

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 113

READT 020/13

IN THE MATTER OF

a charge laid under s.91 of the Real Estate Agents Act 2008

BETWEEN

**THE REAL ESTATE AGENTS
AUTHORITY (per CAC 20004)**

Prosecutor

AND

MARGARET LINDSAY of Eastbourne,
real estate agent

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

HEARD at WELLINGTON on 29 October 2013

DATE OF DECISION 20 December 2013

COUNSEL

Mr L J Clancy for the prosecution
Mr P Napier for defendant

DECISION OF THE TRIBUNAL

The Charge

[1] Following a complaint by Mr Richard Finn, the defendant has been charged with misconduct under s.73(c)(iii) of the Real Estate Agents Act 2008 (“the Act”) in relation to alleged wilful and reckless breaches of rules 6.2, 6.3, 6.4 and 9.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (“the Rules”). The charge reads as follows:

“Following a complaint by Richard Finn (complainant), Complaints Assessment Committee 20004 charges Margaret Lindsay (defendant) with misconduct under s.73(c)(iii) of the Real Estate Agents Act 2008, in that her conduct was a wilful and reckless breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (Rules) as follows:

- (a) *Rule 6.2: The defendant did not act in good faith and deal fairly with the complainant by:*
- (i) *continuing to engage with the complainant, in relation to his possible tender on a property at 32-36 Rimu Street, Eastbourne (property), when,*

from 7 May 2012, the defendant had a possible interest in the property; and/or

- (ii) participating in the tender having obtained information from the complainant, which would put the defendant at an advantage or perceived advantage.*
- (b) Rule 6.3: The defendant's conduct was likely to bring the profession into disrepute, in that the defendant submitted a tender on the property, in respect of which, her agency was responsible for conducting the tender and she engaged with the complainant in relation to his possible tender.*
- (c) Rule 6.4: The defendant should not have withheld from the complainant that it was possible she may participate in the tender.*
- (d) Rule 9.2: The defendant's conduct placed undue or unfair pressure on the complainant, in that the complainant was only informed of the defendant's personal interest on the morning tenders were due."*

The Basic Facts

[2] The licensee/defendant worked for Harcourts Eastbourne which held a listing for the property at 32-36 Rimu from 16 March 2012. The licensee was then working with the complainant as a prospective purchaser of a suitable residential property in Eastbourne. On 17 February 2012, the complainant had submitted a tender for a property at 709 Marine Drive, Eastbourne, which was not accepted. On 4 May 2012, the complainant made an offer on 729 Marine Drive which was not accepted. The licensee had shown other properties to the complainant and given him general advice.

[3] Tenders for the property at Rimu Street were to be submitted by 12.00 noon Thursday 10 May 2012.

[4] There is a dispute between the parties as to when the complainant viewed the property. The complainant thinks that he viewed it on 7 May 2012. The licensee states that the complainant saw the property on 21 April 2012, on which date she showed him and his family through it. On Tuesday 3 May 2012, the licensee had emailed the complainant with information about that property.

[5] There is also a conflict of evidence as to discussions between the complainant and the licensee regarding the property. The complainant states that they discussed his plans for development and using the property to generate income. The licensee denies this.

[6] On 8 May 2012, the complainant emailed the licensee with questions about the property. The licensee replied the same day.

[7] The complainant says that he received a number of messages from the licensee on 9 May 2012, which included an offer to draft a tender for the property from him. The licensee confirms that she called the complainant twice on 9 May and left messages.

[8] On 10 May 2012, the deadline date for tenders, the complainant and the licensee both claim to have left messages for each other in the morning before speaking by telephone at around 11.00 am. At that stage, the deadline for tenders was 12.00 noon. They had a further telephone discussion at 11.30 am that morning. It was only at this

stage that the licensee indicated to the complainant, for the first time, that she and her husband were interested in the property and, indeed, had already submitted a tender.

[9] At this point, the complainant was referred to Ms Kim Slessor, another agent at the agency and the listing agent, to assist with his tender. As it happened, the deadline for submitting tenders was extended to 4.00 pm because the husband vendor was out of town until 2.00 pm that day and Mr Eliot Falconer (the agency manager) had arranged to attend a funeral at 2.00 pm.

[10] Accordingly, at 4.00 pm on Thursday 10 May 2012, Ms Slessor and Mr Falconer presented the vendors of the property with tenders from both the complainant (and his partner) and the licensee (and her husband). The complainant's initial offer was \$950,000 and the licensee's initial offer was \$1,000,000. Neither tender was accepted and Ms Slessor contacted the parties inviting increased offers. The complainant increased his offer to \$965,000. The vendors decided to negotiate with the licensee and her husband, who purchased the property for \$1,100,000. The vendors signed a consent form, dated 11 May 2012, in respect of the licensee acquiring an interest in the property and a valuation was subsequently supplied assessing the market value of the property at \$1,100,000.

[11] The licensee stated that she first expressed an interest in acquiring the property at the agency's weekly staff meeting on the morning of Monday 7 May 2012. That evening she viewed the property with her husband who "*quite liked*" it. The two of them discussed the property between themselves over the next few days, arguing the pros and cons, and on the morning of 10 May 2012 made a final decision to submit a tender.

Particular Evidence to Us

Ms F Fagasoia-Meade – For the Prosecution

[12] Ms Fagasoia-Meade gave written evidence by consent as Compliance Case Manager at the Authority. She was assigned as the investigator for the complaint from Mr Finn which lead to this prosecution.

[13] Ms Fagasoia-Meade generally covered the basic factual situation but, in particular, produced the material documentation comprising the agreed bundle of documents.

[14] Inter alia, she stated that the defendant responded to the complaint on 27 July 2012 and, in the course of that, stated that the property had been listed for sale by tender for at least two months before she viewed the property with her husband on Monday 7 May 2012. The defendant also stated that she and her husband were not interested in purchasing the property until the morning of the tender.

[15] In a further response in late October 2012 to the question from Ms Fagasoia-Meade whether the defendant started to have an interest in the property when she viewed it on 7 May 2012, the defendant responded that "*it hadn't crossed our minds as an option for us until earlier that day. I was still not interested in it after the visit, my husband quite liked it*". Inter alia, Ms Fagasoia-Meade noted that in a response to her from the complainant on 23 August 2012, he said that he recalled having conversations with the defendant about development plans for the property which he would not have had with a competing party.

Mr Richard Finn – For the Prosecution

[16] Mr Richard Finn, the complainant, confirmed his detailed typewritten brief. He then added further oral evidence-in-chief before being carefully cross-examined by Mr Napier.

[17] Mr Finn is employed by a polytechnic as programme director of stage and screen arts. He and his partner had contacted the defendant in about January 2012 to find a suitable property within the Eastbourne area. Consequently, they then had discussions with her about their budget and needs and endeavoured to buy various properties with the defendant's assistance.

[18] Mr Finn said that on 3 May 2012 the defendant drew 32 Rimu Road, Eastbourne, to their attention and they viewed it with her on 7 May 2012. They then discussed with the defendant their plans for development of that property should they acquire it. Mr Finn stated *"I told Ms Lindsay of my plans for the shop, the accommodation for my daughter, son-in-law and their new baby, and the importance of using the property to generate income and our price range ..."*.

[19] He described how, on the morning of 10 May 2012 (the tender day), he felt under pressure to respond to the defendant's numerous messages and he had been trying to ascertain whether the property would be *"plus GST"* for him. Eventually, he made contact with the defendant about 11.00 am that day and told her he required her assistance to submit a tender for the property. She replied that she wanted to withdraw from being the agent for Mr Finn and his partner *"as she and her husband had become interested in the property"*. The complainant said that he and his partner were stunned at that response as, until then, they had no idea that the defendant was interested in the property or likely to submit a tender.

[20] Mr Finn then described how, about 20 minutes later, they received a call from another agent of that real estate firm, Ms Slessor, who had been directed by the defendant to handle completion of a tender from them forthwith. Later that afternoon, he received a text from Ms Slessor advising that only two tenders were submitted and both offers were *"similar"* and that the vendor would consider a higher offer. Accordingly, the complainant and his partner increased their offer price from \$950,000 to \$965,000. After waiting another day, they received a text advising that the vendor had decided to negotiate with the other purchaser. A little later, they were told that the defendant and her husband were purchasing the Rimu Street property. They replied expressing dismay and heard no more that night of 11 May 2012.

[21] In his evidence-in-chief, inter alia, the complainant states:

"4.10 I feel that the tender process was totally compromised as Ms Lindsay knew who she was competing with and had important information about our budget even before she and her husband submitted their tender. We no longer trusted the agents of the agency as we believe they had important knowledge which they could share and to help each other.

...

"4.12 We were upfront with Ms Lindsay at the outset, as we told Ms Lindsay of our ambition to purchase in Eastbourne which is why we engaged the agent and agency who has the largest portfolio in the area we wanted to buy. We had numerous discussions with Ms Lindsay about the property. We subsequently

found out that Ms Lindsay had visited the property with her husband on 7 May 2012. She did not say anything about this to us prior to her withdrawal on 10 May 2012. We would not have had these discussions if we had known Ms Lindsay was also interested in purchasing it or submitting a tender. If we had known we would have asked to work with another agent or perhaps withdrawn our interest altogether. This last minute “reveal” was unnecessary and intentional.”

[22] The complainant emphasised that the defendant knew how much money he could offer for the property and that, due to the income stream from this Rimu Street property, he could offer much more than he previously had for other Eastbourne properties. He said that he was extremely busy with his work at the time but, on the day of the tender, felt it was time for action and he expected that the defendant was remaining keen to assist him submit a tender. He said that having the matter taken over at the 11th hour by Ms Slessor, on the basis of being in competition with the defendant, created *“48 hours of pressure and tension for me and my partner”*. He said he *“felt vulnerable”* as he *“had suddenly lost my support and was competing with it”*. He said he found it distressing and stressful that Ms Slessor took over when it seemed there was only 10 minutes remaining for the tender deadline so that it was all *“a real drama for me”*.

[23] Inter alia it was put to the complainant, in thorough cross-examination by Mr Napier, that the defendant would say she had not discussed the price of the Rimu Street property with him. He said that is not his recollection and he believed he had discussed precisely the question of price with the defendant and the borrowing he would need. He said *“I did discuss with her what I might pay”* but he discussed with her more his methodology for arriving at a price and for negotiating rather than as specific tender sum. He asserted *“she knew exactly what I could go to”*. It was put to him that the defendant had no idea of the price he would go to. He responded *“she is a very experienced agent and was close to me for months. Of course she knew my budget”*.

[24] It was also put to the complainant (by Mr Napier) as to why he did not increase his offer to a higher sum when given the chance in competition with the defendant. He responded *“I increased it to a level which I was comfortable with. I would never had paid \$1 million for it”*.

The Evidence for the Defence

The Defendant

[25] Generally speaking, the defendant’s evidence was consistent with the facts outlined above. However in her evidence-in-chief she stated, inter alia, *“I never had any discussions with Richard [Finn] about his budget or business needs. I was aware of how much Richard had offered on other properties, but we did not discuss how much he thought the property was worth or how much he could offer ...”* She also stated that the complainant (Mr Finn) had never discussed his plans with her regarding development of the property. The defendant said it had not initially been her intention to make any offer on the property. She then continued:

“14. ... We were discussing the property at our staff Monday morning meeting as the tender was closing on the Thursday and we were concerned that there was no solid interest. Eliot [her manager] said he felt the lack of interest was because it was being over quoted, and that the property should sell for \$1 million.

15. *I said that, at that price, I thought maybe my husband (Charles) and I should take a look at it as buyers as it might be something Charles was interested in. Eliot encouraged me to do so. I rang Charles in the afternoon to see if he wanted to go and see the property. He did, so we viewed it that evening.”*

[26] The defendant licensee said that she and her husband discussed the pros and cons of the property over the next few days and only made a decision to put in a tender on the morning of 10 May 2012. She said that in the week beginning 7 May 2012 she was unsure as to whether she and her husband would make an offer on the property and she continued to try and assist the complainant. She added *“I was not sure whether Mr Finn would be making an offer and I tried to clarify the situation”*. Part of her evidence-in-chief reads:

- “24. *On the day of tender (10 May 2012) at around 9 am, I called Richard again to see if he wanted to tender. Again there was no response.*
25. *At 11 am Richard returned my call. He immediately (before I could get a word in) launched into the GST matter and other areas of concern that he felt he had. I said to Richard as I had said in numerous occasions that he really needed to talk to someone, an accountant or his solicitor, and seek advice on this himself. Richard seemed very reluctant to do this. I said to him that the tender closes at 12.00 noon and the clock was ticking.*
26. *Richard also asked how much the vendor wanted and I told him they wanted \$1.2 million. I said if he wanted to tender he could put an offer in where he saw value, and if it was what he wanted to do he needed to decide quickly as the tender was due to close at 12 noon. This was the only time the price of the property was discussed between Richard and me.*
27. *Given the overall lack of communication from Richard and his reluctance to seek professional advice, it was my impression throughout the week and on the morning of 10 May that he was not interested in submitting a tender.*
28. *I had recommended that Richard seek advice on GST on 3 May and 8 May. Richard appeared reluctant to do any due diligence on the property, which also contributed to my belief he was not that interested in the property.*
29. *I was surprised to hear from Mr Finn at 11.30 am when he advised that he had spoken to someone about the GST issue and would be submitting a tender. This was only half an hour before the tender deadline.*
30. *I immediately advised him that my husband and I had an interest in the property, having just submitted a tender ourselves. I said to Richard that I would have Kim, the listing agent, call him to look after him. I called Kim to ask her to assist the Finns to submit a tender. I also spoke to Eliot Falconer to alert him to the situation. I believe this conversation took place face to face at the Eastbourne office.*
31. *At no point did Mr Finn advise me of the content of the offer he was going to make.”*

[27] Later in her evidence-in-chief, the defendant said that the initial tender submitted by her husband and her was for \$1 million and she did not expect the vendors to accept that because she knew they wanted \$1.2 million. She continued that when the tenderers were

given the opportunity to increase the tender on the morning of 11 May 2012, after speaking to her husband, she raised their offer to \$1,050,000 but at no time was she aware of the amount offered by Mr Finn and his partner or of any detail of their tender. After further negotiations with the vendors, she and her husband purchased the property for \$1.1 million. She finished her evidence-in-chief with the following paragraph:

“40. I have found this process extremely distressing. It was never my intention to cause any disadvantage to the Finns and I did my best at the time to act appropriately. I apologise to Mr Finn and Ms Stone if they feel they have somehow been negatively affected by this process. However, it is my belief that, in the circumstances, my agency and I could not have handled the situation any differently or any better.”

[28] In cross-examination the defendant said that she is well aware of the requirements of the Act and its regulations and particularly those rules referred to above (in the charge) and she has not broken any of them. She accepted that she had a professional interest in assisting the complainant and his partner purchase a home in Eastbourne as she would have got a commission share for that. She generally confirmed the above facts.

[29] The defendant said she knew that the complainant was seeking to buy a property within the range of \$700,000-\$750,000 but she put it that *“people don’t tell you all”*. She said she did not know what sum the complainant and his partner were likely to offer for Rimu Street but she could see how its income stream would enable him to make a higher offer than he had for other properties, because Rimu Street involved a leased shop and the potential for further development to achieve income. The defendant insisted that she had not discussed the complainant’s budget with him and that what the complainant had said along those lines was untrue. She insisted that the only hint of the plans the complainant might have had for the property were that he might let his daughter live in the attic of the property and that he and his partner would live in its first floor apartment.

[30] The defendant admitted that from the very outset of her introducing the complainant to Rimu Street, she felt he might well put in a tender for it. She generally confirmed that she and her husband visited the property on the evening of Monday 7 May 2012 but did not decide to submit a tender until the morning of 10 May 2012. She accepted that she had drawn the complainant’s attention to this property. She said that the property had been on the market for 13 months at that stage and there was a lack of interest in it. She had thought that she and her husband should look at it because they had sold their property, were soon to vacate that, and she felt that if Rimu Street could be acquired for about \$1 million it was a good proposition from a purchaser’s point of view. She said that at all times she had no idea what the complainant might offer, if he did.

[31] Also under cross-examination from Mr Clancy, the defendant admitted that, with hindsight, she should have ceased representing or assisting the complainant from the evening of 7 May 2012 or perhaps earlier that day. However, she maintained that she herself *“didn’t really want to buy it”* and was not particularly interested, but her husband became keen that they acquire it. She said that she had wondered whether she should tell the complainant of the interest of her and her husband in the property but did not, because she felt that at material times she herself was not interested. Then she again said that, with hindsight, *“it would have been good if I had told the complainant immediately”*. She said that she and her husband discussed the pros and cons of purchasing the property from the Monday evening until the Thursday morning and then decided to take advice and do some due diligence on the morning of the tender day.

[32] The defendant said she had not perused the shop lease relating to the building even though her agency's advertising referred to it, but felt her husband probably did. She said she would have given the package of relevant documents relating to the property to her husband to consider.

[33] The defendant said that the reason on 9 May 2012, the day before the tender date, she rang the complainant many times but without making contact with him, was "*I was trying to find out whether he was tendering or not*". It was put to her in that context that surely the complainant needed to know of her interest and she responded "*true*".

[34] She seemed to know of the complainant's concern about GST, but emphasised that it was only on the day of tender that she knew the complainant and his partner wished to submit a tender. It was put to her that, even then, she did not tell him that she and her husband had already submitted a tender until her second conversation at 11.30 am on that morning of 12 May 2012 with the complainant by when there was only half an hour to pass before the tender deadline, as far as she then knew. The defendant's response is that the complainant did not ring her until there was only about half an hour remaining.

[35] The defendant said she thought that if the complainant had told her on 9 May 2012 that he wanted to tender, then she would probably have then disclosed her interest and she now feels that "*with hindsight I should have told him sooner*". It was put to her that she could have left a voicemail message or sent an email to that effect to the complainant when she and her husband took an interest in the Rimu Street property. She responded "*we weren't sure until the last minute ourselves*". She then added "*but I should have*".

[36] The defendant also explained that she had not mentioned her interest to the complainant during her first telephone call of the day of the tender at 11.00 am because, when he rang her, he launched straight into the GST issue and she felt that he was not then interested in submitting a tender.

[37] Inter alia, it was put to her that the complainant was still discussing with her whether he should submit a tender and was very likely to, but she did not disclose her interest and that meant she was acting unfairly. Her response was "*that never crossed my mind*". She felt that until the complainant said "*I do want to submit a tender*", she did not feel he needed to know of her interest.

[38] The defendant was pressed by Mr Clancy that it was her duty to have disclosed her interest much sooner than she did and that she put the complainant under much pressure when he knew she and her husband had tendered. She responded "*I suppose so but I didn't then feel that. I felt he put himself at risk by tendering so late*".

Evidence from Mr Charles Lindsay

[39] Mr Lindsay gave evidence consistent with that of his wife, the defendant. He is a licensed salesperson working in Wellington City and is very experienced having been in the real estate industry since 1988 and with a focus and experience at commercial real estate as well as residential. He added that they had been considering purchasing a property in Eastbourne since selling their home in February 2012, but they make a point of not discussing real estate at home.

[40] Inter alia he said that, in determining to offer \$1 million, he considered the roll valuation, the rent from the property, and his plans for it. He said the defendant felt they should offer more and that the vendor would insist on \$1.2 million but there was no way he would agree to that amount. He also said "*Margaret and I also discussed the fact that Eliot*

Falconer had mentioned to Margaret that the property could or should sell for around \$1 million, so we thought we should make an offer at that price”.

[41] Mr Lindsay also said that he did not know anyone else was interested in the property until about 1.00 pm on the day of the tender 10 May 2012 when the defendant called him to advise that the tender deadline had been extended to accommodate that other person. At the time he thought that was unfair and that tender deadlines should not shift.

[42] Mr Lindsay was carefully cross-examined by Mr Clancy. Mr Lindsay emphasised that the offer from the defendant and him was subject to due diligence. He said that he had done no research into the property prior to the tender because he could rely on the tender from the defendant and him being subject to due diligence. He insisted that *“my wife wasn’t that interested”* in the purchase.

[43] He also stated *“we only looked at the property because my wife’s management felt that asking price was too high and we felt the income from the tenancy could pay off a mortgage. I didn’t know there was another interested party as my wife and I don’t discuss business at home”*.

[44] He said that the Rimu Street property was their eighth home since they had been married and he deals with property all the time as a real estate agent in Wellington but does not look at LIMs or titles, and leaves that sort of thing to his lawyer. Because he particularly works in commercial real estate he was not bothered by any GST implications in this case.

The Evidence of Ms Kim Slessor for the Defendant

[45] Ms Slessor is a licensed salesperson also working for Harcourts at Eastbourne. In quite some detail, she covered her role in the above events. She mentioned that Harcourts had marketed the property as an investment style property with development potential.

[46] Inter alia, she covered that in the morning of Friday 11 May 2012 she telephoned the complainant to see whether he wanted to increase his offer and he increased it to \$965,000. She said *“I reminded him that he was in competition and checked with him that this was his very best offer. He confirmed that it was”*. She said that Eliot Falconer and she presented the two new offers to the vendors at around 11.00 am that day and the vendors decided they would work with the Lindsays to try to reach agreement.

[47] Ms Slessor felt that every care had been taken by her and Mr Falconer to ensure that the complainant and his partner were not disadvantaged in the tender process. She said *“Margaret was never given any details of the content of the Mr Finn and Ms Stone’s offer and she was kept entirely separate from the tender process.”* She felt that the complainants were not at any disadvantage, but benefitted by being given extra time to submit their tender and then, despite having submitted the lower offer, were given an opportunity to compete with the Lindsays and increase their offer.

[48] Under cross-examination it emerged, inter alia, that the extension of the tender deadline *“had nothing to do with the defendant”* and was due to the situation of the vendors. It also emerged that Mr Falconer, as manager of Harcourts at Eastbourne, took over all negotiations from 4.00 pm on the day of the tender.

Evidence of Mr Eliot Falconer for the Defendant

[49] Mr Falconer is the Principal Officer and Chief Executive of Team Eastbourne Ltd and five other companies which are franchisees of the Harcourts real estate group. He has worked in the real estate industry for 25 years. He described the defendant as an extremely successful salesperson. He is also the sales manager of that Eastbourne office and is in regular contact with it and the agents there. Indeed, he put it: *"I would say that I'm aware of everything that is going on at the Eastbourne office"*.

[50] Mr Falconer generally covered the above facts. He had felt that the lack of interest in the making of offers for the Rimu Street property was due to the high expectations of the vendors and he encouraged his agents to demonstrate where the market was for that property. He advised them that if anyone was prepared to show interest over \$1 million, then such a person should be encouraged to make a tender. He said that when he made such a statement at a sales meeting of the agency on Monday 7 May 2012, the defendant had responded *"if it is \$1 million, my husband might be interested"*. He said he then suggested that the defendant tell her husband about the property and see whether he was interested.

[51] Mr Falconer said that the next he heard about the property was about 11.30 am on 10 May 2012, the day of the 12.00 noon deadline for tender. The defendant told him that she had heard from the complainant who wanted to submit a tender and that she had already done so. The defendant then told Mr Falconer that she had advised the complainant of her interest and referred him to Ms Slessor, another agent in the office.

[52] Mr Falconer then immediately decided to oversee the tender process, himself. He put it *"I took control with the intention of handling the matter as cleanly as any other tender, so that there could be no ambiguity surrounding the process"*. He said the defendant was kept completely separate from the tender process, which had been extended to 4.00 pm as already explained, and that she had no opportunity to ascertain the content of the complainant's tender.

[53] He covered the detail of events leading to the sale of the property to the defendant and her husband. He concluded on the note that he regards the defendant as a dedicated salesperson with an excellent reputation. He vouches for her honesty and integrity and knows that this situation has been upsetting for her to the extent that she has suggested she should resign, but he does not believe she is at fault in any way.

[54] Under cross-examination from Mr Clancy, Mr Falconer said it had not been expected that the complainant would decide to submit a tender so that when he did, he (Mr Falconer), took control *"to make sure it was all done by the book"*. He also explained that his office knew that the vendor was not available to have tenders opened until 4.00 pm and there was only half an hour for Ms Slessor to implement the complainant's instructions to submit a tender, so he decided the practical solution was to take the unusual step of extending the tender deadline from 12.00 noon that day to 4.00 pm that day.

Relevant Law

Wilful or Reckless Breach of the Rules

[55] The allegation against the licensee is wilful or reckless breach of rr.6.2, 6.3, 6.4 and 9.2 of the Rules which read:

“6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.

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.

...

9.2 A licensee must not engage in any conduct that would put a client, prospective client or customer under undue or unfair pressure.”

[56] It is alleged that the defendant wilfully or recklessly contravened rules requiring that licensees:

- [a] Act in good faith and deal fairly with all parties engaged in a transaction (r.6.2);
- [b] Do not engage in conduct likely to bring the industry into disrepute (r.6.3);
- [c] Do not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided (r.6.4).
- [d] Not impose undue or unfair pressure on a client or customer.

[57] Section 73(c) of the Act provides that a wilful or reckless breach of the Rules amounts to misconduct, whereas a mere breach of the Rules is unsatisfactory conduct under s.72(b).

[58] In *Evans v REAA and Orr* [2012] NZREADT 67 we summarised the position as follows:

“[51] A wilful or reckless breach of the Rules is misconduct under s.73(c)(iii). A breach of the Rules simpliciter is unsatisfactory conduct under s.72(b) which creates strict liability in this regard, reflecting Parliament’s view about the importance of compliance with the Rules (as well as the Act and regulations made under the Act).

[52] ... if, having held a hearing ... a Committee is satisfied on the balance of probabilities that an agent has breached the Rules, then a finding of unsatisfactory conduct must follow pursuant to s.72(b).

[53] A defence of total absence of fault may be available to an agent.”

[59] When considering a charge of misconduct, we may make a finding of unsatisfactory conduct if satisfied that a licensee, although not guilty of misconduct, has engaged in unsatisfactory conduct (s.110(4) of the Act).

[60] The issue of wilfulness/recklessness was considered by us in *REAA v Clark and Clark* [2013] NZREADT 62 at [70] to [74]. We referred to the following passage from the case of *Aaron Zaitman v Law Institute of Victoria* unreported, 9 December 2004, at [52]:

“It is implicit in what I have just said that, while the solicitor who does not knowingly act in contravention must be shown to have foreseen that what he was doing might amount to a relevant contravention, there is no need to go further and establish that the solicitor foresaw the contravention of “probable”; it is enough that he foresaw it as “possible” and then went ahead without checking ... [I]t will be enough if the solicitor ... is shown to have been aware of the possibility that what he was doing or failing to do might be a contravention and then to have proceeded with reckless indifference as to whether it was or not.”

[61] In line with the above authority, the prosecution submits that for a charge of misconduct to succeed, it is not necessary that a deliberate intention to breach professional standards is established. To prove a wilful or reckless breach of the Rules, it is sufficient that there be evidence that satisfies us, on the balance of probabilities, that a licensee foresaw the possibility that his or her conduct might involve a breach of relevant standards and that the licensee proceeded regardless. We agree with the theory of that.

Discussion

[62] If we are satisfied, on the balance of probabilities, that the complainant’s conduct did breach any or all of the above rules, and that the licensee perceived that risk, then a finding of misconduct is warranted. If we conclude that any or all of the rules set out above were breached, but that this was not done wilfully or recklessly, a finding of unsatisfactory conduct should follow. By and large the facts are not in dispute.

[63] Mr Clancy submits for the prosecution that, on the licensee’s own evidence, she and her husband were contemplating submitting a tender for the property over the period 7-10 May 2012. We agree that, in those circumstances, it was not fair to withhold that information from the complainant and continue to act for him. It was unacceptable for the licensee to only disclose her interest after she had submitted her own tender, less than an hour before the tender deadline, and that put the complainant under undue and unfair pressure. Indeed, with hindsight, the defendant seemed to acknowledge that.

[64] Mr Clancy also submits that the unfairness of the licensee’s behaviour is further highlighted by the fact that she had an existing professional relationship with the complainant prior to this transaction. She had acted for him in respect of a number of offers for properties and was aware, at the very least by implication, of his budget, which was considerably less than the vendor’s price expectations (\$1,200,000) for the Rimu Street property. The complainant’s concern that this information may have been used to his detriment is understandable given the clear conflict of interest between advising the complainant and seeking to purchase the property herself. Mr Clancy submits that the licensee’s behaviour, as a whole, was likely to bring the real estate industry into disrepute. We agree.

[65] The rules set out above are not technical in nature. As an experienced licensee, the licensee would have been aware of them. She accepts that. The prosecution case is that the licensee must, at the very least, have perceived a risk that her conduct might breach

those rules, but she chose to proceed regardless. She cannot have genuinely believed that it was acceptable to act for the complainant without disclosing that she too was interested in the property and was considering bidding against him, until after she had submitted a tender.

[66] The complainant had been relying on the defendant licensee to show him and his partner the available suitable properties in Eastbourne listed through the licensee's firm. That arrangement had been ongoing for some months and had led to the complainant and his partner making two unsuccessful offers for residential properties in Eastbourne. The property at Rimu Street differed from those in that it is a commercial property in the heart of Eastbourne township shopping centre. It contains a retail shop on the ground floor and garage space, an apartment on the floor above that, and much attic space; and is regarded as having a variety of development options and potential.

[67] From the outset the complainant seems to have vacillated about his interest in the subject property. He was also worried about GST implications which he did not understand and could not find someone to explain to him. For one reason or another, although he had viewed the property, had discussions with the licensee, and thought about the situation from 24 April 2012, he did not make contact with the licensee on the day before the tender day and did not respond to her telephone calls until about 11.00 am on Thursday 10 May 2012 the day of the 12.00 noon tender deadline.

[68] The licensee's husband is a very experienced real estate agent in Wellington city, in particular, and his expertise covers commercial property as well as residential. Somewhat surprisingly from the complainant's perspective, from the evening of Monday, 7 May 2012, the licensee and her husband gave serious consideration to making a tender themselves for the Rimu Street property. Although they say, inter alia, that they felt the vendor ought to be assisted to obtain a good vendor's price, and they knew that the vendor's expectation of over \$1.2 million would need to be considerably lowered to achieve a sale, we infer that they saw a wise purchase from their point of view. It happened that this was at a time when they had just sold their own residence and needed to find alternative accommodation for themselves.

[69] In any case, they were seriously interested in submitting a tender themselves, although they say they did not firm up on that view until mid morning on the Thursday 10 May 2012 of the tender day, but the defendant did not disclose to the complainant that interest of her and her husband until the complainant, rather belatedly, instructed her at 11.30 am on that tender day to prepare a tender for the complainant and his partner. Only then did the defendant tell the complainant that she and her husband had, about an hour earlier, put in their own tender for the property so that she felt she must arrange for another agent to complete a tender document for the complainant immediately; and she facilitated that.

[70] This news was a shock and very stressful for the complainant and his partner. As it happens, the tender deadline of 12.00 noon that day was extended to 4.00 pm which enabled the other agent to comfortably complete a tender for the complainant and his partner. For one reason or another, that took until nearly 4.00 pm that day. That extension came about because the manager of the Eastbourne branch, who was to open tenders with the vendor, needed to attend a funeral from 2.00 pm to about 4.00 pm and, also, the vendor happened to be out of town that day until about 2.00 pm. That extension was not arranged by the defendant licensee who had withdrawn totally from the process in terms of the complainant at 11.30 am that day.

[71] As it happened, neither tender was acceptable to the vendor and each tenderer was given a proper and fair chance by the agency manager (Mr Falconer) to increase their respective tenders.

[72] There was much evidence and argument before us as to the effect of the defendant's knowledge of the complainant's position and what the outcome might have been had there been earlier disclosure to the complainant of the interest of the licensee. It was emphasised by Mr Napier (on behalf of the defendant) that, in any case, the vendor got the best price and the complainant has lost nothing.

[73] We agree with Mr Napier that the defendant could not be regarded as a buyer's agent for the complainant and his partner but was a vendor's agent in the usual way. We note Mr Napier's strenuous submission that the conduct of the defendant did not disadvantage anyone. We take that into account but it does not condone her conduct. We also accept Mr Napier's submission that the defendant's duty was to obtain the best price for the vendor but, of course, that is while acting fairly and ethically and in accordance with the Act and the rules.

[74] It is to the defendant's credit that in the course of her evidence she accepted that, with hindsight, she should have disclosed her interest in the property to the complainant on the evening of 7 May 2012 or certainly the next morning.

[75] It should be clear from our above views that we are not satisfied that the complainant and his partner were fairly dealt with. The interest of Mr and Mrs Lindsay should not have been withheld from Mr Finn. Also the perception of the defendant's conduct is likely to bring the industry into disrepute. Also the complainant was put under unfair pressure.

[76] When we stand back and look at the evidence overall, we conclude that the defendant should have foreseen that her conduct does not comply with the above rules or the requirements of the Act. She seemed to overlook that she had established a professional relationship with the complainant for a fee. This was not a situation of her giving experienced advice to the complainant but of her acting professionally. The complainant was entitled to expect her help and advice on an objective and experienced basis and on a basis of trust and confidence. Once a conflict arose and interfered with that requirement, the conflict should have been immediately disclosed by the defendant to the complainant and his partner. No matter what perception the defendant had at material times on her situation, there is the perception to the public of unfairness. In any case, there are such factors that the defendant knew what the vendor sought and what her firm thought the market sale price should be. The detail and nuances of that information were not known to the complainant.

[77] As Mr Clancy put it at various times, there was some cuteness being applied by the defendant and her husband at material times from the evening of 7 May 2012. It defies common sense that they, as experienced real estate agents, conducted no research into the merits of their purchasing the Rimu Street property as they maintain. As indicated above, they were clearly endeavouring to not disclose their interest to the complainant if they could possibly avoid doing that in terms of ethical conduct.

[78] The law and the relevant rules are referred to above. Simply put, we can accept that, in the particular circumstances we have covered, there was no wilful or reckless breach of any rule so that misconduct is not proven on the balance of probabilities. The defendant did not seem to consider, at material times, that her conduct might breach professional standards.

[79] However we find, and the defendant and her husband have admitted that, with hindsight, the complainant should have been told much earlier of the defendant's competitive interest in tendering for the property. That disclosure should have probably been made, they admit, on the evening of 7 May 2012 when she and her husband had viewed the property and begun considering in earnest their making a tender. Probably, the defendant hoped that the complainant would decide not to tender; so that the interest of her and her husband in acquiring the property would be academic in terms of her conduct as a real estate agent. That failure to disclose is unsatisfactory conduct under s.72 of the Act as we explain further below.

[80] Section 72 of the Act reads:

“72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
- (c) is incompetent or negligent; or*
- (d) would reasonably be regarded by agents of good standing as being unacceptable.”*

[81] There was much argument that such disclosure would not have altered the outcome. One will never know. The licensee defendant feels that the complainant could not have afforded the price to which the vendor was entitled and that she has not stepped out of line. Such a disclosure on the evening of 7 May 2012 may have galvanised the complainant into being more confident and aggressive in his tendering price and in his ability to increase his borrowing risks. We note the complainant's evidence that he would not have offered \$1 million. It follows that the vendor would, most likely, never have sold to him.

[82] The defendant had a special professional relationship of confidence with the complainant and that must have been, perhaps unconsciously, of advantage to her. She allowed a conflict of interest situation to arise, not be promptly disclosed, and caused much shock and stress for the complainant and his wife. The resulting situation was, at the very least, not a good professional look and we well understand the concerns of the Committee and of the prosecution.

[83] We can understand that the complainant feels gazumped, or out-manoeuvred, by a licensee whom he thought was his trusted adviser and negotiator. Involvement in any type of conflict of interest situation is undesirable for real estate agents. If such a situation is thought to be inevitable, it needs delicate and thoroughly ethical handling.

[84] We find the defendant's conduct “unsatisfactory” because it appears that she has taken advantage of her special relationship as adviser to the complainant. All the Rules referred to in the Charge have been breached by the defendant. Misconduct has not been proved, but we find the defendant guilty of “*unsatisfactory conduct*” as defined in s.72(b) of the Act. It would also be such under paragraphs (a) and (d) of s.72.

[85] We record that, as we were about to issue this decision, Mr Napier advised us that *Brown v The Real Estate Agents Authority* [2013] NZHC 3309 (per Priestly J) had been issued and he particularly referred us to paragraph [64] of that decision which reads:

“[64] Serious negligence is a grave charge to level against a real estate agent, particularly one o Mrs Brown’s experience. The charge in s 73(b), as I have said, is linked to serious incompetence, disgraceful conduct and wilful or reckless contravention of the Act. Different tests must inevitably apply to those other types of misconduct stipulated in s 73. Nonetheless those other types of misconduct must inform serious negligence.”

[86] We appreciated that reference but our above views seem consistent with those of Priestly J.

[87] The defendant is entitled to a penalty hearing, or the matter of penalty could be dealt with by a sequence of submissions on the papers, or by agreement. Currently, we see the offending as nearing the mid-level of unsatisfactory conduct so that a censure and fine of about \$2,000 could be appropriate. We ask the Registrar to arrange a telephone conference with our Chairperson and the parties to discuss procedure towards penalty.

[88] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

Judge P F Barber
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member