

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 5

READT 87/11

IN THE MATTER OF

charges laid pursuant to s.73 of
the Real Estate Agents Act 2008

BETWEEN

**THE REAL ESTATE AGENTS
AUTHORITY (CAC 10070)**

Complainant

AND

MARGARET (MARNIE) ADAMS

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr J Gaukrodger - Member

HEARD at AUCKLAND on 13 and 14 February 2012

DATE OF DECISION: 7 March 2012

COUNSEL

Mr B M Stanaway for complainant
Messrs J Billington QC and M D Toulmin for defendant

DECISION OF THE TRIBUNAL

The Charge

[1] On 21 March 2011 a Complaints Assessment Committee (“CAC”) of the complainant received a complaint from Mr M Bayley (Managing Director of Bayleys Real Estate Ltd) about certain conduct of the defendant referred to below. That led to the complainant charging the defendant with misconduct under s.73(c)(i) of the Real Estate Agents Act 2008 (“the Act”) and also, in the alternative, with misconduct under s.73(c)(iii) of that Act *“in that her conduct consists of wilful or reckless contraventions of rules 6.2, 6.4, 9.1 and 9.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009”*.

[2] In the course of the hearing, the defendant entered a guilty plea to the alternative charge; and Mr Stanaway offered no evidence to the first charge (referred to above) which was, therefore, dismissed by us for non-prosecution.

[3] The formal charge document set out basic *“particulars”* for the first charge which we now set out by way of background even though that charge has been withdrawn, namely:

“Particulars:

- a) *Between 8th September and 23 December 2010 the defendant acquired an interest in a property at 19 Palmer Crescent, Mission Bay, Auckland belonging to Anthony Miles Morton, Armenell Morton and Knight Coldicutt Trustees Limited, clients for whom she was acting (“the clients”) without the consent of the clients.*
- b) *The defendant failed to provide a valuation of that property to the clients.*
- c) *The defendant failed to disclose to the clients the possibility of the licensee (defendant) benefiting from the transaction.”*

[4] With regard to the second charge, which has been admitted to and in respect of which we below set out our reasons for sentence, the particulars were cited as follows:

- “a) *On or about 23 December 2010 the defendant acquired an interest in a property at 19 Palmer Crescent, Mission Bay, Auckland belonging to the clients, for whom she was acting, without informing the clients and obtaining the consent of the clients.”*

The Relevant Statutory Provisions

[5] Section 73 of the Act deals with “*misconduct*” and, for present purposes, reads:

- “73. *For the purposes of this Act, a licensee is guilty of misconduct if the licensee’s conduct - ...*
- (c) *consists of a wilful or reckless contravention of - ...*
- (iii) *regulations or rules made under this Act; or ...”*

[6] The rules referred to above read:

- “6.1 *An agent must comply with the fiduciary obligations to his or her client arising as an agent.*

...

- 6.4 *A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.*

...

- 9.1 *A licensee must act in the best interests of a client and act in accordance with the client’s instructions unless to do so would be contrary to law.*

...

- 9.4 *A licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client’s interest.”*

Background Facts

[7] Ms Adams was employed by Bayleys Real Estate Ltd (“Bayleys”) as a residential salesperson pursuant to a licensee’s contract dated 17 November 2009 but she had so worked for Bayleys for nearly 10 years previously.

[8] On 12 July 2010 Bayleys entered into an agency agreement with the vendor for the sale of the property at 19 Palmer Crescent, Mission Bay, Auckland. Ms Adams was the salesperson with principal responsibility for the sale of the property. After a marketing campaign, the property was sold at auction on 8 September 2010 to Geoffrey Lloyd Harriman “*and/or nominee*”.

[9] Bayley’s file, in accordance with standard protocol of that company, included an 8 September 2010 transaction report signed by Ms Adams, as listing salesperson and selling salesperson, which was, in turn, then signed by Ms Adams’ manager. The transaction report contained a standard section requiring the salesperson to advise whether a declaration under s.134 of the Act (sale to a licensee or a related person) was required. Ms Adams circled ‘no’ on that report, indicating that no issue involving the sale of an interest to her or to a related person arose in the sale of the property.

[10] Settlement of the sale of the property occurred on 23 December 2010.

[11] In early January 2011, it was brought to the attention of Ms Adams’ manager that Ms Adams may have had some involvement in the purchase of the property. The manager searched the title but, at that time, it remained noted in the name of the vendors notwithstanding that settlement had taken place on 23 December 2010. A further search of the title on 7 February 2011 showed that the registered proprietors were Geoffrey Lloyd Harriman, Margaret Mary Adams (Ms Adams) and Jacobson Associates Trustee Ltd. The transfer had been registered on 17 January 2011.

[12] Mr Bayley met with Ms Adams on Friday 11 February 2011 and asked specific questions, including whether she was involved as the purchaser or as part of the purchasing entity for 19 Palmer Crescent, Mission Bay. Mr Bayley asserts that Ms Adams, after prevarication, answered ‘yes’ confirming both her involvement as part of the purchasing entity and that she did not disclose this to the vendors in any manner, and that she did not complete the required disclosure documentation. Subsequent meetings between Mr Bayley and Ms Adams followed.

[13] Subsequently, Ms Adams provided a letter from Mr Harriman stating that her inclusion in the purchasing entity (the JMAR Trust) was an error on his part as Ms Adams had only ever intended to be a lender of finance and not a purchaser. This claim was repeated at subsequent meetings and in affidavits and statements filed with the CAC.

[14] The CAC alleged that there was an agreement between Ms Adams and Mr Harriman proximate to the auction of 19 Palmer Crescent on (8 September 2010) that they would be involved together in the purchase, renovation, and re-sale of the property for profit; that it was intended that somewhere between \$50,000-\$100,000 profit each would be obtained; and at the date of auction (8 September 2010) an understanding had been reached between Ms Adams and Mr Harriman as alleged; and that Ms Adams acquired an interest in the property at that time. Those allegations have not been proven.

[15] Mr Adam Featherstone, who at the relevant time was a sales assistant to Ms Adams at Bayleys, has stated:

- [a] During the marketing campaign for 19 Palmer Crescent leading up to the auction of 8 September 2010, he and Ms Adams conducted open homes together and often discussed the property;
- [b] Ms Adams told him that the property was perfect for renovation and that it would be a good project for her to take on;
- [c] Ms Adams said that her friend Geoff Harriman would be a good partner for the renovation project as he had the building contacts and that the project would be a good way for them to make a \$50,000-\$100,000 profit each;
- [d] Following the auction, Ms Adams talked about the final purchase price. She told Mr Featherstone that based on the figures that she and Geoff Harriman had put together they would still make a profit;
- [e] On 7 October 2010, and subsequently, Ms Adams had contact with her banker, Mr Martin Farrell. He made notes of a telephone conversation with Ms Adams on 7 October 2011 concerning the purchase of a property at Palmer Crescent. He made a notation of "50/50" with a friend. He also wrote "*put 100K into it and try and sell for over \$2M, say in Feb for quick profit*". Mr Farrell also noted that he could "*start the ball rolling*" for mortgage finance;
- [f] An email was sent on 7 October 2010, following that conversation at 11.44 am by Mr Farrell to Ms Adams, and this included "*so that we can get a quick approval for you in regards to the new property that you have purchased, can I please get you to send us the following ...*"

[16] However, those statements have not been tested by formal evidence or cross-examination.

[17] On 19 October 2010 Ms Adams transferred the sum of \$87,250 from her rapid repay home loan account to the account of Geoff Harriman with the notation "*PC Trust*". She states that was a payment out of friendship to assist Mr Harriman to complete the purchase.

[18] At 11.00 am on 1 November 2010, Ms Adams and Mr Harriman met with Mr Farrell at the head offices of Bayleys at Viaduct Harbour Drive, Auckland. Ms Adams was present for about 30 minutes. Mr Farrell kept notes of the conversation. Mr Farrell's impression or assumption was that the property purchase was a type of joint venture arrangement between Mr Harriman and Ms Adams with the intention to improve the property by undertaking renovation repairs at an estimated cost of between \$100,000-\$120,000 and to then sell the property for \$2M or more after the renovations were complete. This was anticipated to occur in February 2011. Estimated profits of \$100,000 were anticipated. Mr Farrell noted that Ms Adams advised that it was important that she "*was seen to be kept at arms length for the purchase of the property*".

[19] Acting on instructions from Mr Harriman, a trust known as the JMAR Trust was settled by Deed on 5 November 2010. Ms Adams was a trustee of the trust, together with Mr Harriman and professional trustees.

[20] Parts of the chronology of subsequent relevant events between the parties and the property are:

- [a] On 18 November 2010 BNZ finance was approved for the purchase of 19 Palmer Crescent by the JMAR Trust;
- [b] On 9 December 2010 the BNZ finance documents were sent to Quay Law acting for Ms Adams and Mr Harriman;
- [c] On 21 December 2010 Ms Adams and Mr Harriman met with Mr Ian Mellett of Quay Law at Ms Adams' home and signed forms, loan documents and conveyancing forms. Mr Mellett explained that Ms Adams was a trustee;
- [d] On 22 December 2010 the BNZ received executed loan documents from Quay Law. Ms Adams transferred \$100,000 to Mr Harriman's bank account with a notation "JMAR";
- [e] On 23 December 2010 the property transaction was settled and the loan drawn down;
- [f] In early February 2011, Ms Penny Coleman inspected the property with Ms Adams (acting for Bayleys) and indicated that she was prepared to offer \$2.1M;
- [g] On 5 February 2011 Ms Adams ordered a Certificate of Title in advance of drafting a Sale and Purchase Agreement (on behalf of Bayleys) and saw her name on the title. Ms Adams telephoned Mr Harriman and Quay Law regarding this. An accountant, Mr Andrew Jacobson, prepared documents for Ms Adams' resignation as a trustee of JMAR;
- [h] On 21 February 2011 a private Sale and Purchase Agreement was signed between JMAR Trust and Mr and Mrs Coleman;
- [i] On 2 March 2011 Mr Harriman emailed Martin Farrell of the BNZ, and instructed him that 50% of the net profits from the sale of the property are to be paid to each of them Ms Adams and Mr Harriman (i.e. \$379,751.88 each).

Discussion

[21] Ms Adams has admitted that she "*acquired the interest in the property on or about 23 December 2010*". This acquisition of an interest was more than three months after the property had been sold unconditionally to Mr Harriman at auction on 8 September 2010. However, the interest was acquired in breach of Ms Adams' obligations under Rules 6.1, 6.4, 9.1 and 9.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules.

[22] Rule 6.1 provides an agent must comply with his or her “*fiduciary obligations*” to the client. As a matter of law, an agent owes obligations to a principal which, in most respects, may be described as “*fiduciary*” in that the agent is entrusted with the care of the client’s property and is obliged to keep the principal fully informed of all relevant matters. The breach in this case did not cause a loss to the vendor and was that Ms Adams did not tell Mr Morton (the vendor) she had agreed to provide finance for the unconditional purchase of Mr Harriman. This was a breach of Ms Adams’ obligations under Rule 6.1

[23] Rule 6.4 embodies a number of obligations and that which is relevant here is withholding information from the client. In this case, once Ms Adams had agreed to become involved in advancing funds to enable completion of the purchase, she should have advised Mr Morton that was the case, but she did not do so. To that extent information was withheld which should have been provided.

[24] The breach of Rule 9.1 embodies an obligation to act in the best interests of the client. To the extent that rule applies here, it would have been in the best interests of Mr Morton to have been advised of Ms Adams’ interests in the sale when she agreed to assist the purchaser.

[25] Rule 9.4 required Ms Adams to keep Mr Morton well informed of matters relevant to his interests. The same comments apply in relation to Rule 9.4 as they do to Rule 9.1 in that Mr Morton ought to have been advised of Ms Adams’ involvement and asked to consent.

[26] As Mr Billington QC put it, in summary, the breach embodied by Charge 2 is not that Ms Adams obtained an interest in the property but that she failed to inform Mr Morton of all relevant facts which, in this case, was the fact that she was acquiring an interest in order to assist the purchaser complete his unconditional obligations.

[27] We note that, notwithstanding the breach of these rules, Mr Morton confirmed in writing to the CAC that had he been asked to consent in the prescribed form to Ms Adams’ involvement, he would have done so; and Mr Morton in his evidence to this Tribunal has said he is satisfied with the outcome and is very complimentary of the work done on his behalf by Ms Adams to achieve a sale of the property. We note that the property was sold for a price well in excess of its current RV; very close to a current market valuation; and very close the vendor’s auction reserve when there was no other interest in the property.

[28] We appreciate that this infringement by Ms Adams, which has led to her admission of misconduct, has about it the irony that neither the purchaser nor vendor complain and both support Ms Adams.

[29] In paragraphs 20-31 of her affidavit dated 27 January 2012, Ms Adams sets out the efforts she made to sell the property. In particular, in paragraph 20 she states at how shocked she was at how the condition of the property had deteriorated since she handled its sale to Mr Morton in 2003. The pool needed resurfacing, mildew had developed on the window frames, and the whole house had an air of dampness about it, and it needed repainting. In an effort to present the property in the best possible light, Ms Adams went out of her way to arrange a chemical washing of the house and cleaning of the windows. She also drew Mr Morton’s attention to other maintenance issues.

[30] Pre-auction, Ms Adams reported regularly and frequently to Mr Morton as to the interest being shown by visitors to the open homes which indicated feedback of \$1.2m-\$1.4m as the range of a likely sale price. Mr Morton's expectation was a sale price of \$1.8m to \$2m.

[31] As a result of Ms Adams' efforts, there were four prospective purchasers, Mr Harriman, Mr and Mrs Owen, Lee McIntyre, and Joanne Hill. Notwithstanding this interest, the only bid at the auction was from Mr Harriman who purchased the property for \$1.705m.

[32] There were to have been a number of witnesses and they had either filed affidavits or briefs of evidence which are before us by consent. However, for present purposes we only refer to all that evidence as follows.

[33] Ms McGill is a long term friend of the defendant and has been in a long term relationship with Mr Harriman. Sometime in late September 2010 she told the defendant that Mr Harriman was concerned as to how he would finance the purchase of the property and the defendant responded that they should not worry because she, the defendant, would help if necessary. Those communications must have been by text or telephone as Ms McGill and Mr Harriman did not arrive back in New Zealand until 15 October 2010.

[34] There is an extensive brief from Mr Harriman which states that on 15 October 2010 he and Ms McGill had a catch up with the defendant and *"during the course of that catch up, I mentioned to Ms Adams that I continued to have some concerns with funding the balance of the purchase price at settlement, and accordingly that I was concerned that the deal may not go through and that my deposit would be lost"*. An understanding then arose that the defendant would provide some funding and arrange for Mr Harriman to meet her own banker, Mr M Farrell. The defendant agreed to make an immediate payment to Mr Harriman of \$87,250 which was half of the deposit Mr Harriman had paid at the auction and she also agreed to advance a further \$100,000 to Mr Harriman towards settlement of the purchase.

[35] Mr Harriman then explained that, when instructing his lawyers about the purchase, they proceeded thinking incorrectly that the defendant was his domestic partner rather than Ms McGill and so recommended a trust structure to protect the defendant in terms of her providing money towards the purchase. He also said that he and Ms McGill had decided they could not afford to keep the property so it needed to be renovated and on-sold as quickly as possible, which is what happened. He seemed to be saying that, as a result of the misunderstanding as to the status of the defendant, her name was shown on the Certificate of Title as a purchaser when she had merely agreed to help him by lending him money to assist settle the purchase. He also seemed to be saying that he was so concerned at the financial hardship to the defendant from her being fired by Bayleys, that he felt she should share in the resale proceeds and he did this unilaterally without previously discussing such an advancement with the defendant.

[36] There is also a full brief from Mr Farrell, the bank manager. He received a call from the defendant on 7 October 2010 about the purchase by Mr Harriman and seemed to have understood that the defendant was purchasing it on a 50/50 basis with Mr Harriman and that the property was to be renovated by expenditure of about \$100,000 and then resold for a quick profit. He then covered various meetings he had had with Mr Harriman and the defendant. He understood it was important that

the defendant was seen to be kept at arms length regarding the bank lending money to Mr Harriman so that for example he said, "*she would not be a guarantor of the loan*". He was surprised when Mr Harriman sent him a signed copy of a trust deed dated 5 November 2010 showing the defendant to be a trustee of the trust but assumed it was pursuant to legal advice. The bank approved a loan to the purchaser and the loan was drawn down on 23 December 2010. He also gave further detail about the reselling of the property after it had been renovated.

[37] In respect of her sentencing, the defendant filed an affidavit sworn 14 February 2012. Inter alia, she deposed that she had never disputed that her conduct was contrary to the client care rules and her concern was an appropriate outcome in terms of her career. She had been a very successful agent at Bayleys for about 12 years and, prior to that, had been a successful Chief Executive in a number of organisations. She put it that in view of her earnings at the time "*there is no basis on which I would have wilfully engaged in a breach of my obligations and put at risk an extremely successful career*". She emphasised that she admitted to being "*reckless*" as opposed to "*wilfully*" offending. She put it that she did not think about her own obligations because of her overriding concern about the financial problems for Mr Harriman and Ms McGill over the purchase. She emphasised that her assistance to them was to take the form of accessing her bank revolving credit and was due to their friendship.

[38] The defendant covered that, since her dismissal by Bayleys and her adverse publicity, her financial position has deteriorated significantly and that she has experienced great personal distress and anxiety.

[39] There is also an affidavit from a Mr M P A Harris co-owner and founder of Sotheby's International Realty Business in New Zealand. Inter alia, he stated that Sotheby's have had no issue with the defendant's character or professionalism since she joined them in March 2011, and that she is a key salesperson who they regard as extremely professional and well respected. He thinks it remarkable that, in terms of her pre-eminent position as a sales person for 12 years or so, she has not attracted a single prior complaint from a client. He then referred to the quite severe effect for the defendant of a suspension not just for the period of the suspension but involving a minimum of three further months of very little income for her in obtaining new listings and getting into gear again as a sales agent. Mr Harris also explained how it would be very helpful for there to be an orderly wind up for the defendant before the period suspension commenced.

[40] It was emphasised for Ms Adams that it was only subsequent to the contract going unconditional that she, in an attempt to assist her friends Mr Harriman and his partner Ms McGill, became involved in introducing them to the BNZ and, ultimately and mistakenly, became a purchaser as a result of Mr Harriman's accountant preparing a Trust Deed on the basis he thought Ms Adams was Mr Harriman's partner.

[41] Mr Billington QC put it, inter alia, that the reality of the situation was that Ms Adams provided funding to enable renovation and either retention or on-sale; and that is the extent to which she "*acquired an interest*" which (it was put) crystallised on registration.

[42] We are conscious that Bayleys correctly considered it had a duty to lay this complaint in terms it complying with the Act. Bayleys did not consider the various

explanations tendered by the defendant were credible and felt that the defendant had committed a fundamental breach of her fiduciary duties as a real estate agent mainly by failing to advise the vendors of “*matters relevant to their interests and advancing the interests of Mr Harriman (and herself) without the informed consent of her vendors*”. Other views of Bayleys related to the first charge which has been dismissed. In that context Bayleys seemed to conclude that the defendant formed a plan to enter into a joint venture with Mr Harriman to purchase, renovate, and on sell the property for profit before the auction on 8 September 2010. In fact there is strong evidence that there was no such intention and her involvement in the renovation and resale of the property for profit under the control of Mr Harriman did not commence in any way until some weeks after the auction. Then, he was holding an unconditional contract to purchase and urgently needed funding, and the defendant assisted with that.

[43] We certainly accept that the defendant, as a licensed agent, was subject to an overriding fiduciary duty to not prefer the interests of herself or another over those of the vendor. A core responsibility of agents is that they must act in good faith and may not obtain a benefit for themselves or another without the informed consent of the principal, *Stevens and Ors v Premium Real Estate Limited* [2009] NZSC 15.

[44] Throughout the case, Mr Billington QC stressed with regard to the defendant’s conduct that she secured the best possible price for her vendor but also met the interests of her friends who had acquired the property, and all parties have given the defendant their unqualified support in her current predicament. Mr Billington emphasised that the defendant did not acquire an “*interest*” in the property until some weeks after the unconditional auction contract, and even then, she was simply assisting the purchaser with funding to ensure that the transaction would proceed.

[45] With regard to a charge of misconduct under s.73 of the Act, it is recognised that there are now two disciplinary levels under the 2008 Act: i.e. unsatisfactory conduct, - Complaints Assessment Committees and the Disciplinary Tribunal; and Misconduct, - Disciplinary Tribunal only;

[46] There is a clear progression from unsatisfactory conduct under s.72 to misconduct under s.73 of the Act; refer *Complaints Assessment Committee (CAC 10024) v Downtown Apartments Ltd* [2010] NZREADT 06 at paragraph [49].

[47] At a high level of generality, it may be said that s.72 requires proof of a departure from acceptable standards and s.73 requires something more, namely, a marked or serious departure from acceptable standards (at paragraph 50). At paragraph [52] the Tribunal noted:

“In Martin v Director of Proceedings (HC Auckland, CIV 2006-404-5706, 2 July 2008, Courtney J, the High Court held that the Pillai v Messiter approach is not relevant under the Health Practitioners Competence Assurance Act 2003, because under that Act misconduct covers conduct ranging from low level misconduct to gross negligence to deliberate misconduct (paragraph 28 of the judgment)”.

[48] At paragraph [54]:

“The High Court approach in Martin v Director of Proceedings applies equally to the Real Estate Agents Act 2008. The distinction drawn in the Real Estate

Agents Act 1976 between professional misconduct and serious misconduct reflecting on character justifying suspension or cancellation has been deliberately omitted from the 2008 Act. Instead there is a single distinction between unsatisfactory conduct and misconduct, as defined in the Act, is capable of covering a wide range of conduct.”

[49] Ms Adams is charged under s.73(c)(iii) alleging misconduct based on a wilful or reckless contravention of the Client Care Rules. It is accepted that a wilful or reckless contravention of the Client Care Rules must be proved to amount to misconduct, having regard to the hierarchy between s.72 and s.73 of the Act. What is required is a marked or serious departure from acceptable standards. Wilfulness denotes deliberate or intentional conduct: Recklessness denotes risk-taking conduct. We accept that the alleged misconduct relies on well-known and established fiduciary, good faith and fair dealing obligations between a licensee and client.

[50] The defendant has pleaded guilty to serious offending, even on her version of events, her plea recognises that she markedly or seriously departed from acceptable objective standards in terms of the informed observer. As Mr Stanaway also put it, recklessness denotes conscious risk-taking conduct. An ingredient in the present case is that the defendant admitted to her banker that she needed to seem uninvolved and at arm's length in the purchasing arrangements of Mr Harriman.

[51] Mr Stanaway is also correct, of course, that we approach sentencing at a starting point rather than at an end point; so that, at the appropriate starting point for the offending, we take into account aggravating and mitigating features; and we have endeavoured to do that.

[52] We accept that aggravating features are that the defendant is an experienced licensee and, at least recklessly, disregarded her acknowledged and clear obligation to the vendor; and made no effort to advise him of the interest in the purchase which she proposed to take even though, apparently, it would have been easy for her to have done so and Mr Morton has said he would have readily agreed. She must have known of the forms prescribed by the Act regarding disclosure. The Real Estate Agents (Duties of Licensees) Regulations 2009 provide for, inter alia, a form 2 “*Client Consent for Licensee to Acquire Interest in Property*”. That must be signed before the vendor agrees to seek to sell the property.

[53] It is also aggravating that Bayleys were required to put considerable effort and expense into trying to unravel the type and extent of conduct of the defendant covered above, and that involved legal advice and other costs. By Rule 7.2 of the said Client Care rules, Bayleys was required to take the reporting action which it did. That rule reads: “7.2 *A licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct must make a report to the Authority*” “*Misconduct*” is defined in s.73 of the Act.

[54] The prime mitigating features are a rather belated guilty plea and the defendant's previous good record. She is a first offender in every respect.

[55] We agree with Mr Stanaway that it is of little consequence that the vendor was happy with the sale price he received at the auction and does not wish to complain about the conduct of the defendant. The purpose of the Act and its Rules is to ensure that there is confidence in the relationship between agent and vendor, standards must be objectively maintained, and vendors must receive all relevant

information in a timely manner. It is not for the agent to elicit a vendor's consent or acquiescence after the event; this must be done prior to the event if sought. Section 3 of the Act reads:

“3. Purpose of Act

- (1) *The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.*
- (2) *The Act achieves its purpose by –*
 - (a) *regulating agents, branch managers, and salespersons:*
 - (b) *raising industry standards:*
 - (c) *providing accountability through a disciplinary process that is independent, transparent, and effective”*

[56] We also agree with Mr Stanaway that it is of little consequence, at this stage, that the defendant claims that a fair price was paid to the vendor for the property. Also, it is a factor that the defendant appears to have shared in a profit from the resale of the property.

[57] As Mr Stanaway also put it, the heart of the matter is the appearance to the objective observer of what has occurred and, objectively, the transactions appear suspicious in terms of integrity.

[58] Also, the vendor was entitled to be fully informed of possibilities for the property and of the attitude of the defendant so that the vendor could make an informed, choice before the event. Had the vendor been promptly informed he may well have decided to renovate the property and seek a higher price with, perhaps, greater profit because of that; even though now he appears to support the defendant.

[59] In final oral submissions. Mr Billington QC wished it to be made clear that Mr Harriman is a business person of experience and substance and could certainly not be regarded as a stooge or cover for the defendant. Mr Billington emphasised that the support for the defendant comes from sensible people and that the vendor (Mr A M Morton) is very satisfied with the price he received at auction and appreciates the efforts to which the defendant went to effect that. There is no suggestion of lack of integrity on the part of such persons.

[60] We understand that there have been no previous complaints made against the defendant in her 12 or so years as a top agent.

[61] Mr Billington emphasised that the records kept by the defendant's bank manager confirm that she had no interest until some weeks after the auction and then she rashly arranged for Mr Harriman to meet her bank manager at Bayleys office but (he put it), at least, that was not done surreptitiously. Mr Billington puts it that she was rather reckless or negligent well after the event of an unconditional purchase contract at auction and she did not become involved until about a month after that. It is also put for the defendant that the bank manager's notes are not quite accurate about the defendant's attitude.

[62] Simply put, Mr Billington QC submits that the error or fault made by the defendant was to not inform the vendor Mr Morton of the interest she, the defendant, acquired in the property on 23 December 2010, the date of settlement of the purchase following from the 8 September 2010 auction contract. Mr Billington

emphasised that the failure of the defendant was not to keep Mr Morton the vendor fully informed but that there was no loss to anybody and no concern on the part of others involved in the transaction.

[63] Overall, Mr Billington emphasised that the sentencing is about an application of the client care rules to the facts of this case and does not concern a particular breach of the Act.

[64] Mr Stanaway's considered final approach to this matter was to focus more on the word "*reckless*" as a modifying adjective of "*contravention*" under s.73(c) of the Act rather than on the adjective "*wilful*". He also noted that, overall, this is not just a case about a failure to inform the vendor Mr Morton but that, in breach of the said rules, the defendant acquired an interest in the property she had been engaged to market.

[65] Ms Adams was at all relevant times an extremely successful agent. It is put that her success as an agent on commission income indicates that it is nonsensical that she would put everything at risk for an interest in one residential property; and that is borne out by the fact her involvement was open as meetings with the BNZ took place in Bayleys' offices, and were organised by Ms Adams' personal assistant; and, although it was intended Ms Adams be kept "*at arm's length*", had she deliberately set about to breach her obligations, the facts would have been significantly different. However, she has pleaded guilty to the alternate charge of wilful or reckless breach of the said Rules in the context we have covered in these reasons for sentence.

[66] As a result of her transgressions Ms Adams has lost a significant earning capacity, been required to sell her home, to live off the capital realised from the sale of the home and, as a consequence of the suspension, will be kept out of the industry for a period. In addition added to the period of suspension, there will be an additional loss of earnings following suspension as new listings will have to be acquired and property sold.

[67] We accept that, here, the breach has not caused any loss nor elicited any complaint from the most important party in the transaction, the vendor. The vendor supports Ms Adams.

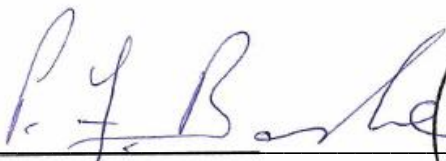
[68] Also, Ms Adams has provided evidence of good character and we are confident there will be no reoffending. Ms Adams has had a long and successful career in real estate, and is paying a high price for this mistake.

[69] We have, of course, been concerned to promote and protect the interests and confidence of the public in general with regard to the real estate industry.

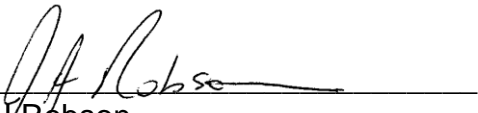

[70] We record the sentencing package which we imposed on 14 February 2012 namely:

- [a] We order that the defendant's licence as a real estate sales person is suspended for six months from 14 March 2012; and
- [b] The defendant is fined \$10,000; and
- [c] The defendant is to contribute the sum of \$5,000 to the Authority for its costs.

[71] We note that the total \$15,000 is to be paid to the Authority forthwith.



Judge P F Barber
Chairperson


Ms J Robson
Member
Mr J Gaukrodger
Member