

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Chief Executive, Department of Justice and Attorney General v Jones and Anor* [2020] QCAT 35

PARTIES: **CHIEF EXECUTIVE, DEPARTMENT OF JUSTICE AND ATTORNEY GENERAL**
(applicant)
v
MARTIN DAVID MOALA JONES AND DILIGENT PROPERTY MANAGEMENT PTY LTD
(respondent)

APPLICATION NO/S: OCR231-18

MATTER TYPE: Occupational regulation matters

DELIVERED ON: 10 January 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member King-Scott

ORDERS:

- 1. Martin David Moala Jones is reprimanded.**
- 2. Martin David Moala Jones is ordered to pay a fine of \$5,000.00 to the Chief Executive, Department of Justice and Attorney-General within 28 days of this order.**
- 3. Martin David Moala Jones is permanently disqualified from holding or obtaining a licence or certificate of registration under the *Property Occupation Act 2014*.**
- 4. Diligent Property Management Pty Ltd is reprimanded.**
- 5. Diligent Property Management Pty Ltd is ordered to pay a fine of \$10,000.00 to the Chief Executive, Department of Justice and Attorney-General within 28 days of this order.**
- 6. Diligent Property Management Pty Ltd is permanently disqualified from holding or obtaining a licence or certificate of registration under the *Property Occupation Act 2014*.**
- 7. Martin David Moala Jones and/or Diligent Property Management Pty Ltd pay compensation of \$18,087.75 that represents the deficiency in the**

trust account to the fund or as directed by the Chief Executive, Department of Justice and Attorney-General.

- 8. Martin David Moala Jones is permanently prohibited from being an executive officer of a corporation which holds any form of licence issued under the *Property Occupation Act 2014* (Qld).**
- 9. Martin David Moala Jones and/or Diligent Property Management Pty Ltd pay the costs of the Chief Executive, Department of Justice and Attorney-General of \$47,767.56.**

CATCHWORDS:

PROFESSIONS AND TRADES – AUCTIONEERS AND AGENTS – DISCIPLINARY PROCEEDINGS – whether grounds for disciplinary action – real estate agent not licensed – operated a trust account when not licensed – representations that tenant had paid rent when hadn't – failure to pay bond money to Residential Tenancies Authority – continued to operate trust account when directed not to do so – audit of trust account 10 months and 8 days after due date – appointment of receiver – appropriate penalty

Agents Financial Administration Act 2014 (Qld)
Agents Financial Administration Regulation 2014 (Qld)
Property Occupations Act 2014 (Qld)
Queensland Civil and Administrative Tribunal Act 2009 (Qld)

Chief Executive, Department of Justice and Attorney-General v Harper [2018] QCAT 22
Chief Executive, Department of Justice and Attorney-General v Rodgers & Anor [2018] QCAT 99
Chief Executive, Department of Justice and Attorney-General v Smart Real Estate (Qld) Pty Ltd [2013] QCAT 58
Chief Executive, Department of Tourism, Fair Trading & Wine Industry Development v Byrne [2005] CCT X014-04
Christine Jury and Sparkling Property Developments Pty Ltd [2014] QCAT 24

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

REASONS FOR DECISION

- [1] The Respondent, Martin David Moala Jones ('Mr Jones'), was a licensed real estate agent. He held a licence from 7 January 2015 to 7 January 2018.
- [2] Mr Jones was the sole director and shareholder of Diligent Property Management Pty Ltd ('Diligent'). That company held a corporate real estate licence which expired on 27 May 2016.
- [3] Mr Jones owned and carried on the real estate business under the name "Diligent Property Management" from premises situated at 23 Beaconsfield Terrace, Gordon Park, Brisbane. Together, Mr Jones and Diligent will be referred to as 'the Respondents'.
- [4] On 18 November 2016, the Office of Fair Trading ('OFT') received a complaint from Mr Grant Kwai who alleged he had not received all the rental income he was entitled to from the Respondents who had been appointed to manage his property. OFT commenced an investigation into the activities of the Respondents as real estate agents and the operation and control of the trust account. The investigation revealed numerous breaches of the *Property Occupations Act 2014* (Qld) (hereafter referred to as 'the POA') and the *Agents Financial Administration Act 2014* (Qld) (hereafter referred to as 'the AFAA').

Relevant legislation

- [5] Section 172 of the POA sets out the grounds for starting disciplinary proceedings against a licensee or real estate sales person.

Grounds for starting disciplinary proceedings

(1) The following are grounds for starting a disciplinary proceeding against a licensee or real estate salesperson under section 173 —

- (a) ...
- (b) the licensee or salesperson has contravened or breached—
 - (i) this Act; or
 - (ii) the Administration Act; or
- ...
- (d) an amount has been paid from the fund because the licensee or salesperson did, or omitted to do, something that gave rise to the claim against the fund;
- ...
- (g) for a licensee—
 - (i) the licensee is not a suitable person to hold a licence; or
 - ...
 - (iii) the licensee has, in carrying on a business or performing an activity, been incompetent or acted in an unprofessional way; or
- ...

- [6] Pursuant to section 173 of the POA, the chief executive may apply to the Queensland Civil and Administrative Tribunal ('QCAT') to conduct a disciplinary proceeding. The application must state:

- (a) the grounds for starting the proceeding; and
- (b) the conduct constituting the grounds; and
- (c) that an application will be made for 1 or more orders under section 186.

[7] Section 186 of the POA provides as follows:

- (1) QCAT may make 1 or more of the following orders against a person in relation to whom QCAT finds grounds exist to take disciplinary action under this Act—
 - (a) an order reprimanding the person;
 - (b) an order that the person pay to the State, within the period stated in the order, a fine of not more than—
 - (i) for an individual—200 penalty units; or
 - (ii) for a corporation—1000 penalty units;
 - (c) an order that the person pay compensation (inclusive of any commission to which the person is not entitled) to someone else who has suffered loss or damage because of the act or omission that resulted in the finding;
 - (d) that the person be disqualified permanently, or for the period stated in the order, from holding a licence or registration certificate;
 - (e) another order QCAT considers appropriate to ensure the person complies with this Act.
- (2) If the person is the holder of a licence or registration certificate, QCAT may also make 1 or more of the following orders against the person—
 - (a) an order that the person's licence or registration certificate be suspended for the period stated in the order;
 - (b) an order that the licence or registration certificate be cancelled;
 - (c) for a licensed individual who is an executive officer of a corporation, an order that the individual be disqualified permanently from being an executive officer of a corporation that holds a licence permanently or for a stated period;
 - (d) an order imposing conditions on, or amending or revoking the conditions of, the person's licence or registration certificate.

Disciplinary grounds

[8] The following is a synopsis of the disciplinary grounds alleged to have been breached.

- (a) Ground 1 are the breaches of sections 89(2), 97(1), 102(1), and 206(5) of the POA, sections 9, 21(2), 22(5), 35(2), and 136 of the AFAA and sections 3, 8, and 17 of the *Agents Financial Administration Regulation 2014* (Qld) (hereafter referred to as 'the AFAR').
- (b) Ground 2 is a breach of section 172(1)(d) of the POA involving an amount paid from the Claim Fund.
- (c) Ground 3 is a breach of section 172 (1)(g)(i) of the POA that Mr Jones is unsuitable to hold a licence.
- (d) Ground 4 is a breach of section 172(1)(g)(iii) of the POA that Mr Jones has acted unprofessionally.

[9] The following are particulars and applicable maximum penalties:

- (a) Contrary to section 97(1) of the POA, the Respondents acted as real estate agents for property owners without holding a real estate agent licence and having failed to renew Diligent's corporate licence on 27 May 2016. Maximum penalty is 200 penalty units or 2 years imprisonment.
- (b) Contrary to section 89(2) of the POA, during the period 28 May 2016 and 8 March 2017, while not the holder of a real estate agent licence, the Respondents recovered and kept as commissions a total of \$88,288.58. Maximum penalty is 200 penalty units.
- (c) Contrary to section 102(1) of the POA, the Respondents acted as property agents for the owners of properties located at 28 Delsie St, Cannon Hill and 29 Groom St, Gordon Park but, at the time, did not hold 'appointments to act'. Maximum penalty is 200 penalty units.
- (d) Contrary to section 206(5) of the POA the Respondents, on five occasions between 22 June 2016 and 15 November 2016, in the performance of the activities of a licensee, rendered an account in the form of a monthly 'Transaction Summary Report' to Mr Grant Kwai representing that the tenants in his property had paid an amount in rent when in fact the amount had not been received by the Respondents. The representation was false and contravened section 206(5) of the POA. Maximum penalty is 540 penalty units.
- (e) Contrary to section 22(5) of the AFAA, between 24 August 2015 and 3 February 2016, the Respondents received amounts, as bonds, totalling \$7,400.00 into the trust account. The Respondents did not pay the bonds to the Residential Tenancies Authority ('RTA') the person entitled to receive the amount contrary to the section. A claim against the fund was made for each amount not lodged at the RTA. Maximum penalty is 200 penalty units or 2 years imprisonment.
- (f) Contrary to section 9 of the AFAA, the Respondents opened and operated a trust account whilst not the holder of a licence. The account was opened by the Respondents on 23 January 2015 but Diligent was not granted a licence until 27 May 2015. Between 23 January 2015 and 27 May 2015, the Respondents operated a trust account contrary to section 136 of the AFAA. Maximum penalty is 200 penalty units.
- (g) Contrary to section 136 of the AFAA, the Respondents operated a trust account whilst not the holder of a licence. The Respondents had not renewed Diligent's licence which expired on 27 May 2016. Between 28 May 2016 and 7 March 2017 when the OFT gave a direction over the operation of the trust account, the Respondents continued to operate the trust account in contravention of section 136 of the

AFAA. Maximum penalty is 200 penalty units or 2 years imprisonment.

- (h) Contrary to section 35(2) of the AFAA, the Respondents lodged an audit report 10 months and 8 days late contrary to the section. The Respondents should have lodged a report with the OFT within 4 months after 31 January 2016, it was not lodged until 18 April 2017. Maximum penalty is 200 penalty units or 2 years imprisonment.
- (i) Contrary to section 21(2) of the AFAA, the Respondents, on six occasions made payments from the trust account to Mr Jones and Renee Chad, his partner, in a manner contrary to the section. The payments are not identifiable as authorised commission, fees or expenses nor did they relate to a relevant property transaction or transaction fund as required by the AFAA. Maximum penalty is 200 penalty units or 2 years imprisonment.
- (j) Contrary to section 3 of the AFAR, the Respondents failed to keep particular books, accounts and records. The Respondents did not keep a register of trust account receipt forms, consecutively numbered trust account receipt forms, a trust account cash book and trust account ledgers. The records were not completed and held in a way that they could be properly audited. Maximum penalty is 10 penalty units.
- (k) Contrary to section 8 of the AFAR, the Respondents were unable to provide copies of trust account receipt forms pursuant to the section. Maximum penalty is 10 penalty units.
- (l) Contrary to section 17 of the AFAR, the Respondents did not reconcile the trust account cash book balance at the end of each month with the trust ledger and the financial institution's statement balance pursuant to the section. Maximum penalty is 10 penalty units.
- (m) Because of a short fall of \$18,087.75 in the trust account a claim was made on that amount paid from the fund pursuant to section 172(1)(d) of the POA. The Respondents have not refunded the sum.

Seriousness of the offences

- [10] Some of the sections breached by the Respondents are criminal offences punishable with the following terms of imprisonment as detailed above. One penalty unit is \$133.45. The maximum penalty that could be imposed for a breach of section 206(5) of the POA is \$72,063.00.
- [11] Pursuant to section 186(1)(b) of the POA QCAT may impose a penalty of not more than 200 penalty units for an individual (\$26,690.00) and 1000 penalty units for a corporation (\$133,450.00).

Appointment of receiver

- [12] On 17 May 2017, the OFT appointed Julie Ann Williams of Insolvency and Turnaround Solutions ('ITS') as receiver over the trust property of the Respondents.¹ The engagement included receiving claims against the receivership property.
- [13] The total fees and disbursements incurred by the receiver in carrying out her engagement and the amount subsequently paid from the Claim Fund was \$47,767.56. The Respondents have a liability to pay² but have not paid those fees.

Record of interview

- [14] On 7 June 2017 Mr Jones participated in a voluntary formal record of interview. The salient points arising from the interview were that Mr Jones:
- (a) Was the person in charge of the business and solely responsible for the operation of the trust account;
 - (b) Did not issue compliant trust account receipts;
 - (c) Did not undertake or keep compliant trust reconciliations;
 - (d) Did not maintain compliant trust account cash books;
 - (e) Did not maintain compliant trust account ledgers;
 - (f) Used accounting software for the trust account transactions which was not compliant;
 - (g) Did not keep trust account books and records in a manner that could be easily audited; and
 - (h) Directed tenants to deposit trust monies into the general business account after the trust account was frozen.

Mr Jones' response

- [15] The Tribunal directed that Mr Jones respond to the Applicant's Application or Referral - Disciplinary Proceeding by 26 October 2018 which was extended to 14 December 2018. Mr Jones filed a response to the Application in which he acknowledged that he had looked at all the material served on him and stated that his reasons had not changed and that the business was '*simply a mum and dad business that made mistakes, non intentional*'. He stated further that '*I haven't run this past a lawyer or anything as I have no money due to our bankruptcy*'.

Applicant's submissions

- [16] The Applicant submits that:
- (a) The Respondents' transgressions have demonstrated either an unwillingness or inability to comply with important legislative

¹ EX JW1 Statement of Julie Ann Williams.

² Section 64 of the AFAA.

requirements. There has been, at the very least, a reckless disregard for compliance with the statutory obligations of a real estate agent;

- (b) The failure extends over 3 pieces of legislation;
- (c) The unprofessional behaviour was not an isolated one off event but was persistent and repetitive;
- (d) The Respondents have benefited financially and not reimbursed the Claim Fund for any of the amounts improperly dealt with;
- (e) The provisions of the Acts contravened are in place to foster an industry that has confidence of the public and could not be said to be technical or minor in nature;
- (f) The trust account provisions breached in the present case have as a purpose the preservation of trust funds;
- (g) The Respondents have not repaid the trust account short fall of \$18,087.75 or the receiver's costs of \$47,767.56. It is further submitted that for the Respondents to arrive at this position shows a level of incompetence that demonstrates their unsuitability to be allowed to continue as licensees;
- (h) The false accounting breach of section 206(5) of the POA was deliberate; and
- (i) The trust account audit being 10 months and 8 days late delayed identification that the trust account had not been managed in accordance with the legislation.

Findings

[17] On reading all the material submitted by the Applicant, I am satisfied that the Respondents have breached the provisions of the POA, AFAA and AFAR as particularised in paragraph [9] above. I am satisfied that Diligent was the alter ego of Mr Jones who was its sole director and shareholder. The Applicant submits that, collectively, the Respondents are one and the same and should be considered as such in this matter. I accept that submission.

[18] I accept the submissions in relation to the culpability of the Respondents set out in paragraph [16] hereof.

Comparative orders of the Tribunal

[19] I have been provided with 5 comparable decisions of the Tribunal involving similar transgressions of the legislation.

Michelle Rodgers and Keppel Lifestyle Creations Pty Ltd

[20] Ms Rodgers' breaches involved twenty-eight payments from the trust account not recorded - involving \$38,000. Bonds were not paid to the RTA. Cheques were paid

to different payees. There was no reconciliation of the trust account. However, although incompetent she was not dishonest and cooperated. She repaid the funds. Penalty: Both disqualified for 2 years. Ms Rodgers fined \$3,000.00 and company fined \$5,000.00.

Patricia Harper

- [21] Seven bonds (\$10,386.00) paid into trust account not paid to RTA. Four bond payments (\$7,040.00) paid by tenants not paid into trust account. Seventeen entries in trust account knowing them to be false (\$33,410.00). Two amounts (\$2,627.97) improperly paid from the trust account. Ms Harper acknowledged her offences and cooperated. Shortfall was \$49,869.13. She repaid all funds. Penalty: Disqualified for 10 years and fined \$8,000.00.

Christine Jury and Sparkling Property Developments Pty Ltd

- [22] Thirty-eight unauthorised transactions (\$27,006.51) over a period of 10.5 months. Transactions involved payments from the trust account of a business and personal nature. Made full admissions and was remorseful. Incompetent. Repaid all funds. Penalty: Ms Jury and the company each disqualified for 15 years and both fined \$2,000.00 each.

Amanda Byrne

- [23] Multiple contraventions including acting as an unlicensed restricted letting agent for a period exceeding 2 years. Her transgressions showed contempt for the legislation and caused financial detriment and inconvenience to a number of unit holders. Short fall of \$57,880.18. Ms Byrne acknowledged the disciplinary grounds and showed remorse and accepted permanent disqualification. No indication of dishonest behaviour. Had made some repayment of funds. Penalty: Disqualified permanently and fined \$7,500.00. Ordered to pay costs of \$9,000.00.

Bradley Scott and Smart Real Estate (Qld) Pty Ltd

- [24] Thirteen breaches over a period 6 months involving \$27,800.00. Converted funds for own use. Made admissions and co-operated with OFT. Showed remorse. Funds converted did not result in any loss to clients. Mr Scott and company each disqualified for 5 years and both fined \$5,000.00.
- [25] It is submitted that the matter of *Byrne* is the most comparable. I agree.
- [26] I find that grounds exist to take disciplinary action and make the following orders under section 186 of the POA:

- (a) Mr Jones is reprimanded.
- (b) Mr Jones is ordered to pay a fine of \$5,000.00 to the Chief Executive, Department of Justice and Attorney-General within 28 days of this order.

- (c) Mr Jones is permanently disqualified from holding or obtaining a licence or certificate of registration under the POA.
- (d) Diligent is reprimanded.
- (e) Diligent is ordered to pay a fine of \$10,000.00 to the Chief Executive, Department of Justice and Attorney-General within 28 days of this order.
- (f) Diligent is permanently disqualified from holding or obtaining a licence or certificate of registration under the POA.
- (g) Mr Jones and/or Diligent pay compensation of \$18,087.75 that represents the deficiency in the trust account to the fund or as directed by the Chief Executive, Department of Justice and Attorney-General.
- (h) Mr Jones is permanently prohibited from being an executive officer of a corporation which holds any form of licence issued under the POA.
- (i) Mr Jones and/or Diligent pay the costs of the Chief Executive, Department of Justice and Attorney-General of \$47,767.56.