

Decision No: [2012] NZREADT 30

Reference No: READT 024/11

**IN THE MATTER OF**

of charges laid under s 91 of the Real Estate Agents Act 2008

**BETWEEN**

**REAL ESTATE AGENTS AUTHORITY (CAC 10031)**

**AND**

**LEVANI DAULEVU CHARLIE LUM-ON**

Defendant

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

Ms K Davenport - Chairperson  
Ms J Robson - Member  
Mr G Denley - Member

**APPEARANCES**

Mr L Clancy, counsel for the Authority  
The defendant in person

***Introduction***

[1] Mr Lum-On is a real estate agent who works in South Auckland. He faces a charge arising out of his dealings with Barry and Tira Nathan. Mr and Mrs Nathan made a complaint to the Real Estate Agents Authority. They said that in 2008 they had answered an advertisement in the Manukau Courier for “rent to buy” properties being advertised by Mr Lum-On under the Ray White banner. Mr and Mrs Nathan complained that they felt coerced into entering into a rent to buy scheme called a “lay-by” and that they ended up with nothing at the end of the lay-by. Mr Nathan said that he was told by Mr Lum-On that he would pay a set amount each week for four weeks (\$650) and at the end of the period he would get 5% of the purchase price of the property rebated as a deposit and then would be able to buy the property. The property concerned was at 32 Pallant Street, Manurewa. Mr and Mrs Nathan said that in October 2008 after they had been to see Mr Lum-On they were asked to pay a deposit to secure the property that they were hoping to lay-by. A receipt for this money was given by Mr Lum-On. The receipt records that the \$1,500 on 1 November 2008 was a “deposit for the lay-by of 32 Pallant Street, Manurewa”.

[2] In November 2008 Mr and Mrs Nathan entered into a “lay-by” agreement with the owners of Pallant Street – Two Internationals Limited for the weekly consideration of \$650 per week. They agreed to pay \$339,000 for the property in return for an exclusive option to purchase exercisable up to four years from the date of the

agreement. If the Nathans did not pay the lay-by consideration then their tenancy could be terminated by the Tenancy Tribunal. The agreement specifically recorded that the Residential Tenancies Act was applicable. Annexed to this was an unsigned Agreement for Sale and Purchase.

[3] Mr and Mrs Nathan said that after they had paid their initial deposit they went to two seminars for First Home New Zealand which advised them about budgeting and finance. These were also attended by a mortgage broker who worked with Mr Lum-On. The first seminar was at the Ray White office, the second seminar was at the Republic Bar in Manukau. Mr Lum-On was a director of First Home NZ company.

[4] Mr Nathan paid further monies on 24 November, 22 December, 23 December and funds throughout January and February with the payments petering off in March and April 2009. The total amount paid by the Nathans under this agreement was \$11,350. When it became apparent that they were struggling to meet the \$650 payments they agreed to simply rent the property for \$400 per week. Mr Nathan said that he understood that the "*lease compensation*" (the \$650) initially was being paid into the Trust account of Ray White but subsequently learned that it was Mr Lum-On's personal account. Mr and Mrs Nathan understood that the \$1,500 was a deposit towards the scheme but had not received anything back when the agreement ended. Mr and Mrs Nathan complained that the scheme appeared to be "*a quick way to get funds by unscrupulous people*".

[5] Having received this complaint the Real Estate Agents Authority investigated it, interviewed Mr Lum-On, and referred the matter to the Complaints Assessment Committee. The Complaints Assessment Committee determined that a charge ought to be laid against Mr Lum-On pursuant to s 73A of the Real Estate Agents Act. The Tribunal now summarises these charges.

### **Charge 1**

- (i) *A wilful and reckless contravention of s 16 of the Real Estate Agents Act 1976 in that he carried on business of a real estate agent without holding a licence by arranging for the complainants to enter into a "lay-by" agreement to purchase an interest in land, namely the property at 32 Pallant Street, Manurewa.*

### **Charge 2**

- (ii) *A wilful and reckless contravention of s 62 of the Real Estate Agents Act 1976.*

### **Particulars**

- (a) *That he received \$1,500 from the complainants in consideration for his services in arranging for the complainants to enter into a "lay-by" agreement to purchase an interest in the property at their election.*
- (b) *The defendant did not hold a Real Estate Agents' licence under the Real Estate Agents Act when he recovered \$1,500 from the complainants.*

**Charge 3**

- 3 *Misconduct under s 73A of the Real Estate Agents Act in that his conduct would be reasonably regarded by agents of good standing or reasonable awareness of the public as disgraceful.*

**Particulars**

- (a) *In or about November 2008 the first defendant falsely represented to the complainants that their \$1,500 payment was a deposit on their "lay-by" agreement when in fact it was commission for the first defendant.*
- (b) *In or about November 2008 the first defendant falsely represented to the complainants that their \$1,500 payment would be held in a real estate agent's Trust account.*

**Charge 4**

- (iii) *An allegation of misconduct under s 73A that the conduct would be regarded as disgraceful.*

**Particulars**

- (a) *The first defendant had a conflict of interest in arranging for the complainants to enter into a "lay-by" agreement in respect of the property.*
- (b) *The defendant did not disclose his conflict of interest to the complainants.*

[6] At that time of these events Mr Lum-On held a salespersons licence and worked for Ray White Manukau.

[7] These charges form the basis for the issues to be determined.

- (a) Was Mr Lum-On acting as an agent when he advised on the "lay-by" agreement?
- (b) Did he receive \$1,500 from the Nathans as a deposit or a fee for service? If the latter, does that contravene the Real Estate Agents Act?
- (c) Did he falsely represent that the \$1,500 was to be held in a trust account?

**Adjournment?**

[8] At a conference call in November 2011 Mr Lum-On appeared and sought an adjournment for six months. The grounds on which he sought an adjournment for six months were that he could not instruct counsel because he was not in a financial position to do so.

[9] The Tribunal declined this application and set the case down to be heard in February 2012, some four months later.

[10] Mr Lum-On applied again for an adjournment in a telephone conference held on Friday 24 February and by e-mail on Monday 27 and again at the commencement of the hearing stating that he had applied for Legal Aid on Monday 27 February. He did not have any proof that he had applied for Legal Aid but claimed that he had lodged the claim in the Manukau Court on Monday. The Tribunal declined his request. Mr Lum-On protested strongly about being forced to commence the hearing claiming that he was not prepared, it was not fair and that he did not have a lawyer and did not want to say the wrong thing. The Tribunal considered that Mr Lum-On had had many months' notice in which to either apply for Legal Aid or to prepare the case himself. Accordingly the hearing proceeded.

### **The Case**

[11] The Tribunal heard from Mr Nathan who gave the evidence set out in the introduction above. The Tribunal also heard from Mr Gouverneur, the investigator for the Real Estate Agents Authority who played for the Tribunal the recording of the first interview with Mr Lum-On. A transcript appears in the bundle of documents. It is significant because it records Mr Lum-On as acknowledging that the \$1,500 paid by the Nathans was not part of the *"lease consideration"*, (as Mr Lum-On refers to it) but in fact a commission or payment to Mr Lum-On for his time and effort in putting the transaction together.

[12] Mr Lum-On gave evidence. He repudiated the statement about the \$1,500 saying that he was unprepared for the interview with the Real Estate Agents Authority and did not know it could be used against him. He confirmed that the \$1,500 was not a fee (for him) but in fact was a deposit (for the vendors). He said that he had received no benefit from the *"lay-by"* agreement. He reiterated that the *"lay-by"* agreement had nothing to do with Ray White and that he had been told to remove any of the Ray White logos from his advertising when they became aware of the scheme. He had done so. There was more confusion over the question of payment of the \$650 lease consideration. It was Mr Lum-On's case that the owners of the property in Manurewa, two rugby players trading as Two Internationals Investments Limited, were content that Mr Lum-On received the monies into his own account, used cash to pay for works to be done on the property and rates and accounted to them for approximately \$4,000 less than he actually received. The Tribunal and the Real Estate Agents Authority have never seen any of Mr Lum-On's bank accounts or the records of receipts from the owners.

[13] Mr Lum-On provided Mr Gouverneur with a copy of a scanned letter purporting to be from one of the owners in which he confirmed that Mr Lum-On had accounted to him for all of the monies for the *"lease consideration because of the nature of our job and our time spent travelling"* and he *"gave permission for Mr Lum-On to deduct costs incurred in our absence off work he arranged on the property"*. Mr Lum-On denied that the owners believed that their compensation monies had been paid to Ray White. The Tribunal asked the Complaints Assessment Committee to confirm with the owner that this was the correct position. The owner's evidence was contained in a memorandum from the Complaints Assessment Committee. The evidence was from Mr Williams, one of the directors of Two Internationals Investments Limited. He was spoken to by the investigator for the Real Estate Agents Authority and a file note was submitted to the Tribunal recording a conversation on 8 March 2012. Mr Williams could not remember much of the detail relating to the sale. He was not able to confirm

the exact amount he had received from Mr Nathan but said he believed that Mr Lum-On had been very helpful to them and that everything was above board. He said he never felt ripped off or that Mr Lum-On was in it for a “*quick buck*”. He told the investigator that Mr Lum-On helped them with having various things done around the property. He confirmed that he had written the letter referred to above but he could not remember where the amount in the letter came from but said that his accountant ran the accounting side. The only other thing that he added was that occasionally he paid Mr Lum-On for work that they have done around the property. He said that Mr Lum-On passed on the full weekly consideration of \$650 to them without any deduction. He said that he noticed because they had a rental company and that was the amount that was coming in each week. He said he was not sure whether the \$1,500 was received from Mr Lum-On or not. He said he would have to go through his records and even then they would probably not be perfect because he had “*lumped it*” with the purchase price in terms of the house.

### ***Submissions on behalf of the Complaints Assessment Committee***

[14] The Complaints Assessment Committee submitted that all four charges had been made out. They submitted in respect of the first charge that Mr Lum-On was clearly acting as an agent carrying out real estate agency work. In respect of the second charge the Complaints Assessment Committee submitted that Mr Lum-On acknowledged that he received the \$1,500 as a fee for service in arranging the “*lay-by*” agreement and thus was in breach of s 42. They submitted that evidence shows that of the \$11,350 paid by the complainants only \$7,280 was ever paid to the owners. Mr Hodge submitted that on the balance of probabilities the \$1,500 was a fee for service. The Complaints Assessment Committee submitted that in respect of Charge 3 this was contingent upon the finding that the \$1,500 had been accepted as a fee for service. If so, then did the Tribunal find that Mr Lum-On had misrepresented that the payment was a deposit towards the “*lay-by*”? The Complaints Assessment Committee submitted that the Tribunal should accept Mr Nathan’s evidence and find accordingly against Mr Lum-On.

[15] Finally in respect of Charge 4 the Complaints Assessment Committee submitted that Mr Lum-On had a conflict of interest in arranging the “*lay-by*” agreement not disclosed to the complaint and this amounted to disgraceful conduct.

### ***Submissions of Mr Lum-On***

#### ***Charges 1 and 2***

[16] Mr Lum-On submitted that the interview was not oppressive in the ordinary sense but that there was a degree of pressure and anxiety in the interview which was not reflected in the replaying of the tape. He said that if he had realised the “process and how mistakes can occur” he would have engaged a solicitor to help him. He said he was also unwell at the time, recovering from the flu. He submitted further:

1. That the \$1,500 was a deposit which he sought because it committed the owners to the process of sale which would take the property off the market either for sale or to rent.

2. The payment of \$1,500 would be a clear indication that they were serious purchasers.
3. Although he failed to record it in the agreement as he should have, he did tell the purchasers that \$1,500 was a deposit and he endorsed the receipt in that way.
4. The *“lay-by”* agreement should have made provision for a payment of a deposit *“my omission that I had not put it in directly caused and later resulted in my subsequent incorrect and false confession”*.
5. The \$1,500 was banked into his ASB account. It remained there. He did not take it or use it for any personal needs.

[17] Mr Lum-On also presented fresh evidence, saying that he had withdrawn \$1,060 of the money in cash and paid it to meet arrears of rates. He attached emails which he said showed that there were arrears of rates and that he had said he would pay it. The Complaints Assessment Committee has not had an opportunity of responding to this evidence.

[18] He says therefore that whilst the \$1,500 was not passed on to the owners of the property, \$1,060 was paid by him in cash in June 2009 as arrears of rates owed by Mr and Mrs Nathan. Mr Lum-On submitted that the reason that he lied and maintained throughout the interview that the \$1,500 was not a deposit was because he believed that what the interviewer was asking him was why the deposit had been taken but had not been recorded in the agreement. He took from this that he therefore had committed some kind of offence. He submitted that despite the fact that it was obvious that it was a deposit, he had committed the initial lie which he told and which he persisted with. He submitted that *“legal history proves that people do tell lies in interviews for any number of reasons and that a lie told in the circumstances he recounted”* should not take the matter beyond the threshold of probabilities. He submitted that if he had considered the \$1,500 as a fee for running around he would have withdrawn it from his account. He submitted there was no withdrawal of \$1,500 from his account; rather there was a withdrawal of \$1,060 and an email confirming that he would take the cash to Ray White Rentals.

[19] In fact the Tribunal does not have copies of Mr Lum-On’s bank statements. All that the Tribunal has are the extracts which he forwarded to the Real Estate Agents Authority’s investigator noting that he had made payments from this account for arrears.

[20] Mr Lum-On makes these submissions in respect of Charges 1 and 2.

### **Charge 3**

[21] He submitted that if the Tribunal found that he did not accept a fee then Charge 3(a) could not be proved and he otherwise said that the Tribunal would have to decide if there was misrepresentation and whether the deposit would be held in the Ray White trust account. He accepted the direct conflict of evidence and the Tribunal must resolve that conflict. He also submitted that Mr Nathan’s evidence did not reveal his true personality and credibility and refuted that there was any evidence of coercion

in Mr Nathan entering into the “rent to buy” scheme. He drew to the Tribunal’s attention the failure of Mr Nathan to declare his income and his failure to pay even rent. He submitted that Mr Williams and Mr McCaw were owed approximately \$6,000 in unpaid rent which was unacceptable and goes to the *“incredibility, (un)reliability and integrity of Mr Nathan”*. He told the Tribunal that there was a lot of cleaning up that needed to be done on the property before new tenants could move in.

[22] In respect of Charge 4 he submitted that there was no negotiation over the price because the Nathans were not in a position to negotiate the price. They could not get a loan he submitted because Mr Nathan had undeclared income. He submitted *“Given the Nathans’ undeclared cash income which prevented a normal loan and Messrs Williams and McCaw desire to get out of the property market, this was not a conflict of interest but rather a win-win situation.”* He concluded that there was no prejudice to the Nathans as they were allowed to stay in the house rent-free to the tune of \$6,000. He submitted that he did very little running around for the Nathans and that \$1,500 was a not a reward for this. However, he agreed that he did a lot of work for the vendors in repairs and maintenance, arrears, etc. He said that they told him to make sure that he covered his expenses for running around but they did not stipulate how much, just that *“I make sure I was not out of pocket. Despite this ‘carte blanche’ I took very little. Once I took money for petrol. At the very most my remuneration from Messrs Williams and McCaw was less than \$500. I assert this factor should be kept in mind when assessing my credibility and honesty.”*

### **Assessment**

[23] The Tribunal now consider the charges. Was Mr Lum-On acting as an agent at the time that he entered into the *“lay-by”* agreement? Mr Lum-On asserted that it was not real estate agency work as it was not a rental arrangement or a sale. Under the 1976 Act Mr Lum-On held an approved salesperson’s certificate and not a licence to act as a real estate agent. Section 16 of the 1976 Real Estate Agents Act provides that no person shall carry on the business of real estate agent unless he or she is the holder of a licence issued in accordance with this Act. Section 3 defines real estate agency work as *“any person who ... acts or holds himself or herself out to the public as ready to act for reward as an agent in respect of the sale or other disposal of land ... or for the purchase or other acquisition of land or in respect of the leasing or letting of land whether or not that person carries on any other business”*.

[4] *For the purposes of this section the collection or receipt of rent money by a real estate agent to ... shall be deemed to be carrying on with the business as a real estate agent”.*

Section 62 of the Act provides that *“no person is entitled to recover commission or reward in respect of work or service performed by him or her as a real estate agent unless he or she is the holder of a licence as a real estate agent under the Act”*. The Complaints Assessment Committee alleges that Mr Lum-On was not the holder of a real estate agents licence at the time that he prepared the *“lay-by”* agreement and accepted a fee of \$1,500 from the complainant and collected the *“lease consideration”* from the complainants on behalf of the owners of the property.

### **Relevant Law**

[24] The charges relate to the defendant's conduct prior to the commencement of the 2008 Act on 17 November 2009. Section 172 of the 2008 Act therefore applies and provides as follows:

#### **172 Allegations about conduct before commencement of this section**

- (1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,—
  - (a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and
  - (b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.
- (2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred.

[25] In cases where the licensee who has been charged was licensed or approved under the 1976 Act at the time of the conduct (which the defendant was), and has not been dealt with under the 1976 Act in respect of the conduct (which the defendant has not), s 172 creates a three step process:

**Step 1:** Could the defendant have been complained about or charged under the 1976 Act in respect of the conduct?

**Step 2:** If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?

**Step 3:** If so, only orders which could have been made against the defendant under the 1976 Act in respect of the conduct may be made by this Tribunal.

[26] Looked at in the round, a charge relating to pre-17 November 2009 conduct falls to be determined in accordance with the disciplinary standards set out in ss 72 and 73 of the 2008 Act in the same way as a charge about post-17 November 2009 conduct (**Step 2**). However, there are two requirements under s 172 which limit its retrospective effect:

- (a) complaints outside the jurisdiction of the 1976 Act are also outside the jurisdiction of s 172 (**Step 1**);
- (b) only orders which could be made under the 1976 Act may be made under s 172 (**Step 3**).

[27] Each of the three steps, as they apply to this case, will be addressed in turn.



## **Step 1 – Could have been complained about or charged under 1976 Act**

[28] Under rule 16.2 of the Rules of the Real Estate Institute of New Zealand Incorporated (“REINZ Rules”), made under s 70 of the 1976 Act, any person could complain to REINZ. Following investigation of a complaint, REINZ could take one of a number of steps, including referring a matter to the Real Estate Agents Licensing Board (rule 16.13.5).

### **94 Grounds on which licence may be cancelled by Board**

- (1) The Institute, the Disciplinary Committee, or any other person with leave of the Board, may at any time apply in the prescribed form to the Board for an order cancelling a real estate agent’s licence, and the Board may cancel the licence, on any of the following grounds:
  - (a) That a licensee or, in the case of a licensee company, any officer of the company, has been convicted of a crime involving dishonesty:
  - (b) That a licensee or, in the case of a licensee company, any officer of the company, has been guilty of misconduct in the course of his [or her] or the company’s business as a real estate agent, and that by reason of that misconduct it is in the interests of the public that the licence be cancelled:
  - (c) That a licensee or, in the case of a licensee company, any officer of the company, has been shown to the satisfaction of the Board to be of such a character that it is in the interests of the public that the licence be cancelled:

### **95 Board may suspend real estate agent**

- (1) On any application under section 94(1) of this Act, or on any other application made to the Board in that behalf in the prescribed form by the Institute, the Disciplinary Committee, or other person with the leave of the Board, the Board may, if it is satisfied that a ground exists for ordering the cancellation of a real estate agent’s licence, instead of ordering the cancellation of that licence, suspend the licensee or, where the licensee is a company, the company or any officer of the company, from carrying on the business of a real estate agent for any period not exceeding 3 years as the Board thinks fit.

### **99 Board may cancel certificate of approval or suspend salesman**

- (1) On application made to the Board in that behalf by the Institute, the Disciplinary Committee or by any other person with leave of the Board, the Board may cancel the certificate of approval issued in respect of any person or may suspend that person for such period not exceeding 3 years as the Board thinks fit on the ground—
  - (a) That since the issue of the certificate of approval the person has been convicted of any crime involving dishonesty; or
  - (b) That the person has been, or has been shown to the satisfaction of the Board to be, of such a character that it is, in the opinion of the Board, in the public interest that the certificate of approval be cancelled or that person be suspended.

[29] Mr Lum-On’s conduct could have been complained about under s 99. Step 1 is satisfied.

## **Step 2 – Misconduct (Section 73 of the 2008 Act)**

[30] The question under **Step 2** is whether misconduct (or failing that, unsatisfactory conduct) is proved under the 2008 Act. As to this aspect, the Tribunal discusses its conclusions below.

## **Step 3 – Orders under the 1976 Act**

[31] The Licensing Board had the power to make three types of orders in the event it found that the ground under s 99 of the 1976 Act had been proved:

- (a) An order cancelling the salesperson's certificate of approval;
- (b) An order suspending the salesperson's license for a period not exceeding three years;
- (c) An order imposing a monetary penalty not exceeding \$750.

## **Conclusions**

[32] We therefore need to determine whether or not the facts have been made out in respect of each of the charges.

**Charge No 1** – Was Mr Lum-On carrying on the business of a real estate agent without holding a licence by arranging for the Nathans to enter into the “lay-by” agreement?

### **Decision**

[33] We find that Mr Lum-On was not acting under aegis of Ray White during this transaction but that he was clearly acting as a real estate agent when he met the Nathans, introduced them to the property in Manurewa and assisted them into the agreement. This is all real estate agency work. Mr Lum-On could not act on his own in carrying out this work without a licence. He needed Ray White (and its licence) and did not have it. We therefore find that the first charge has been proved by the Complaints Assessment Committee on the balance of probabilities. Mr Lum-On is in breach of s 16 of the Real Estate Agents Act 1976.

**Charge No 2** – Was the \$1,500 a fee?

### **Decision**

[34] Mr Lum-On argues that this was not a fee. He submits that he has properly accounted for all of this money to the owners of the property. Mr Nathan thought that he was paying a deposit and the receipt confirms this. Mr Lum-On has said in his interview that it was a fee (and that he lied when he said it was a deposit). The Tribunal was assisted by the evidence received from the vendors who said that they have paid a fee to Mr Lum-On from time to time but they were not absolutely certain. The Tribunal therefore has to weigh up the evidence from Mr Nathan in which he told the Tribunal that he believed the \$1,500 was a deposit towards the house, supported by the documentation and supported by subsequent comments by Mr Lum-On against the evidence that Mr Lum-On gave and the fact that he appears to have accounted to

the owners of the property for about \$4,000 less than the complainants actually paid. We also have to weigh up Mr Lum-On's assertion that he lied out of fear that he had done something wrong.

[35] We consider that the explanation Mr Lum-On gave to Mr Gouverneur in the interview that he had with him is most likely to be the true explanation. We think it is quite likely that Mr Lum-On did want a fee for the work that he did in putting this agreement together as any chance of getting a real estate agent's commission on the sale was delayed for up to four years. We have already found that there was no real estate agent's licence held by Mr Lum-On at the time. We reject Mr Lum-On's submissions. While agreeing that interviews are stressful, acknowledging one dishonesty to support a claim that the other should be ignored has little merit. Mr Lum-On stopped short of disclosing records to prove he paid rates. We cannot rely on this evidence as it was not given at the hearing and not tested by cross-examination. But even if we could have, for the reasons set out above we discount this. We therefore conclude that the \$1,500 was a fee for Mr Lum-On.

[36] We find therefore this charge has been established and as has been already found Mr Lum-On did not hold a real estate agent's licence at the time for this. The money was paid directly to Mr Lum-On and not to an agency and therefore contravenes s 62 of the Real Estate Agents Act 1976. We find this charge established.

### **Charge 3**

[37] This charge relates closely to Charge 2 but is an allegation of disgraceful conduct in the statement to the Nathans that the \$1,500 was a deposit on the "lay-by" agreement and that the monies would be held in a Trust account.

### **Discussion**

[38] We agree with the submissions of the Complaints Assessment Committee and find that this charge has been proved.

[39] We consider that the definition of "*disgraceful conduct*" as set out in *Downtown Apartments* set out below is met in this case. The Nathans were relying on the fact that Mr Lum-On was an agent and that their money would be safe when they made the payment to him. We consider that in the circumstances it was disgraceful conduct for Mr Lum-On to tell the Nathans that it was a deposit and/or the monies would be held in a Trust account when they were not. This goes to the fundamental nature of being seen as a real estate agent.

[40] In *CAC v Downtown Apartments Limited and Anor* ([2010] NZREADT 6) this Tribunal held as follows in relation to s 73 of the Act, and s 73(a) in particular:

"49 There are now two disciplinary levels under the 2008 Act:

- a. Unsatisfactory conduct – Complaints Assessment Committees and the Disciplinary Tribunal;
- b. Misconduct – Disciplinary Tribunal only.

Leaving s 73(d) (criminal convictions) to one side, there is a clear progression from unsatisfactory conduct under s 72 to misconduct under s 73 of the 2008 Act:

- (a) Unacceptable conduct (as regarded by agents of good standing) s 72(d)) → disgraceful conduct (as regarded by agents of good standing or reasonable members of the public) (s 73(a));
- (b) Negligence/incompetence (s 72(a) and (c)) → serious negligence/incompetence (s 73(b));
- (c) Contravention of the Act/Regulations/Rules (s 72(b)) → wilful or reckless contravention of the Act/Regulations/Rules/other Acts (s 73(c)).

- 50 At a high level of generality, therefore, it may be said that s 72 requires proof of a departure from acceptable standards and s 73 requires something more – a marked or serious departure from acceptable standards.
- 55 The word disgraceful is in no sense a term of art. In accordance with the usual rules it is to be given its natural and popular meaning in the ordinary sense of the word. But s 73(a) qualifies the ordinary meaning by reference to the reasonable regard of “agents of good standing” or “reasonable members of the public” (emphasis added).
- 56 The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess (see *Blake v Preliminary Proceedings Committee of the Medical Council of New Zealand*, 1997, 1 NZLR 71).
- 57 The “reasonable person” is a legal fiction of the common law representing an objective standard against which individual conduct can be measured but in s 73(a) that reasonable person is qualified to mean an agent of good standing or a member of the public.
- 58 So while the reasonable person is a mythical ideal person the Tribunal can consider *inter alia* the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the first defendant.
- 59 So in summary the Tribunal must find on a balance of probabilities that the conduct of the first defendant represented a marked and serious departure from the standards of an agent of good standing or a reasonable member of the public.”

[41] We agree that this conduct is a serious departure from the standard of an agent of good standing. We find Charge 3 proved.

#### **Charge No 4**

[42] The Complaints Assessment Committee allege that Mr Lum-On’s behaviour was disgraceful and that Mr Lum-On had a conflict of interest in arranging for the complainants to enter into the “lay-by” agreement and he did not disclose his conflict of interest to the complainants. The alleged conflict of interest is that Mr Lum-On was acting for both the vendors, Two Internationals Investments Limited, and the purchasers, the Nathans. The Nathans clearly thought he was assisting them to buy a property and while they agree that they did not consult a solicitor we are uncertain as to whether the Nathans thought that he was acting for them or for Two Internationals or for both of them. We are not satisfied that the Complaints Assessment Committee has proved this charge. We therefore dismiss this charge.

**Penalty**

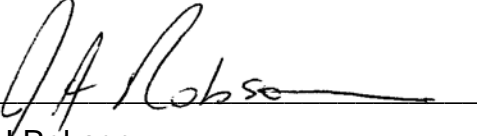
[43] We therefore call for penalty with the Complaints Assessment Committee to file its submissions on penalty within 10 days of the date of this order. Mr Lum-On to file any submissions he wishes to make 10 days thereafter and the Complaints Assessment Committee to reply two days thereafter.

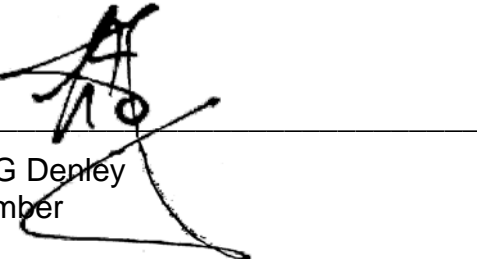
[44] In accordance with s 113 of the Act the Tribunal advises the parties of the right to appeal this decision to the High Court pursuant to s 116 of the Act.

**DATED** at WELLINGTON this 1<sup>st</sup> day of June 2012

  
Ms K Davenport  
Chairperson



  
Ms J Robson  
Member

  
Mr G Denley  
Member