

In the matter of the  
*Property Agents and Land Transactions Act*  
2016 (the Act)

and

In the matter of  
Adam Geoffrey John McMaster  
(a Property Agent)

PROPERTY AGENTS BOARD

ADAM GEOFFREY JOHN McMASTER

Applicant

Respondent

### CONSEQUENT RULINGS AND ORDERS

1. By its decision of 5 December 2022, the Tribunal ruled:

31. *The Respondent denies that the regulatory breaches amount to unsatisfactory professional conduct or professional misconduct as defined in s83 of the Act.*
32. *The circumstances in which the conduct occurred were the subject of extensive evidence. Those circumstances are potentially relevant to whether the conduct was unsatisfactory professional conduct, or professional misconduct. Each of the allegations 2 to 7 inclusive of the complaint is separate, and it will therefore be necessary to make a finding in respect of each one.*

*As previously noted, it was submitted on behalf of the Respondent that "If the activities of the online platform are indeed governed by the Act, the Respondent admits to strict liability/regulatory breaches in relation: -*

- (i) *to timeframes as stipulated in regulation 28(2) and regulation 31(1) concerning trust account reports and audits (Complaint Nos 2, 3, 4, 5)*

- (ii) *That trust account reconciliations had not been produced for the year 2019 in accordance with regulation 21 (Complaint No 6)*
- (iii) *That the trust cheque book and deposit books for the company's trust account omitted the words "Trust Account". (Complaint No. 7)"*

33. *The Tribunal has found that the failures alleged in the complaint occurred in circumstances which were subject to the Act. The Tribunal is satisfied, upon the basis of the Respondent's admission, noting that the conduct admitted is consistent with the affidavit material filed on behalf of the Board, that the Respondent has breached the requirements of each regulation specified in complaint numbers 2 to 7 inclusive, in the way alleged in each of those complaints. The Tribunal accordingly finds those complaints proven.*

34. *It was indicated to the parties that if the Tribunal found one or more of the complaints proven, it would then reconvene to receive submissions as to the characterisation of that conduct, orders and costs. It is noted that the submissions already made contain material relevant to each of these matters."*

Submissions were accordingly made by the parties with respect to those matters.

2. The Respondent submits that he is guilty of neither professional misconduct nor unsatisfactory professional conduct, as defined in s83 of the Act.

3. The Board submits that the Respondent engaged in repeated and prolonged breaches of his professional obligations, and that his conduct falls short of the standard of competence and diligence that a reasonable member of the public is entitled to expect from a reasonably competent property agent, and accordingly is properly characterised as unsatisfactory professional conduct.

4. Complaint 1 has been dismissed. With respect to complaints 2-7 inclusive:

The complaints as to delay are as follows. Complaints 2 and 4 alleged a failure to give trust account reports to the Board.

**Complaint 2 Failure to give a Trust Account Report to the Property Agents Board:**

*The Respondent is guilty of professional misconduct or unsatisfactory professional conduct as defined in s.83 of the Property Agents and Land Transactions Act 2016 in that he failed to complete and give to the Property Agents Board a Trust Account Report for the 6 month period ending 30 June 2019 for Auctions 247 by 31 July 2019, contrary to regulation 28(2) of the Property Agents and Land Transactions Regulations 2017.*

The reports were provided on 23 March 2020, almost 9 months late, and did not comply with the requirements for monthly reconciliation or have the necessary schedules of trust account balances and other requirements. The auditor's report noted that the reconciliation records and schedule of ledger accounts were not accurate and lacked necessary entries.

**Complaint 4 Failure to give a Trust Account Report to the Property Agents Board**

*The Respondent is guilty of professional misconduct or unsatisfactory professional conduct as defined in s.83 of the Property Agents and Land Transactions Act 2016 in that he failed to complete and give to the Property Agents Board a Trust Account Report for the 6 month period ending 31 December 2019 for Auctions 247 by 31 January 2020, contrary to regulation 28(2) of the Property Agents and Land Transactions Regulations 2017.*

5. As with Complaint 4, the reports were provided on 23 March 2020. and did not comply with the required form. By the 31 January it had been 2 months since the application of the Regulations had been confirmed to the Respondent.

6. Complaints 3 and 5 concerned the failure to have the trust accounts audited within the prescribed times.

**Complaint 3 Failure to cause trust account records to be audited:**

*The Respondent is guilty of professional misconduct or unsatisfactory professional conduct as defined in s.83 of the Property Agents and Land Transactions Act 2016 in that he failed to cause the trust account records kept by Auctions 247 to be audited within 3 months of the relevant Audit Year, being 30 September 2019, by an auditor contrary to regulation 31(1) of the Property Agents and Land Transactions Regulations 2017.*

**Complaint 5 Failure to cause trust account records to be audited:**

*The Respondent is guilty of professional misconduct or unsatisfactory professional conduct as defined in s.83 of the Property Agents and Land Transactions Act 2016 in that he failed to cause the trust account records kept by Auctions 247 to be audited within 3 months of the relevant Audit Year, being 30 September 2020, by an auditor contrary to regulation 31(1) of the Property Agents and Land Transactions Regulations 2017.*

7. With both complaints 3 and 5, the reports provided were late, and in any event not in a form suitable for audit, which it is reasonable to conclude was the reason for the failure to provide the audits.

8. The principal issue is whether the conduct to which the Respondent has pleaded guilty may be characterised as unsatisfactory professional conduct.

9. Decisions of the Victorian Legal Services Commissioner suggest that unless there is some aggravating feature or a history of adverse disciplinary findings, conduct involving

trust accounting breaches – where no element of dishonesty or ultimate loss is involved – will ordinarily attract the lesser categorisation of ‘unsatisfactory professional conduct’. See *Commissioner Determination (Trust account breaches)* [2018] VLSC 28, *Commissioner Determination (Trust account breaches)* [2018] VLSC 16, *Commissioner Determination (Trust account breaches)* [2017] VLSC 59, *Commissioner Determination (trust account breaches)* [2017] VLSC 39, *Commissioner Determination (trust account breaches)* [2017] VLSC 40, *Commissioner Determination (Trust account breaches)* [2018] VLSC 17, and *Commissioner Determination (Trust account deficiencies)* [2018] VLSC 34

10. The Board relies upon the respondent’s provision of the untrue declaration dated 27 September 2019 the subject of complaint no.1 as indicative of dishonesty; however that complaint was dismissed, so the Tribunal does not consider it fair to use the allegation as an indicator of dishonesty.

11. It is relevant that no person has suffered loss as a consequence of the Respondent’s conduct. Further, that the Respondent is inexperienced as a property agent, which may in part explain his lack of insight and awareness (but which is a matter properly to be reflected in the orders to be made by the Tribunal);

12. It was submitted for the Respondent, and not contested, that the records his business kept of trust transactions were accurate; however the auditor’s evidence in this respect was that the reports of the records were inadequate for auditing, not accurate and not provided when required.

13. The evidence of the auditor Mr Easter was that initially an exemption was sought for the on-line operations of Auction 247 under the Act and Regulations, but in September 2019 advice was provided that the Board deemed the activities to be an auction house and the Act and Regulations applied.

The auditor advised the auctioneer that the reconciliations were incomplete and not in the format required by the regulations and needed reworking before he could further review them. Auctions 247 contracted Core Accounting to assist to prepare monthly reconciliations conforming with the regulations. Draft reconciliation sheets were in the process of being prepared for further discussion with the auditor. The reconciliation format needed to be reworked to be compliant with the three-way matching of bank, balance cashbook to ledgers, including a trial balance showing who the funds belonged to; Auctions 247 were focusing on producing conforming monthly reconciliation for the first six months of 2019 before preparing monthly reconciliations for the July – December 019 period, once a correct format had been agreed. It was envisaged that the amended reconciliations would be available by 30 April 2020.

He had provided the auctioneer with examples of drive formats. He noted the above breaches of the regulations, that the auctioneer was aware of the shortcomings and had sought professional accounting support to address the issues.

14. The Board on 27 September 2019 reminded the Respondent that the Audit report was due date by 30 September 2019, and an application for an audit exemption was then lodged. This was refused on 11 October. From then on there were 21 communications from the Board to the Respondent over the period until 10 December 2020, the great part of which were reminders that there had not been compliance with the required steps and requirements for compliance, and the conduct complaint was initiated. The Board's letter dated 14 December 2020 noted the provision of submissions was due that day and required rectification of the issues with respect to the trust account reconciliations and audits by 23 December. The respondent replied apologising for the delays and setting out the reasons for the identified failures. Those reasons were in substance that it was not until October 2019 considered by the respondent that the respondent's business was subject to the Act. Once that was recognised the respondent in November 2019 commenced manually producing monthly audit reports as the 'Xero' computer system could not do so. 'Easybids' was engaged to produce an appropriate computer system. It is also relevant that Covid 19 was affecting staff availability during the relevant periods. There were further difficulties, and a series of auditors were engaged. The efforts were not successful in providing compliant reports for the relevant periods.

15. It was submitted for the Respondent that the evidence of the Respondent and Ms Hupe was that they did everything within their power to comply with the regulatory provisions, including 'many' attempts to gather information from the Board, and there is no evidence to prove that the Respondent tried to avoid his obligations. The Tribunal is satisfied that while the Respondent did make efforts to comply with the statutory requirements, in the first place the system which he had set up was not sufficient to constitute compliance; and in the second place there was a lack of sufficient or timely action to ensure compliance within a reasonable time. There were a number of computer system difficulties which the respondent faced, but the steps taken to resolve them were over an extended period and the Tribunal considers should have been more focused and concerted.

**16. Complaint 6 Failure to implement proper and appropriate Trust Account Recording procedures:**

*The Respondent is guilty of professional misconduct or unsatisfactory professional conduct as defined in s.83 of the Property Agents and Land Transactions Act 2016 in that between 1 January 2019 and 31 December 2019 he failed to implement proper and appropriate procedures to ensure compliance with legislative requirements outlined in the Property Agents and Land Transactions Act 2016 and the Property Agents and Land Transactions Regulations 2017 in relation to trust monies, including:*

- (i) *The Respondent failed to ensure that the Auctions 247 Trust Account was reconciled at least once in each calendar month between 1 January 2019 and 31 December 2019 contrary to Regulation 21(1) of the Property Agents and Land Transactions Regulations 2017; and*

- (ii) *The Respondent failed to ensure that the Auctions 247 Trust Account was reconciled by calculating the balance of the trust account cash books and preparing a schedule to reconcile the balance of the trust account cash books with the balance of the trust account and preparing a schedule of ledger accounts between 1 January 2019 and 31 December 2019 contrary to Regulation 21(2) of the Property Agents and Land Transactions Regulations 2017; and*
- (iii) *The Respondent failed to ensure that the reconciliation records and schedule of ledger accounts were accurate in relation to trust money received by the respondent between 1 January 2019 and 31 December 2019 contrary to Regulation 6(1)(b) of the Property Agents and Land Transactions Regulations 2017.*

This complaint is of a failure to implement proper accounting procedures with respect to reconciliation of the trust account records over the same periods as covered by complaints 2-5. The failures are essentially the system aspect of the actual failures of reconciliation and lodgement contained in complaint 2,3,4, and 5. While the Respondent has pleaded guilty to and been found guilty of this complaint the Tribunal does not consider that it merits additional action by way of a fine, it does highlight the lack of planning and method of the respondent and indicates the need for continued education with respect to trust accounting.

**17. Complaint 7 Failure to implement proper and appropriate Trust Account Recording procedures:**

*The Respondent is guilty of professional misconduct or unsatisfactory professional conduct as defined in s.83 of the Property Agents and Land Transactions Act 2016 in that between 1 March 2019 and 4 March 2020 he failed to ensure compliance with legislative requirements outlined in the Property Agents and Land Transactions Act 2016 and the Property Agents and Land Transactions Regulations 2017 in relation to trust monies, including:*

- (i) *The Respondent issued trust account deposit forms that failed to have printed on them the words "trust account" contrary to regulation 11(2)(a)(ii) of the Property Agents and Land Transactions Regulations 2017 on 85 separate occasions between 1 March 2019 and 4 March 2020.*
- (ii) *The Respondent failed to comply with the provisions of the the Property Agents and Land Transactions Regulations 2017 by failing to have printed the words "trust account" on Auctions 247 Trust Account cheques including one that had been issued to make a payment.*

18. The evidence was that the failure to was rectified when the respondent became aware of the error, and the Board notified by 30 June 2020.

## Aspects of Natural Justice

19. It was submitted for the Respondent that as these breaches had occurred prior to the Respondent receiving advice that had been requested from the Board about his obligations under the Act, because he believed that his business was not subject to the Act, that there would be a breach of natural justice and unfairness in summoning the Respondent in relation to complaints **2, 3 and 6** as it is 'impossible for the Respondent to turn back time to rectify the non-compliant reporting breaches'. The Tribunal considers however that the Respondent was responsible for compliance with the requirements of the Act and regulations, and an absence of advice from the Board did not excuse that. There was no evidence of a representation by the Board that compliance was or may not have been required. The advice included that if the goods sold were in Tasmania, then the requirements applied.

20. The Tribunal does not see any way in which the 'hearing rule' or the 'bias rule' of natural justice have been infringed.

21. The Tribunal finds that the conduct of the Respondent the subject of each of the complaints 2-7 inclusive is at the level of unsatisfactory professional conduct.

## APPROPRIATE ACTION

22. The Tribunal considers that the Respondent in contesting the application of the Act and regulations up until the conclusion of the submissions in the Tribunal hearing, and the attitude that the failures were partly those of the Board and Mr Wright, demonstrate a more of an endeavour to divert or minimise responsibility which might be expected in criminal proceedings, rather than a recognition of the significance of his conduct of the trust account.

23. Disciplinary proceedings are concerned with the protection of the public rather than being punitive in nature.

As stated in *Craig v Medical Board of South Australia* (2001) 79 SASR 545 by Doyle CJ, with whom Williams and Martin JJ agreed, at pp. 553-4:<sup>1</sup>

*"The purpose of disciplinary proceedings is to protect the public, not to punish a practitioner in the sense in which punishment is administered pursuant to the criminal law. A disciplinary tribunal protects the public ... by making orders which will secure the maintenance of proper professional standards. A disciplinary tribunal will also consider the protection of the public, and of the relevant profession, by making orders which will assure the public that appropriate standards are being maintained within the relevant profession".*

24. Securing the proper maintenance of professional standards and the resulting protection of the public require that disapproval of the conduct is signified. A reprimand is

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<sup>1</sup> Cited in *Medical Council of Tasmania v Lad (No 2)* [2007] TASSC 69 per Blow J, para. [11].

justified, and a fine is appropriate. Further education into the nature and substance of obligations as to trust accounts keeping is also appropriate.

25. The Tribunal considers that the amount of the fine should be significant but having regard also to the respondent's liability for costs, should be in the sum of \$10,000.

26. The Board sought an order prohibiting the Respondent from conducting property agent business for 2 years, to be wholly suspended if there was compliance with the Tribunal's other orders. The Tribunal does not consider it necessary to ensure compliance by the Respondent, to impose a suspended prohibition. If there is non-compliance or further breaches of the Act or regulations the Board will be able to pursue the matter as appropriate.

27. The Respondent sought an order with respect to a further education course which was directed to chattel auctioneers, observing that none was available. The Tribunal notes that, but even absent such a course the basic regulatory obligations relating to trust account keeping, reconciliation, reports and auditing were the areas in which the respondent was found to have failed, and in which reinforced education is necessary.

## **COSTS**

28. The Respondent contested until the Tribunal's determination, that for the relevant period, the activities of Auctions 247 were subject to the *Property Agents and Land Transactions Act 2016*. It was necessary and proper for the matter to be pursued by the Board until that stage, and the costs of doing so are appropriately borne by the respondent. The other significant issues upon which the respondent was also unsuccessful were the alleged partial responsibility of the Board and of Mr Wright for the trust account failures, and the issue of natural justice. The overall outcome of the proceedings was also in the Board's favour. It is proper for the Respondent to pay the Board's costs on a party-party basis.

29. The Board has nominated the sum of \$10,000 which excludes the costs relating to complaint 1 which was dismissed before the substantive submissions and hearing. The Tribunal considers the Board's costs would be substantially in excess of that amount, so is prepared to make a lump sum order for \$10,000 rather than requiring taxation.

## **ORDERS**

The Tribunal orders:

1. That the Respondent is reprimanded;
2. That the Respondent pay a fine of \$10,000.00 within 21 days of the making of these orders.



3. That within:
  - (a) four months of the date of these orders the Respondent complete to the reasonable satisfaction of the Property Agents Board (Board) a minimum of a further five points of Continuing Professional Development (CPD) concerning trust accounting and trust accounting obligations; and
  - (b) 30 days of the completion of the CPD referred to in (a), the Respondent provide to the Board a report, written in his own words, which addresses the content of the CPD including:
    - (i) evidence of his CPD attendance or activity;
    - (ii) a written summary of the outcomes/lessons learnt from this CPD; and
    - (iii) a written summary of how he intends to apply those outcomes/lessons in his business.
4. That within three months of the date of these orders the Property Agent rectify all outstanding trust account compliance issues the subject of these complaints, to the satisfaction of the Board.
5. That the Respondent pay the Board's costs of the proceeding before the Tribunal fixed in the amount of \$10,000.00.
6. That there be liberty to apply to amend the timeframe contained in order 3(a) if the Respondent, despite using his best endeavours, is unable to complete five CPD points within four months of the date of these orders.

Dated 31 March 2023



Keyran Pitt KC  
President.