $20,000 for a corporate defendant.

[23] Further, in cases where penalties have been imposed on individual licensees, suspension of the licensee's licence has been ordered as well as (or in the absence of) a fine.[12] Focus on the fine, alone, is not helpful in considering consistency of penalty. Penalties ordered in particular cases must be considered as a whole.

[24] It must also be noted that none of *McDonald*, *Goyal*, *Taylor*, *Kumandan*, or *Brady* involved offending under the audit regulations.

[25] The only Tribunal decisions referred to by counsel which are comparable, in that they concerned a corporate agency defendant, and breaches of the audit regulations, are *Burnett v The Real Estate Agents Authority (CAC 404)*,[13] and *The Real Estate Agents Authority (CAC403) v Optimize Realty Limited (t/a Harcourts Whangarei)*.[14]

[26] In *Burnett*, the Tribunal considered an appeal against a fine of $2,000 ordered by a Complaints Assessment Committee against Mr Burnett's company, Investor Business Brokers Ltd ("IBB"), following the Committee's finding of unsatisfactory

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10 Section 110(f) of the Act.

11 *Complaints Assessment Committee 409 v Brady* [2019] NZREADT 21.

12 See *McDonald* (in this case, penalty was considered under the provisions of the Real Estate Agents Act 1976, which differ from those under the current Act), *Goyal*, *Taylor* (Ms Taylor's licence was suspended for 18 months, but she was not ordered to pay a fine), and *Kumandan*.

13 *Burnett v The Real Estate Agents Authority (CAC 404)* [2017] NZREADT 2.

14 *The Real Estate Agents Authority (CAC403) v Optimize Realty Limited (t/a Harcourts Whangarei)* [2019] NZREADT 23.

conduct. IBB had failed to provide monthly reconciliations for a period of four years. Mr Burnett accepted that there were significant delays in providing the reconciliations, despite having been reminded of the requirement on three occasions.

[27] The Tribunal observed that the IBB's breaches were more serious than Mr Burnett accepted, and accepted a submission for the Committee that failure to comply with audit regulations is a potentially 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 fine, but that its jurisdiction on an appeal against penalty was limited to determining whether the Committee had erred in exercising its discretion (that is, made an error of principle, considered irrelevant matters, failed to consider relevant matters, or was plainly wrong).[15] The Tribunal was not satisfied as to any of those matters, and dismissed the appeal.

[28] Ms Hwang acknowledged that the Tribunal had a limited jurisdiction to consider the fine imposed in *Burnett*, but submitted that IBB's breaches in that case were far more serious than in the present case: as it failed to provide monthly reconciliations altogether almost every month for four years, despite warnings. She submitted that it would be inconsistent, and unfair and unjustified, to impose a fine of between $20,000 and $25,000 on AJS – that is, ten times the fine imposed in *Burnett*.

[29] However, because of its particular circumstances (in particular, that it was an appeal against the penalty ordered following a finding of unsatisfactory conduct, where the maximum fine that may be ordered against a corporate defendant is $20,000, rather than $30,000), *Burnett* is of limited assistance in determining penalty in the present case.

[30] In *Optimize Realty*, the agency concerned was found to have engaged in unsatisfactory conduct, under s 72(b) of the Act, by reason of breaches of regs 6(b)(ii), 7(3) and 15(1) of the audit regulations, and s 122 of the Act, over a four-month period. The Tribunal imposed a fine of $7,500.

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15 See *May v May* [1982] 21 CZFLR 165.

[31] The Tribunal recorded that the agency had co-operated with the Committee and had set out the steps it had taken to prevent any recurrence of the breaches. The level of fine was that suggested by counsel for the Committee, and supported by counsel for the agency. While accepting that recommendation, the Tribunal noted that it would not have been able to consider imposing any lesser penalty, and described the fine as "lenient" but had regard to the agency's co-operation and steps taken.

[32] Again, as the penalty imposed in *Optimise Realty* followed a finding of unsatisfactory conduct, it is of limited assistance when determining penalty in the present case.

[33] As the Tribunal said in its substantive decision, 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. It is not something that is "nice to have", or something that need not necessarily be complied with. The Tribunal referred to its decision in *Burnett*, in which it said that:[16]

> … 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 part 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.

[34] In the present case, the length of the period over which the Agency failed to comply with the audit regulations, and the fact that it did not provide any reconciliations at all during the period from August 2016 to March 2017, such that reconciliations were provided up to seven months late, means that the AJS's offending must be regarded as very serious and placed at the upper end of the range.

[35] We accept the Committee's submission that the penalty ordered against AJS should take into account the matters set out at paragraph [14], above, and that as a result of the earlier disciplinary finding against it, AJS is not entitled to any benefit that might be given to the first occurrence of offending.

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16 *Burnett*, fn 13, above, at [12].

[36] However, we also take into account that AJS appears to have co-operated with the Committee's investigation (at least to the extent of the defended hearing being limited to determining whether the breaches were reckless or wilful), and that it is acknowledged that there have been no reports of breaches of the audit regulations since the Public Trust was appointed as AJS's auditor. Further, there has been no suggestion that there was any particular element of commercial gain in the breaches.

[37] 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 AJS must be placed at the mid to upper level of the available penalty. We have concluded that the appropriate order is a fine of S14,000.

Orders

[38] AJS is censured, and ordered to pay a fine of $14,000. The fine must be paid to the Authority within 20 working days of the date of this decision.

[39] 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.

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Hon P J Andrews
Chairperson

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Mr G Denley
Member

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Ms C Sandelin
Member