

Real Estate

Continuing Professional Development



Trust accounts

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Learning outcomes

At the end of this topic, you will be able to:

- explain the obligations of agents regarding trust accounts
- explain the audit requirements for trust accounts.

Terms used in this guide

In this guide, we will use various terms related to real estate agency work and complaints processes. This table will explain key terms.

Term/abbreviation	Notes
CAC	The Complaints Assessment Committee.
Client	A person on whose behalf an agent carries out real estate agency work under a signed agreement. In this guide, we will consider that the agency has a client relationship with the seller and, therefore, that seller is their 'client,' and any buyer or potential buyers are 'customers'.
Code of Conduct	The Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.
Consumer	Customers and clients and potential customers and clients in the real estate sale and purchase process, and lessors and lessees and potential lessors and lessees in the commercial leasing process.
CRM	Client Relationship Management system. This is software used as a tool for managing your agency's relationships and interactions with potential clients, clients and customers.

Customer	A person who is a party or a potential party to a transaction and excludes a client or potential client (as defined in rule 4.1 of the Code of Conduct)
Disciplinary Tribunal	The Real Estate Agents Disciplinary Tribunal.
Purchaser/Buyer	The person buying the property
REA	The Real Estate Authority.
REAA	The Real Estate Agents Act 2008.
Supervisee	A person being supervised
The Audit Regulations	Real Estate Agents (Audit) Regulations 2009
Vendor/Seller	The person selling the property

Note:

The sale and purchase agreement most agencies use is the *ADLS/REINZ Agreement for Sale and Purchase of Real Estate*. However, some agencies use other agreement forms. Although we will reference the ADLS/REINZ form, the comments will be relevant to those using other forms.

In this guide, we will reference the *ADLS/REINZ Agreement for Sale and Purchase of Real Estate - Tenth Edition 2019 (2)*.

Introduction

This guide provides information relating to an agent's responsibility to manage trust accounts, including audit requirements. Improved knowledge of trust accounts is also beneficial for salespersons and branch managers and will assist with their understanding of how their actions impact those that hold ultimate responsibility.

In this guide, we will examine legal requirements and case law that has further clarified the nature of trust account obligations.

One of the key duties of a real estate professional is the safe handling of money on behalf of their clients and customers. This usually relates to deposits on real estate purchases but can also include rent from properties being managed by the agency. If trust accounts are not managed correctly, the result could be a financial loss to consumers as well as reputational damage to the licensee, agency, and the industry as a whole. In this guide, we'll consider the legal requirements for trust accounts and common issues related to trust accounts.

Obligations of agents regarding trust accounts.

Money received from real estate transactions is required by law to be paid into a trust account. Trust account money is not available for payment of an agent's debt and cannot be taken by an agent's creditors. The trust account obligations are an important part of the consumer protection focus of the REAA.

Agencies need to have good systems for dealing with client and customer money. They also need to have sound procedures for oversight of the handling of money and of trust accounts.

Note: The text from some sections of the REAA and Audit Regulations are included in the Appendix.

This topic does not cover Anti-Money Laundering and Countering of the Financing of Terrorism (AML/CFT) requirements which all licensees must be familiar with. Licensees should refer to the Department of Internal Affairs guidance on AML/CFT for real estate industry professionals.

Trust accounts

The 'Interpretation' section of the Real Estate Agents (Audit) Regulations 2009 defines the terms 'trust account' and 'trust account money' as follows:

4 Interpretation

(1) In these regulations, unless the context otherwise requires, -

.....

trust account means a general or separate account kept by an agency at any bank carrying on business in New Zealand –

(a) that is designated as a trust account; or

(b) into which trust account money is deposited.

trust account money means all money that, when received by an agency, is subject to section 122 of the Act.

.....

These trust accounts must be audited, and auditors of trust accounts have specific duties.

Under s 122 of the REAA, every agency must ensure that any money received regarding a real estate transaction is deposited in a designated trust account. The bank must receive notice that the account is a designated trust account and the agency must request written confirmation that the bank accepts the terms of the notice.¹

The text of s 122 of the REAA is provided in Appendix 1.

¹ For the specific requirements of the notice to the bank refer to regulation 5(1) and 5(2) of the Audit Regulations.

Issues with trust accounts

Here are examples of issues that have arisen with trust accounts:

- licensees lacking understanding of what their obligations are in terms of trust accounts
- agents not appointing an auditor in accordance with the REAA and Audit Regulations
- agencies not administering the trust account in accordance with the REAA and Audit Regulations
- agencies failing to provide monthly reconciliations of their trust account by the required date
- agencies refusing to supply information that has been requested by REA
- licensee falsely signing declarations required by the Audit Regulations
- audit reports being late or not provided at all
- statutory declarations not being provided
- money being released before 10 working days with no agreement between all parties.
- money being received into trust accounts that is not for property deposits
- late or no receipts submitted to the auditor.

In this guide we will examine trust account requirements in relation to some of these issues.

Third-party trust account providers

Many real estate agencies now use independent third party trust account services (such as NZ Real Estate Trust or NZRET) as an alternative to the real estate agency operating an in-house trust account for money received or held by a real estate agent for or on behalf of another person in relation to a real estate transaction.

Trust account records

Every agency must keep accurate trust account records in a way that enables them to be properly audited. They must be up to date, clearly show the amount of trust money held for each client, and be secured as far as practicable against retrospective alteration or deletion (Regulation 6(1)).

Trust account records must be kept for at least seven years from the date of the last transaction. After the first three years, records may be held through electronic storage, imaging, or similar.

The text of Regulation 6 of the Audit Regulations is provided in Appendix 2.

Receipt of funds

All trust money received must be receipted, banked, and recorded promptly and accurately in a trust account ledger. A separate ledger account must be kept for each client.

The trust account ledger must state the person making the payment, the amount, date, purpose, and source of the receipt, and the client for whom the money is being held.

Where trust account money is paid in cash, or if the payer of trust money requests, a receipt must be issued to the payer, and a copy of the receipt must be kept by the agency in either electronic or paper form. ²

Receipt forms have to comply with Regulation 8 of the Audit Regulations. Trust receipts must be issued sequentially and include:

- the name of the agency
- the person from whom the trust account money is received
- the person to be credited with the trust account money
- a brief description of the purpose for which the trust account money is received
- the amount, in words and figures, of trust account money received
- the date of issue of the trust receipt
- the signature of the agent, cashier, or other person authorised by the agency to sign trust receipts
- the words 'official receipt form for trust money'
- how the trust account money has been received by the agency, for example, by cash or by bank transfer.

The text of Regulation 8 of the Audit Regulations is provided in Appendix 2.

Holding trust money

Ten working day rule

When an agency receives trust money, such as the deposit on a property purchase, this money must be kept in the agency's trust account **for ten working days after the date on which it was received** before making a payment of that money to any person (REAA, s 123). A court order or an authority signed by all the parties to a transaction may require the agent to pay the money before the expiry of the ten working day period.

Note that s 123 does not just apply to deposits. This section applies to any money the agency receives regarding any transaction in its capacity as a real estate agency.

The text of s 123 of the REAA is provided in Appendix 1.

Request for early release of a deposit

If written notice is received of any requisition or objection in respect to the title of the land affected during the ten working day period, the agent must continue to hold the money in the trust account until:

- written notice by court order; or
- an authority directing payment to be made and signed by all the parties to the transaction is received. (REAA, s 123).

² Refer to <https://www.dia.govt.nz/AML-CFT-Information-for-Real-Estate-Agents> for specific requirements on AML/CFT for real estate industry professionals.

The delay before any money is paid out is designed to protect the parties involved in property transactions.

Contractual requirements relating to the deposit release

In addition to the requirements in s 123, licensees need to be aware of any contractual obligations which might apply in a particular situation relating to the release of deposit money. For example, Clauses 2.4 and 2.5 of the *ADLS/REINZ Agreement for Sale and Purchase of Real Estate - Tenth Edition 2019 (2)* relate to the release of deposit money.

The text of clauses 2.4 and 2.5 of the *ADLS/REINZ Agreement for Sale and Purchase of Real Estate - Tenth Edition 2019 (2)* is provided in Appendix 3.

It is important that in every case, licensees:

- check what obligations might apply
- check that clients have an opportunity to seek legal advice; and
- seek their own advice if in any doubt.

The deposit can be released if the agreement is cancelled (in accordance with the terms and conditions of the contract). (*ADLS/REINZ Agreement for Sale and Purchase of Real Estate - Tenth Edition 2019 (2)*, clause 5.2)

The text of clause 5.2 is provided in Appendix 3.

When a request for early release of the deposit is made:

- the other party needs to have the opportunity to seek advice from their lawyer; and
- all parties need to authorise the early release; and
- the lawyers from both parties need to acknowledge acceptance of the early release of the deposit.

(Rule 9.7 and clauses 2.4 and 5.2 of the *ADLS/REINZ Agreement for Sale and Purchase of Real Estate - Tenth Edition 2019 (2)*)

Licensees need to be aware that there are several situations contemplated in the sale and purchase agreement to cancel or avoid the agreement that may arise over an extended period of time (and potentially up to the date of settlement), well after the ten working day period provided for in s 123 of the REAA.

In the absence of proper authorisation by all the parties (as specified in the sale and purchase agreement) and in accordance with a licensee's professional and client and customer care obligations, a licensee must hold the deposit as stakeholder for this extended period (notwithstanding the provisions in s 123 of the REAA). As indicated above, licensees should ensure that parties have the opportunity to seek legal advice and get their own advice if they are unsure.

The deposit can be released if the agreement is cancelled (in accordance with the terms and conditions of the contract).

Note that an early release of the deposit is for the benefit of the parties to the transaction, rather than the salesperson and/or the agency. An early release clause should only be inserted in any sale and purchase agreement if requested by the client or customer.

Statement of account

The agency must provide a written summary of account to the person lawfully entitled to the money. This account must state:

- the particulars of the money received in the trust account on their behalf; and
- how the funds have been applied.

If specifically requested, the account must be provided in writing as soon as the relevant client asks you and, in any case, no later than 28 days after the money was received in the agency trust account. (REAA, s124)

The text of s 124 of the REAA is provided in Appendix 1.

Furthermore, it is an offence for an agent to render (submit) false accounts, and anyone found in breach under the Act may be liable to penalties. (REAA, s124).

The text of s 152 of the REAA is provided in Appendix 1.

Payment and Refunding money

All money received by an agent in respect of a transaction must be paid to the person lawfully entitled to that money or in accordance with that person's directions. (REAA, s122)

If money is received (for example, as a deposit on a property) and the transaction doesn't go through, the accounts must show the refund.

The obligation is on the agency to comply with AML/CFT requirements, even if they use a third-party provider. Licensees must be familiar with AML/CFT requirements and refer to the DIA's website for further information.

Refunds should only be sent back to the account from which the money came.

Monitoring trust account money

The agency must account for all transactions made in and out of the trust account, as required by the Audit Regulations.

A receipt must be issued as soon as possible after receiving the funds into the account.

Cleared funds

Cleared funds are defined in clause 1.1 (8) of the ADLS/REINZ *Agreement for Sale and Purchase of Real Estate – Tenth Edition 2019(2)* as follows:

1.0 Definitions, time of performance, notices, and interpretation

1.1 Definitions

...

(8) "Cleared funds" means:

- (a) An electronic transfer of funds that has been made strictly in accordance with the requirements set out in the PLS Guidelines;
- or
- (b) A bank cheque, but only in the circumstances permitted by the PLS Guidelines and only if it has been paid strictly in accordance with the requirements set out in the PLS Guidelines.

...

The current PLS guidelines are available on this webpage:

<https://www.lawsociety.org.nz/branches-sections-and-groups/property-law-section/guidelines/>

New Zealand banks send electronic credit payments as 'cleared' funds. Sending as 'cleared funds' means the bank that receives the payments can credit these payments as immediately available funds. Whether the funds can be accessed will be subject to any restrictions that may be in place on the account.

An agency should not pay out non-cleared funds because until cleared, the funds have not actually been received.

If it is requested that funds be released more quickly, and this request meets legal requirements and the requirements under the sale and purchase agreement, **ensure that the funds have cleared first**. This is particularly important because with electronic payment, transfers can be processed very quickly.

Record keeping

Every agency must keep trust account records in a way that enables them to be properly audited. Each receipt, payment, and transfer must be promptly and clearly recorded in the ledger for each client so the funds can easily be traced backwards and forwards. (Audit Regulations, r6(4))

Your agency must be able to show how the balances of your accounting system ledger/journals reconcile with the bank statements.

The text of Regulation 6 of the Audit Regulations is provided in Appendix 2.

Monitoring reconciliation of accounts

At the end of a calendar month, the ledger accounts must be reconciled with bank statements. These reconciliations must be given to your auditor every month, even if there were no transactions during the month concerned. Reconciliations are due with the auditor on the 20th of each month, except for January, when the report is due by the 27th.

Any variations between balances must be investigated. Variations may indicate:

- transactions are entered into the ledger and not yet showing on the bank account; or
- transactions are banked and not entered into the ledger; or
- there are data entry errors (such as '\$15,000' being entered instead of '\$18,000').

Miscellaneous fees and bank charges should not be included in the trust account.

Dispersing money/making payments

Under s 122 of the REAA, agents are required to make certain payments from their trust accounts. Examples of types of payments made from trust accounts are:

- fees/commission deducted
- balances of deposits to clients or their lawyers
- deposit refunds due to a sale not becoming unconditional
- rental fees deducted from rent received
- rents paid to landlords
- payments on managed rental properties (such as for repairs, rates or insurance).

Paying out funds you receive

All money you have received for a real estate transaction must be paid to the person who is lawfully entitled to that money or in accordance with their instructions. Some customers may decide to include a condition stating that the deposit funds be held in the client's lawyer's trust account until settlement.

Trust money must be held in the trust account until it is paid out. You are required to account for all trust money you have received.

It is essential that trust funds are only paid to those lawfully entitled to receive the funds or as directed by them.

Uncertainty regarding legal entitlement to money in the trust account

If you are in doubt regarding who is lawfully entitled to any money, you must take all reasonable steps to learn, as soon as practically possible, who is entitled to the money. The funds should be held in the trust account in the meantime (REAA, s122(2)).

The text of s122 of the REAA is provided in Appendix 1.

Creditors are not entitled to take trust money as payment

If the agency is in financial difficulty, any creditors affected are not entitled to take trust money to pay for outstanding accounts. This is outlined in s 122(4) of the REAA:

122(4) *No money to which this section applies is available for payment of the agent's debts, nor may it be attached or taken in execution under the order or process of any court at the instance of any of the agent's creditors.*

Interest on trust funds

If any interest is earned on trust account funds, it must be paid to the person entitled to it.

Withdrawal of commission

Any payment/deduction from a trust account must have the authority of the person who is lawfully entitled to the trust money. The salesperson usually establishes entitlement to withdraw commission from trust funds during the listing process when the agency is entering into an agency agreement with the client.

Authorising payments

It is best practice to have more than one authorised person approve the payments before making them. A process can be built into the agency's systems for electronic transfers whereby a secondary authorisation process occurs.

Auditing your trust account

A qualified auditor must audit trust accounts that hold money related to a licensee's work at the times and in the manner set out under the Audit Regulations. All real estate agency trust accounts must comply with the Audit Regulations.

You must notify REA of the name of the auditor responsible for auditing your trust account(s) when you:

- start a new real estate agency business; or
- make any significant change to an existing business (such as entering into a partnership or taking part in any type of merger with another business).

This notification must happen before entering into any financial transactions. (Audit Regulations, r 12).

The text of Regulation 12 is provided in Appendix 2.

Appointment of auditor

A person may be appointed as an auditor if that person:

- is qualified to be an auditor (refer to section 35 of the Financial Reporting Act 2013 (FRA)); and
- is not disqualified based on specified conflicts of interest (refer to Regulation 11(2) of the Audit Regulations or the provisions of s36(4) of the FRA).

The text of Regulation 11(2) is provided in Appendix 2.

Audit requirements for new agencies

Before a new agency receives any money in respect of their first transaction, they must inform REA of their nominated trust account auditor through a notification of auditor form. Correspondence must include confirmation from the auditor that they are eligible to be an auditor. (Audit Regulations, r 12).

The text of Regulation 12 is provided in Appendix 2.

Auditor ceases to be engaged by agency, does not commence role or is disqualified

If the appointed auditor either:

- ceases to be engaged by the agency; or
- does not commence their role as an auditor; or
- is disqualified under the Audit Regulations from auditing the agency's trust accounts.

then notice must be given to REA either:

- before such time as the auditor ceases to be engaged; or
- within 20 days of the agency becoming aware of the matter (Audit Regulations, r 13).

Any notice must be made in writing and signed by the authorised person, who is either:

- the individual agent licensee (if trading as an agent); or
- a partner of any partnership; or
- an officer of the real estate agency company.

The text of Regulation 13 is provided in Appendix 2.

Opening and closing trust accounts

Opening a new trust account

If an agency opens a new trust account, it must notify its auditor and REA of the new account details within ten working days (Audit Regulations, r 14(2)).

Closing trust accounts or making them inactive

The trust account you use may be deactivated for a number of reasons, such as changing jobs, starting a company of your own or entering into a partnership with another agent.

You must inform your auditor in writing that the account is inactive and that all money that was in it has been paid to the appropriate people. You must provide the auditor with all unaudited trust account records and receipts, which they should keep while the account remains inactive.

If you stop conducting business as an agent

If you stop conducting business as an agent, you must have a final audit carried out on the account within 20 working days. If you are suspending your licence, you should inform REA that your trust account will be inactive.

Audit requirements

The agency is required to permit the auditor access to the trust accounts, produce a signed copy of the most recent audit report, and produce all trust account records, bank statements, and any other relevant information (Audit Regulations, r 14).

A trust account audit should be conducted to the standard required of a reasonable assurance engagement as specified by the Standard on Assurance Engagements 3100 (SAE 3100).

Schedule for auditors to examine the trust account

Auditors must examine the trust account at least three times each year as specified in the schedule outlined in Regulation 21.

The auditor must give REA a signed copy of the annual audit report within ten working days of completing the final audit for the year.

Failure to supply your auditor with the necessary documents to enable them to comply with the audit schedule may lead to disciplinary action.

Official statutory declaration

You need to provide an official statutory declaration with each statement you give to your auditor (Audit Regulations, r 16). This declaration must be taken by either a Justice of the Peace, barrister and solicitor, notary public or another official as listed in section 9 of the Oaths and Declarations Act 1957.

This statement and declaration must be provided to the auditor three times a year at their request before the start of the audit. REA does not provide a template for this declaration but recommends you use the wording in Audit Regulation 16(2).

Provision of monthly accounts and other documents to the auditor

You have to provide the auditor with monthly accounts and any other documents or information the auditor requires. The auditor can also require your bank to provide information about your bank accounts. (Audit Regulations, r 27).

You are required to provide the auditor with written confirmation from your bank that the account is a designated trust account.

Auditor's annual audit report

Auditors must provide an annual audit report to REA within ten working days of completing the final audit for the year. This audit report must be signed and use the REA template or be in accordance with it. REA will acknowledge receipt of the audit report submitted within ten working days.

Auditors must also supply a signed copy of the audit report to the agent.

The auditor must be satisfied that all money you receive as a real estate agent has been 'duly and promptly' deposited in the trust account and that all money paid into the trust account is properly accounted for (Audit Regulations, r 20 (2)).

Duty to report defaults or irregularities

Auditors must promptly report specified matters to REA. The infographic on the next page outlines these specified matters.

Matters auditors must promptly report to REA

Balances of each client not clearly shown

Trust account records that do not show the trust account balances of each client



Records are not kept in a manner that enables them to be properly audited

Trust account records that are not kept in a manner that enables them to be properly audited

Any matter involving dishonesty, or a breach of law on the part of the agency



Loss, deficiency or failure to account for trust account money

A loss or deficiency of trust account money, or a failure of the agency to account for any trust account money

Failure to comply with the REAA or Audit Regulations

The auditor must promptly report any failure to comply with the provisions of the REAA or the Audit Regulations in relation to the agency's trust accounts. This includes failure to supply the auditor with the documents the agency needs to provide to meet its responsibilities in a timely manner.



Other matters such as errors, irregularities, or misstatements

The auditor should report any other matter, such as errors, irregularities, or misstatements in a trust account that the auditor believes should be reported.

When an agent notifies the auditor that their trust account is inactive or reactivated

Auditors must advise REA whenever they receive any notification of an inactive or reactivated trust account from an agent (Audit Regulations, r 25 and r 26)



Disclosure of information by an auditor

Subsection 125(2) of the Real Estate Agents Act 2008 says, 'All information obtained by an auditor in the course of the audit of any trust account under this Act must be treated as confidential'. However, Regulation 28 of the Audit Regulations says that an auditor may disclose information that was obtained in the course of an audit of an agency's trust account if:

- the disclosure is made in a report to REA; or
- the information is required for the purpose of proceedings that may arise out of any such report or otherwise in relation to the trust accounts of the agency concerned; or
- the information disclosed relates to money in which a person has a legal or beneficial interest, and the disclosure is made to that person; or
- the information is required for the purpose of any investigation conducted by a Complaints Assessment Committee; or
- the disclosure is made with the consent of the agency; or
- the disclosure is otherwise permitted or required by REA, the Audit Regulations or any other enactment.

Auditor's duty when agency business ceases

Where an individual agent ceases to carry on real estate business, or a partnership is dissolved, or a company has been wound up, within 20 working days, the agency's auditor must perform a final audit of the trust accounts as if the closing date was 31 March (Audit Regulations, r 18).

Inactive trust accounts

Regulation 24 applies where an agency (or individual agent licensee) has an inactive trust account because either:

- the agency is an individual who previously operated a trust account but who is now:
 - employed by another agency; or
 - an officer of a company that is an agent; or
 - a member of a partnership that operates a partnership trust account, or
- the agency is no longer actively engaged in carrying on the business of an agent.

Where the trust account is inactive, the agency must notify the appointed auditor in writing that the trust account is inactive. They must give the auditor all unaudited trust account records and ensure no further receipts are generated.

Under Regulation 25, if an auditor receives notice of an inactive trust account, the auditor must, if satisfied that all the trust account records for that inactive trust account are in their possession, advise REA in writing that:

- notice has been received under regulation 24 that the agency's trust account is inactive; and
- all relevant trust account records required to be audited under the Audit Regulations have been received, including all unused receipts and cheques, and the agency has provided an assurance that no further trust receipts are to be generated electronically; and

- except for the reports that are required to be given to the Authority up to the date of the notice, the audit reports required under regulation 22 will not be given to the Authority until further notice.

Read the following case study and answer the questions that follow.

Case study

This case relates to an agency's compliance with requirements for managing trust accounts.

A CAC determined that the agency had engaged in misconduct and laid a misconduct charge with the Disciplinary Tribunal to decide on the charge.

The agency accepted that it breached the audit regulations but denied that it willingly or recklessly contravened the regulations.

Background

Under s122 of the Act, all money received by an agency in respect of any transaction in the agency's capacity as an agent must be held by the agent in a general or separate trust account. It is held in the trust account pending payment to the person lawfully entitled to it or at that person's direction. Regulation 15 of the audit regulations outlines the agency's duty to provide a monthly list of balances and a reconciliation statement. During the period from April 2016 to May 2017, the agency's auditor reported to REA that the agency had failed to provide trust account reconciliations by the specified time, as follows;

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

Note: the reconciliations for the months of July 2016 and February 2017 were provided to the agency's auditors by the required time.

The agency's response to the charge was:

- The accounts person who competently managed its trust account from 2005 "unexpectedly" went on maternity leave in March 2016, and the agency appointed Mr C as an account administrator. In about April 2016, the agency discovered that Mr C was struggling with managing the trust account.
- The agency then contracted an external auditor to manage the trust account, but the contracted auditor eventually advised that he was unable to provide audit services. During this period, they said reconciliations were provided to its auditor, albeit late.
- From 1 September 2017, the agency appointed the Public Trust to manage its trust account fully, and no issues had arisen since that time.
- The breaches were not willful or reckless, as it had not "flagrantly disregarded" the audit regulations but had "persistently tried to rectify a string of unfortunate appointments".

Determination by the Disciplinary Tribunal

The Tribunal found 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. The Tribunal accepted the submission made on behalf of the CAC that compliance with the audit regulations is not something that is "nice to have" but is mandatory. The Tribunal cited a passage from *Burnett v Real Estate Agents Authority* (CAC 404) about the seriousness of a failure to comply with the audit regulations:

...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 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.

- There was no doubt that the Agency knew that the audit regulations required it to provide monthly trust account reconciliations to its auditor by the 20th of each month. It knew that it would possibly breach the audit regulations if it did not comply with the regulations. Yet, for just over one year, it did not do so. It consistently provided reconciliations one month late and did not provide any reconciliations at all in the period from 21 August 2016 to 10 March 2017. The result was that reconciliations were provided up to seven months late.
- The Agency's wish to change its auditor did not excuse its failure to provide reconciliations. Until it had a new auditor in place, the Agency was required to provide reconciliations to its existing auditor. Although the Agency knew that it was required to do this and would possibly breach the audit regulations if it failed to, it did not do so. After advising the auditor in July 2016 of its intention to appoint a new auditor, it did not provide the intended new auditor with the necessary documentation and did not complete the process of appointing a new auditor.
- The fact that a staff member went on maternity leave also did not excuse the Agency. The replacement staff member struggled with the requirements of the audit regulations, and it was the Agency's responsibility to take immediate steps to deal with the situation. If the replacement staff member was not coping with complying with the regulations, the proper

response was to seek advice from the Agency's auditor, then follow that advice. In this case, the Agency did not do so.

- The Agency knew that it was obliged under the audit regulations to provide monthly trust account reconciliations. It was aware that it would be breaching the regulations if it did not provide them but continued to operate the trust account without complying with the regulations. Such conduct is properly regarded as a reckless contravention of the audit regulations.

The Tribunal was satisfied that the CAC had established the charge of misconduct in this case.

Orders

The Tribunal ordered that:

- the agency be censured
- the agency pays a fine of \$14,000 to REA.

Complaint number: C27610

Disciplinary Tribunal references: [2020] NZREADT 03, [2020] NZREADT 20

Date: 1 May 2020

You can read about this complaint and decision in the REA decisions database at rea.govt.nz



Questions

Answer the following questions.

1. Why did the Disciplinary Tribunal not accept the agency's excuse that its failure to provide reconciliations was due to it wishing to change its auditor?

2. Why did the Disciplinary Tribunal not accept the agency's excuse that a staff member went on maternity leave and her replacement was struggling with the requirements of the audit regulations?

3. Why did the Disciplinary Tribunal accept the CAC's submission that the conduct of the agency in contravening the audit regulations was "reckless"?

4. Why did the Disciplinary Tribunal regard compliance with the audit regulations as 'fundamental' in terms of the purpose of the REAA?

Note the following comments from the Disciplinary Tribunal:

[para 23] “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 s3 of the Act:”

[para 24] We accept [the CAC counsel]’s submission that compliance with the audit regulations is not something that is “nice to have”. Compliance is mandatory. The Tribunal expressed the importance of the regulations in its decision in *Burnett v Real Estate Agents Authority (CAC 404)* as follows:⁵

...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 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.

5

Burnett v Real Estate Agents Authority (CAC 404) [2017] NZREADT 2, at [12].



Putting my learning into practice

How has this topic improved your knowledge and understanding of 'Trust Accounts'?

Describe at least one change you will make to the way you work as a result of this topic.

Appendix 1: Relevant sections from the Real Estate Agents Act 2008

The following are extracts from the Real Estate Agents Act 2008:

122 Duty of agent with respect to money received in course of business

- (1) All money received by an agent in respect of any transaction in his or her capacity as an agent must be paid to the person lawfully entitled to that money or in accordance with that person's directions.
- (2) Despite subsection (1), if an agent is in doubt on reasonable grounds as to the person who is lawfully entitled to the money, he or she must take all reasonable steps to ascertain as soon as practicable the person who is entitled and may retain the money in his or her trust account until that person has been ascertained.
- (3) Pending the payment of any such money, the money must be paid by the agent into a general or separate trust account at any bank carrying on business in New Zealand under the authority of any Act and may not be drawn upon except for the purpose of paying it to the person entitled or as that person may in writing direct.
- (4) No money to which this section applies is available for payment of the agent's debts, nor may it be attached or taken in execution under the order or process of any court at the instance of any of the agent's creditors.
- (5) Nothing in this section takes away or affects any just lien or claim that an agent who holds money to which this section applies has against the money.

123 Money to be held by agent for 10 working days

- (1) When an agent receives any money in respect of any transaction in his or her capacity as an agent, he or she must not pay that money to any person for a period of 10 working days after the date on which he or she received it.
- (2) Despite subsection (1), a court order or an authority signed by all the parties to the transaction may require the agent to pay the money before the expiry of the period specified in that subsection.
- (3) If at any time while holding any money on behalf of any party to the transaction, the agent receives written notice of any requisitions or objections in respect of the title to any land affected by the transaction, the agent must not at any time pay that money to any person except in accordance with a court order or an authority signed by all the parties to the transaction.

124 Agent to furnish account to client

- (1) As soon as an agent is asked by his or her client to do so, and in any case not later than 28 days after the agent receives any money in respect of the transaction in his or her capacity as an agent, the agent must render to the person lawfully entitled to the money an account in writing, setting out particulars of all such money, and its application.
- (2) If an agent is in doubt on reasonable grounds as to the person who is lawfully entitled to any money, the agent must take all reasonable steps to ascertain as soon as practicable the person who is entitled and is not required to render an account under this section until the person lawfully entitled has been ascertained

125 Agents' trust accounts to be audited

- (1) Every general or separate trust account of an agent must be audited at the times and in the manner prescribed by regulations made under this Act.
- (2) All information obtained by an auditor in the course of the audit of any trust account under this Act must be treated as confidential.
- (3) Subsection (2) is subject to any rights of disclosure that may be prescribed for the purposes of the audit.

149 Offence to fail to pay person lawfully entitled to money received

An agent commits an offence if that agent fails to pay a person lawfully entitled to money received in respect of any transaction in accordance with Section 122 or otherwise contravenes that section.

152 Offence to render false accounts

- (1) A person commits an offence who renders an account purporting to be an account for any money received by him or her in his or her capacity as a licensee, knowing the account to be false in a material particular.
- (2) Every person who commits an offence against this section is liable on conviction, -
 - (a) in the case of an individual, to imprisonment for a term not exceeding 2 years or a fine not exceeding \$40,000, or both; or
 - (b) in the case of a company, to a fine not exceeding \$100,000.

Appendix 2: Relevant regulations from the Real Estate Agents (Audit) Regulations 2009

Regulation 6 outlines the requirements for recording into and maintaining trust account records.

6 Trust account records

- (1) Every agency must-
 - (a) keep trust account records in a manner that enables those records to be conveniently and properly audited; and
 - (b) ensure that those trust account records-
 - (i) are up to date; and
 - (ii) clearly show the amount of trust account money held for each client; and
 - (iii) are, as far as practicable, secure against retrospective alteration or deletion.
- (2) All entries in the client ledger accounts, and in other records that are the source of those entries, must-
 - (a) be dated; and
 - (b) include references that identify their source or destination and enable them to be traced backward and forward.
- (3) All entries in the journal must include sufficient detail to make their purpose evident.
- (4) Trust account records relating to a client must be retained for a period of at least 7 years from the date of the last transaction recorded in them, but-
 - (a) May be retained after the first 3 years, in the form of imaging, or other similar technology; or
 - (b) In the case of computer-generated trust account records originated by the agency, may be retained in the form of electronic storage, imaging, or similar technology.

Regulation 7 outlines the requirements for receipt and payment of trust account money.

7 Receipt and payment of trust account money

- (1) Every receipt, payment, transfer, and balance of trust account money must be recorded in a trust account ledger with a separate ledger account for each client and no ledger account may contain money of more than 1 client, but a client's account may be subdivided into various matters.
- (2) For the purposes of subclause (1), a joint client must be treated as a single client.

Regulation 11 subclause (2) describes where a conflict of interest lies for an auditor:

11 Disqualification from auditing trust accounts of an agency

...

- (2) A conflict of interest exists if –
- (a) the auditor is in business as an agent;
 - (b) the auditor is, or at any time within the immediately preceding 12 months has been, employed or engaged by the agency (other than as the agency’s auditor);
 - (c) the auditor is, or at any time within the immediately preceding 12 months has been, a partner of the agency or in business with the agency;
 - (d) the auditor is, or at any time within the immediately preceding 12 months has been, an officer of the company that is the agency;
 - (e) the auditor, or any employee of the auditor is, or at any time within the immediately preceding 12 months has been, engaged in processing or recording transactions relating to the agency;
 - (f) the relationship between the auditor and the agency is of a kind described in section 137 of the Act.

...

Regulation 12 outlines requirements of new agencies in regard to appointing an auditor.

12 New agency must notify appointment of auditor before receiving money

- (1) Every agency that is an individual who, or a company that, is granted a new licence under section 43 of the Act must notify the Authority of the auditor who is appointed to audit the agency’s trust accounts, before that agency receives any money in respect of their first transaction pursuant to that licence.
- (2) Every agency that is a partnership formed on or after 17 November 2009, must notify the Authority of the auditor who is appointed to audit that agency’s trust accounts, before any agent who is a member of that partnership receives any money in respect of a transaction undertaken as a member of that partnership.
- (3) Every notice given under this regulation must -
 - (a) specify the name and address of the auditor; and
 - (b) specify the name and identifying bank account number of each trust account that the auditor will audit; and be accompanied by written confirmation from the auditor that he or she
 - (i) is a qualified auditor;
 - (ii) *[Revoked]*
 - (iii) agrees to audit the trust account mentioned in paragraph (b):

- (iv) is not disqualified under these regulations from acting as an auditor.
- (4) Every notice given under this regulation must be in writing and signed, -
 - (a) if the agency is an individual, by that individual; or
 - (b) if the agency is a partnership, by a member of that partnership; or
 - (c) if the agency is a company, by an officer of the company.

Regulation 13 outlines requirements for notifying REA if the auditor is disqualified or no longer engaged.

13 Agency must notify Authority of replacement if auditor disqualified or no longer engaged

- (5) Every agency must give notice to the Authority, within the time set out in subclause (2), if the auditor appointed to audit the agency's trust accounts -
 - i. ceases to be engaged by the agency; or
 - ii. does not, for any reason, commence his or her role as auditor; or
 - iii. is disqualified under these regulations from auditing the agency's trust accounts.
- (6) The notice must be given to the Authority at any time before the auditor ceases to be engaged, or within 20 working days of the agency becoming aware of the matter specified in subclause (1)(a), (b) or (c), whichever is the later.
- (7) Every notice given under this regulation must-
 - (a) Specify the name and address of the auditor who is to be replaced; and
 - (b) Specify the name and address of a replacement auditor who is appointed to audit the agency's trust accounts; and
 - (c) Specify the name and identifying bank account number of each trust account that the replacement auditor will audit; and
 - (d) Be accompanied by written confirmation from the replacement auditor that he or she -
 - (i) is a qualified auditor
 - (ii) *[Revoked]*
 - (iii) agrees to audit the trust accounts mentioned in paragraph ©:
 - (iv) is not disqualified under these regulations from acting as an auditor.
- (8) Every notice given under this regulation must be in writing and signed, -
 - (d) If the agency is an individual, by that individual; or
 - (e) If the agency is a partnership, by a member of that partnership; or
 - (f) If the agency is a company, by an officer of the company.

Appendix 3: Relevant clauses from the ADLS/REINZ Agreement for Sale and Purchase of Real Estate – Tenth Edition 2019 (2)

- 2.4** The person to whom the deposit is paid shall hold it as stakeholder until:
- (1) the requisition procedure under clause 6.0 is completed without either party cancelling this agreement, and
 - (2) where this agreement is entered into subject to any condition(s) expressed in this agreement, each such condition has been fulfilled or waived; and
 - (3) where the property is a unit title:
 - (a) a pre-settlement disclosure statement, certified correct by the body corporate, under section 147 of the Unit Titles Act; and
 - (b) an additional disclosure statement under section 148 of the Unit Titles Act (if requested by the purchaser within the time prescribed in section 148(2),

have been provided to the purchaser by the vendor within the times prescribed in those sections or otherwise the purchaser has given notice under section 149(2) of the Unit Titles Act to postpone the settlement date until after the disclosure statements have been provided; or
 - (4) this agreement is:
 - (a) cancelled pursuant to:
 - (i) subclause 6.2(3)(c); or
 - (ii) sections 36 or 37 of the Contract and Commercial Law Act 2017; or
 - (b) avoided pursuant to subclause 9.10(5); or
 - (5) where the property is a unit title and the purchaser, having the right to cancel this agreement pursuant to section 151(2) of the Unit Titles Act, has cancelled this agreement pursuant to that section, or has elected not to cancel by giving notice to the vendor, or by completing settlement of the purchase.
- 2.5** Where the person to whom the deposit is paid is a real estate agent, the period for which the agent must hold the deposit as a stakeholder pursuant to subclause 2.4 shall run concurrently with the period for which the agent must hold the deposit under section 123 of the Real Estate Agents Act 2008, but the agent must hold the deposit for the longer of those two periods, or such lesser period as is agreed between the parties in writing as required by section 123 of the Real Estate Agents Act 2008, but in no event shall the deposit be released prior to the expiry of the requisition period under clause 6.0, unless the requisition period is expressly waived in writing after the effect of the same is explained to the purchaser by the agent or by the purchaser's lawyer or conveyancer.

6.2

- (1) The purchaser is deemed to have accepted the vendor's title except as to objections or requisitions which the purchaser is entitled to make and notice of which the purchaser serves on the vendor on or before the earlier of:
 - (a) the tenth working day after the date of this agreement; or
 - (b) the settlement date.
- (2) Where the transfer of the property is to be registered against a new title yet to be issued, the purchaser is deemed to have accepted the title except as to such objections or requisitions which the purchaser is entitled to make and notice of which the purchaser serves on the vendor on or before the fifth working day following the date the vendor has given the purchaser notice that the title has been issued and a search copy of it as defined in section 60 of the Land Transfer Act 2017 is obtainable.
- (3) If the vendor is unable or unwilling to remove or comply with any objection or requisition as to title, notice of which has been served on the vendor by the purchaser, then the following provisions will apply:
 - (a) the vendor shall notify the purchaser ("a vendor's notice") of such inability or unwillingness on or before the fifth working day after the date of service of the purchaser's notice;
 - (b) if the vendor does not give a vendor's notice the vendor shall be deemed to have accepted the objection or requisition and it shall be a requirement of settlement that such objection or requisition shall be complied with before settlement;
 - (c) if the purchaser does not on or before the fifth working day after service of a vendor's notice notify the vendor that the purchaser waives the objection or requisition, either the vendor or the purchaser may (notwithstanding any intermediate negotiations) by notice to the other, cancel this agreement.

6.3 In the event of cancellation under subclause 6.2(3), the purchaser shall be entitled to the immediate return of the deposit and any other moneys paid under this agreement by the purchaser and neither party shall have any right or claim against the other arising from this agreement or its cancellation. In particular, the purchaser shall not be entitled to any interest or to the expense of investigating the title or to any compensation whatsoever.