

Case Study - poor supervision results in theft of trust money (Tribunal decision)

Background

This matter was referred by the Property Agents Board (the Board) to the Property Agents Tribunal (the Tribunal) as it was considered that the conduct amounted to more than minor misconduct.

As this matter occurred before 1 April 2017, the relevant legislation in relation to the conduct is the *Property Agents and Land Transactions Act 2005* (the repealed Act) and the Code of Conduct (the repealed Code) appearing in schedule 2 of that Act. However, the orders and actions taken were imposed under Section 110 of the *Property Agents and Land Transactions Act 2016* (the Act).

It should be noted that the legislative requirements relating to trust money have not changed between the repealed Act, Regulations and Code of Conduct and the current legislation. The current legislative provisions are identified in the footnote.

Relevant Facts

A Real Estate Agency Business (the Agency) was registered as a Real Estate Agent at the commencement of the Repealed Act and was named in Part 1 Division 1 of the Register. There was a qualified director and real estate agent authorised to manage the Agency (the Property Agent).

In June 2007, a person (the Employee) was employed as a casual accounts officer with the Agency and after a period the employee qualified as an assistant property manager.

The Employee's role required her to among other things be responsible for the bookkeeping of the Agency. The Employee was responsible for all data entry relating to the Agency's finances, invoicing, payments of accounts and administration of bonds from tenants of properties managed by the Agency.

The Employee was also responsible for opening the mail sent to the Agency.

In May 2013, while the Employee was on leave, the Property Agent received correspondence from the Department of Justice noting that some security deposits had not been paid by the Agency to the Rental Deposit Authority (RDA).

The Employee at the same time confessed to stealing money from the Agency.

The Property Agent engaged accountants to undertake a forensic audit, the result of which indicated that the Employee had stolen approximately \$125,191 in funds that should have been paid to the RDA.

Grounds of referral

The Board in the referral to the Tribunal alleged that the Property Agent's conduct from 1 July 2008 to 17 July 2015 identified:

- The failure to diligently supervise an employee contrary to clause 5(1) of Schedule 2 to the *Property Agents and Land Transactions Regulations 2006* (the Repealed Regulations) (Code of Conduct);
- The failure to adequately supervise the keeping of trust account records relating to trust money received and ensure the reconciliation records and schedule of ledger accounts were accurate, contrary to Regulation 6 of the Regulations;
- The failure to implement proper and appropriate trust accounting systems to ensure the requirements of the Repealed Act and Regulations relating to trust money were complied with.

Clause 6(b) of the Code of Conduct contained in the Repealed Regulations authorised an agent to delegate tasks to other persons employed or engaged to work at the authorised place of business, but also stipulated that the property agent must not delegate responsibility for any aspect of the work.

Discussion and findings of the Tribunal

The Board and the Property Agent agreed in writing supplied to the Tribunal that the Property Agent was guilty of the conduct alleged in the following Complaints:

Complaint 1: Failure to diligently supervise an employee

The Property Agent was guilty of professional misconduct as defined in section 83 of the Act in that he failed to diligently supervise an employee and failed to ensure that the Employee understood and complied with the relevant Act, Regulations and the Code of Conduct in contravention of clause 6(a) of the Repealed Regulations;

Complaint 2: Failure to implement proper and appropriate Trust Account Recording procedures

The Property Agent was guilty of professional misconduct as defined in section 83 of the Act in that between at least 2 June 2011 and 1 April 2013 he failed to implement proper and appropriate procedures to ensure compliance with legislative requirements outlined in the Repealed Act and the Repealed Regulations in relation to trust monies, including:

1. The Property Agent failed to:
 - (a) hold trust money in the trust account for the person entitled;
 - (b) to pay trust money into a trust account;
 - (c) supervise the keeping of trust account records relating to trust money received;
 - (d) ensure that the reconciliation records and schedule of ledger accounts were accurate in relation to trust money received;
 - (e) retain trust money in a trust account until the money was paid to a person entitled to it;
 - (f) issue trust account receipts that had printed on them the ABN or ACN;

- (g) to make a payment of trust money in accordance with the regulatory provisions;
- (h) record details of trust account receipts in a trust account cash book;
- (i) record details of trust account payments in a trust account cash book;

2. The Property Agent submitted trust account reports to the Board that were false in that he declared that all residential bonds received had been paid to the Residential Deposit Authority within the required timeframe pursuant to the *Residential Tenancy Act 1997* when this was not the case, contrary to the provisions of Regulation 28(5) of the Repealed Regulations.
3. The Property Agent breached the *Residential Tenancy Act 1997* in that residential bonds were required to be lodged with the RDA within three working days of receipt and the Property Agent failed to do so.

The material before the Tribunal included the results of the Board's investigation and supporting documents, and the submissions and responses of the Board and Property Agent, together with the agreement in writing between the parties that the Property Agent was guilty of the conduct alleged in each complaint.

Overall Findings of the Tribunal

Having considered the material before it, the Tribunal was satisfied and found that the Property Agent was guilty of the conduct alleged in each complaint, and that the conduct was properly characterised as professional misconduct as defined in section 83 (1) (a) of the Act:

“unsatisfactory professional conduct of a property agent, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence;”

Orders and actions taken by the Tribunal

The Tribunal took into consideration the protection of the public, general deterrence, and appropriate punishment.

In particular the Tribunal took into account:

- The seriousness of the matter and the financial ramifications of the misconduct;
- That the Property Agent had no criminal culpability in relation to the theft of the monies from his Agency;
- The financial losses incurred by the Property Agent including loss of business as a result of the Employee's fraud, audit costs to review all business and trust records and determine the quantum of the Employee's fraud and to assist Tasmania Police and associated legal costs (failing which the Property Agent would have been fined a higher amount) and the financial losses incurred by the Agency as a result of the criminal conduct of the Employee;
- That the Property Agent was the first to alert Tasmania Police and the Property Agents Board to the Employee's misconduct;
- That the Property Agent did not contest the Board's complaint;
- That the Property Agent has not been practising as a Real Estate Agent for a period of time.
- That the Property Agent had been a longstanding Real Estate Agent working in the Real Estate industry and serving the community of Tasmania.

The Tribunal also noted that the parties agreed that part of that fine should be suspended. For the above reasons, which were particular to this case and should not be seen as in any way setting a precedent for resolution of future cases, the Tribunal considered that a suspension would be appropriate.

Pursuant to section 110 of the Act the Tribunal took the following action:

The Property Agent was **reprimanded**;

The Property Agent was **prohibited** from conducting all or any part of a real estate agency business, property management business or general auctioneering business for **3 years** except that he is entitled to apply to be a property representative as defined under Section 3 the Act with a condition that he not be responsible directly or indirectly for the administration of a trust account as defined in the Act;

The Property Agent was **fined the sum of \$40,000**, of which \$25,000 was suspended for a period of 5 years on the basis that the Property Agent commits no breaches of the Act or associated Regulations.

The Property Agent was to pay to the Board the sum of **\$10,000 towards the Board's costs**.

Footnote

The breaches in this case study identified in the current legislation are as follows:

Section 134 – Trust account

Section 135 – Trust money to be paid into trust account

Regulation 6 – Supervision of trust accounts

Regulation 8 – Control of trust money

Regulation 10 – Form of trust account receipt

Regulation 12 – Trust account payments

Regulation 14 – Payments by electronic funds transfer

Regulation 16 – Receipt records in trust account cash books

Regulation 17 – Payment records in trust account cash books

Regulation 28 – Trust account reports

Code of Conduct - Clause 6 Supervision of employees and persons engaged by property agent

Residential Tenancy Act 1997 - lodgement of bonds.