BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 5

READT 023/12

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
BETWEEN	**REAL ESTATE AGENTS AUTHORITY (CAC 10056)**
	Prosecutor
AND	**MARK CHARLES FERGUSON**
	Defendant

MEMBERS OF TRIBUNAL

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

HEARD AT WELLINGTON 26 November 2012 (with subsequent further written submissions)

DATE OF THIS DECISION: 22 January 2013

REPRESENTATION

No appearance on behalf of the defendant
Mr M J Hodge, counsel for the prosecution

DECISION OF THE TRIBUNAL

The Charges

[1] Mark Ferguson ("the Defendant") faces six charges of misconduct laid before us by Complaints Assessment Committee 10056. The charges cover a range of allegations arising from several separate complaints and are set out below. "*Misconduct*" is defined in s 73 of the Real Estate Agents Act 2008 which reads as follows:-

"73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

(a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or

(b) constitutes seriously incompetent or seriously negligent real estate agency work; or

(c) consists of a wilful or reckless contravention of—

(i) this Act; or

(ii) other Acts that apply to the conduct of licensees; or

(iii) regulations or rules made under this Act; or

(d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee".

[2] All charges relate to alleged conduct under the Real Estate Agents Act 2008 except Charge 4 (about a LIM report) and the particular of Charge 6 relating to Mr Law (early release of deposit funds) where the alleged conduct occurred in August 2009 and comes under the Real Estate Agents Act 1976.

[3] Because the Defendant advised that he would not be attending the hearing and, indeed, did not; this prosecution has proceeded by way of formal proof. We are advised that the Defendant has handed back to the Registrar of the Authority his salespersons licence and has indicated he does not wish to take any further part in this prosecution. However, at the end of this decision we provide the defendant with a chance to make submissions about penalty.

Background Information

[4] At the time of the alleged conduct, the defendant worked for Mark Ferguson Real Estate Ltd trading as Ray White in Inglewood. We are told that he has cancelled his licence under s 54(b) of the Act and is not now working in the real estate industry.

[5] The following witnesses have sworn affidavits which are filed in this case:

(a) **Blair Johns:** Mr Johns worked at Ray White with the defendant from 7 September 2009 to 22 August 2011. Most of his listings were joint listings with the Defendant.

(b) **Jason and Catherine McGrory:** the McGrorys listed their house at 20A Elliott Street with Ray White on 29 March 2010 until 29 June 2010 (for three months). They did not renew the agreement once it expired and instead listed with McDonald's Real Estate. They did not receive a written

appraisal for 20A Elliott Street and Ray White did not mention to them any concerns about drug use at the property which eventually sold for $185,000 subject to a drug test. That drug test uncovered no evidence of drug use.

(c) **Sean Warren:** Mr Warren and his partner bought 20A Elliott Street in early 2011. The Defendant told Mr Warren that he would not *"touch [the property] with a barge pole"* because there had been *"some serious drug issues with that place"*. Notwithstanding, Mr Warren made an offer for $185,000 though he deposes he would have paid a maximum of $205,000. His offer was lower due to hearing about the purported drug use from the Defendant.

(d) **Marilyn Lewis:** Ms Lewis and her partner Neville Shotter were shown a property neighbouring 20A Elliott Street by Mr Johns. The Defendant arrived at the second viewing and, in relation to the house at 20A Elliott Street, said words to the effect that it was a *"P house"* or a *"drug house".*

(e) **Dorothy Butler:** Ms Butler listed her house at 6 Tawa Street with Ray White on 11 January 2011. She was promised a $500 travel voucher if the property was listed and sold with Ray White. On 17 January 2011 she signed an agreement for sale and purchase with the Armstrongs. She did not receive the $500 voucher.

(f) **Charlotte Maxner:** Ms Maxner is Ms Butler's daughter. She was present on 11 January 2011 when the Defendant mentioned the $500 travel voucher.

(g) **Gary Armstrong:** Mr Armstrong and his wife bought 6 Tawa Place from Ms Butler in January 2011. They signed authorisation for early release of deposit monies but in hindsight regret doing so.

(h) **Michael Birch:** On 9 July 2009 Mr Birch listed 23 St Ives Grove, New Plymouth, with Ray White with the Defendant and Alexander McDougall. He ordered a LIM report and remembers the Defendant suggesting withholding two pages from possible customers. He sold the house to Ian Law and signed a document authorising early release of deposit monies on 27 August 2009.

(i) **Ian Law:** Mr Law bought 23 St Ives Grove on 10 August 2009 for $385,000. The Defendant gave him a LIM report which he later discovered was missing pages. He does not remember signing the early deposit of trust monies form bearing his signature or having had any discussions about it with the Defendant.

(j) **Alexander McDougall:** Mr McDougall has had a salesperson's licence for five years and worked with the Defendant at Ray White from 13 July 2009

to 15 January 2010. He was involved in the sale of 23 St Ives Grove and deposes that the Defendant bragged to him about removing pages from the LIM report. Mr McDougall eventually told Mr Novak, Mr Birch's and Mr Law's lawyer, about the missing pages.

(k) **Julie Smillie:** Ms Smillie and her partner sold their property via Ray White through an agreement for sale and purchase on 14 December 2009 for $232,000. Due to various mix ups, they obtained a commission refund of $2,000. Some time later, Ms Smillie saw a testimonial on the Ray White website purportedly from her. She says she neither knew of nor authorised the testimonial.

(l) **Gerald Gallacher:** Mr Gallacher is a Senior Investigator at the Authority. He took over the file from Ross Gouverneur in 2012.

Propensity evidence in relation to charges 2 and 6

[6] The Defendant has previously been found to have engaged in unsatisfactory conduct for failing to provide written appraisals to clients and for inducing clients to sign documents authorising the early release of deposit funds without properly explaining their effect.

[7] Charges 2 and 6 (set out below) allege that the Defendant failed to provide a written appraisal to the McGrorys and failed to properly explain the effect of documents authorising the early release of deposits to Ms Butler, Mr Armstrong and Ms Frances, and Mr Law.

[8] Counsel for the Committee adduced evidence in respect of the previous findings as propensity evidence in relation to charges 2 and 6.

Charge 1

[9] Charge 1 provides:

"Following a complaint made by Jason and Catherine McGrory (First Complainants), Complaints Assessment Committee 10056 (CAC 10056) charges Mark Charles Ferguson (Defendant) with misconduct under s 73(a) of the Real Estate Agents Act 2008, in this his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars:

Having previously been engaged by the First Complainants to market and sell their property at 20A Elliott Street, Inglewood (Property 1) that agency agreement having expired:

1.1 The Defendant made comments to Marilyn Lewis, a potential purchaser of Property 1, that Property 1 was "a P house", and/or "a drug house", or words to that effect;

1.2 The Defendant made comments to Sean Warren, a potential purchaser of Property 1, that Property 1 "had serious drug issues", and/or that he (the Defendant) "wouldn't touch it with a barge pole", or words to that effect."

[10] In summary, Charge 1 alleges that Mr Ferguson made negative comments to potential purchasers of the property at 20A Elliot Street relating to drug use at the property after his agency had expired. The relevant witnesses are: Blair Johns, Marilyn Lewis, Jason McGrory, Sean Warren, and Gerald Gallacher. We accept that these witnesses prove Charge 1 as follows:

(a) **Sean Warren:** Mr Warren and his partner purchased 20A Elliott Street in 2011. Mr Warren deposes that he heard rumours about the property being a drug house and on or about 24 January 2011 visited the Defendant. Mr Warren states that the Defendant told him he would'nt *"touch [the property] with a barge pole"* because "*there have been some serious drug issues with that place"*. Mr Warren states that his offer of $185,000 was lower than it would have been had he not heard anything about drug use there. His maximum offer would have been $205,000. He and his partner are very happy in the property and there is no evidence suggesting it has been used for drugs.

(b) **Marilyn Lewis:** Ms Lewis and her partner Neville Shotter looked at a property on Carrington Street. On the second viewing with Mr Johns the Defendant arrived at the property. Mr Shotter commented on the next door property, which was also for sale, 20A Elliott Street. The Defendant said something to the effect that 20A Elliott Street was a *"P house"* or a *"drug house"*. Ms Lewis' *"automatic thought"* was that she would not pursue 20A Elliott Street. She does not recall Mr Johns calling 20A Elliott Street a *"drug house"*.

(c) **Blair Johns:** Mr Johns deposes that he was present when the Defendant told Marilyn Lewis and Neville Shotter that the house at 20A Elliott Street was a "*drug house"* or words to that effect.

(d) **Jason McGrory:** Mr McGrory, the vendor of 20A Elliott Street, deposes that at no time did Ray White raise concerns about drug use at the property. A drug test was eventually done of the property and it did not detect evidence of drug use.

[11] We accept the above evidence and note, in particular, the evidence of Mr Warren and Ms Lewis; so that we find Charge 1 is proven. We also find that the conduct amounts to misconduct as conduct which would be regarded as disgraceful by agents of good standing or by reasonable members of the public (s 73(a)) of the Act because, on the evidence in the affidavits:

(a) The Defendant made unsubstantiated and highly negative comments about a property after his listing agreement in relation to it had expired.

(b) The Defendant did not mention any issue with drugs to the McGrorys and subsequent drug tests came back showing no evidence of drug use.

(c) At times, these comments were made in the context of the Defendant showing a potential customer another property and them being instead interested in 20A Elliott Street, a property for which he no longer held a listing agreement.

(d) The effect of the comments was to put potential customers off the property (Ms Lewis and her partner Mr Shotter) or to lower their offer (Sean Warren).

Charge 2

[12] Charge 2 provides:

"CAC 10056 further charges the Defendant with misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008, in that his conduct consists of a wilful or reckless contravention of Rule 9.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.

Particulars

The Defendant failed to provide the First Complainants with a written appraisal in respect of Property 1."

[13] Charge 2 alleges that Mr Ferguson did not provide a written appraisal for 20A Elliott Street. The relevant witnesses are: Jason McGrory, Blair John, and Gerald Gallacher. We find that the above witnesses prove Charge 2 as follows:

(a) **Jason McGrory:** Mr McGrory deposes he and his wife never received a written appraisal for the property from the Defendant or from Ray White. He further deposes that he had never seen the appraisal letter dated 29 March 2010 until shown it by the Authority.

(b) **Blair Johns:** Mr Johns deposes that he had never seen the appraisal letter dated 29 March 2010 until shown it by Gerald Gallacher on 6 October 2011.

(c) **Gerald Gallacher:** As set out above, the Defendant has previously been found guilty of unsatisfactory conduct for failing to provide written appraisals to clients on two occasions. The previous findings show the Defendant's propensity to perform real estate agency work without providing appraisals; but we do not need to rely on the propensity evidence. The Committee notes that the omissions found proved in the unsatisfactory conduct decision occurred in September 2010, approximately five months after the omission alleged in Charge 2. In criminal proceedings in *R v Mata* [2009] NZCA 254, the Court disagreed with dicta in *R v* Tainui [2008] NZCA 119 that evidence of conduct by a defendant occurring after the offence charged cannot amount to propensity evidence.

[14] We accept that evidence and, in particular, the evidence of Mr McGrory, so that we find that Charge 2 is proven. The conduct amounts to misconduct under

s 73(c)(iii) as a wilful or reckless contravention of rule 9.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 because:

(a) A written market appraisal is an important requirement of the documentation in selling a property and rule 9.5 is clear:

"9.5 An appraisal of land or a business must be provided in writing to a client by a licensee; must realistically reflect current market conditions; and must be supported by comparable information on sales of similar land in similar locations or businesses."

(b) The rule was not complied with.

(c) The Defendant has been found to have breached the rule on other occasions.

(d) Mr McGrory's evidence that the Defendant may have created a false appraisal after the fact and produced it to the Real Estate Agents Authority to cover his omission. If we had not been satisfied that the Defendant's failure to provide a written appraisal was wilful or reckless and therefore amounted to misconduct (s 110(4)), it would have been open to us to make a finding of unsatisfactory conduct rather than misconduct..

Charge 3

[15] Charge 3 provides:

"Following a complaint made by Dorothy Butler (Second Complainant), CAC 10056 further charges the Defendant with misconduct under s 73(a) of the Real Estate Agents Act 2008, in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars

Having been engaged by the Second Complainant to market and sell her property at 6 Tawa Street, Inglewood (Property 2), the Defendant failed to honour a promise to provide the Complainant with a $500 travel voucher on the sale of Property 2."

[16] Charge 3 alleges that the Defendant did not provide Dorothy Butler a $500 travel voucher on the sale of 6 Tawa Street as promised.

[17] The relevant witnesses are: Dorothy Butler, Blair Johns, Charlotte Maxner, and Gerald Gallacher.

[18] We find that the above witnesses prove Charge 3 as follows:

(a) **Dorothy Butler:** Ms Butler deposes that on 11 January 2011, the day she entered into a listing agreement with Ray White, the Defendant told her she would get a voucher for $500 worth of travel for listing and selling with Ray White. She deposes that the Defendant did not mention terms or conditions of the voucher offer. After signing the listing agreement, she received a voucher in the post which entitled the bearer to $500 worth of travel if they listed their property with Ray White. It did not have written

conditions and Ms Butler assumed it was a general mail drop rather than being specifically addressed to her. The property sold on 18 January 2011. Ms Butler contacted the Defendant to arrange the voucher but after several attempts nothing was forthcoming and she laid a complaint with the Authority.

(b) **Blair Johns:** Mr Johns recounts having been present with the Defendant and Dorothy Butler when the $500 travel voucher promotion was discussed.

(c) **Charlotte Maxner:** Ms Maxner is Dorothy Butler's daughter. Ms Maxner describes being present at her mother's home at 6 Tawa Street, Inglewood when it was listed. Also present were Mr Johns and the Defendant. Ms Maxner heard the Defendant tell Ms Butler that she would be entitled to a $500 travel voucher by listing the property with Ray White and did not hear him say anything about the voucher only being valid for February or March 2011.

[19] We accept this evidence and, in particular, the evidence of Ms Butler, so that we find Charge 3 is proven.

[20] We note that, in response to this allegation, the Defendant stated that he never promised a travel voucher to Ms Butler as the promotion was not running at the time she listed her property, but he does not dispute that no voucher was provided.

[21] That conduct amounts to misconduct as conduct which would be regarded as disgraceful by agents of good standing or by reasonable members of the public (s 73(a)) because, on the evidence in the affidavits:

(a) The travel voucher offer was akin to an inducement to list a property with Ray White.

(b) The Defendant did not mention any terms or conditions of the voucher and was not helpful when Ms Butler attempted to follow it up with Ray White.

(c) The Defendant did not provide the voucher despite the property selling (this accepted by the Defendant).

Charge 4

[22] Charge 4 provides:

"CAC 10056 further charges the Defendant with misconduct under s 73(a) of the Real Estate Agents Act 2008, in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars:

Having been engaged by Michael Birch to market and sell his property at 23 St Ives Grove, New Plymouth (Property 3), the Defendant disclosed a copy of a Land Information Memorandum for Property 3 to Ian law, a potential purchaser, from which the Defendant had intentionally removed a number of pages."

[23] Charge 4 alleges that the Defendant disclosed a LIM report relating to 23 St Ives Grove to Ian Law which was missing a number of pages.

[24] The relevant witnesses are: Ian Law, Alex McDougall, Michael Birch, and Gerald Gallacher.

[25] We find that the above witnesses prove Charge 4 as follows:

(a) **Ian Law:** Mr Law deposes that the Defendant posted him a copy of the LIM report for 23 St Ives Grove, New Plymouth. About six months after buying that property, and upon advice from his solicitor that the Defendant might have removed pages from the LIM report, Mr Law went to the New Plymouth District Court (NPDC) to check the LIM report he had received. The NPDC provided a number of pages which were missing from the copy the Defendant had posted him. The missing pages concerned a dispute about a right of way.

(b) **Alexander McDougall:** Mr McDougall deposes that the Defendant *"bragged"* to him about removing pages from the LIM report relating to 23 St Ives Grove. The Defendant referred to removing two pages relating to a right of way dispute between the vendor and his neighbours. He told Mr McDougall that he removed the pages because they might prejudice the sale. Mr McDougall later told Mr Novak, the solicitor for Messrs Birch and Law, about the missing two pages.

(c) **Michael Birch:** Mr Birch is the previous owner of 23 St Ives Grove and deposes that on 27 July 2009 he ordered a copy of the LIM for the property. He talked to the Defendant about two pages in the report that concerned a right of way dispute with the neighbours. He states that the Defendant suggesting holding back the two pages from prospective purchasers.

[26] We accept this evidence so that Charge 4 is proven also. The conduct amounts to misconduct as conduct which would be regarded as disgraceful by agents of good standing or by reasonable members of the public (s 73(a)) because, on the evidence in the affidavits:

(a) A LIM report is fundamentally important to a property purchase given the information it contains which cannot necessarily or easily be obtained from other sources.

(b) It is clearly misconduct to remove pages which potential customs might find off putting. Such non-disclosure risks a customer being unaware of material features of the property they are buying and risks them inadvertently incurring significant cost to rectify problems. Arguably, the sorts of information omitted from a LIM is precisely that likely to result in future problems.

(c) Moreover, on the evidence of Mr McDougall, the Defendant bragged about having removed the pages.

(d) The conduct founding Charge 4 is disgraceful given the context where this cannot be said to have been inadvertent and was deliberately to avoid disclosing information to a potential customer which might put them off.

Charge 5

[27] Charge 5 reads:

"CAC 10056 further charges the Defendant with misconduct under s 73(a) of the Real Estate Agents Act 2008, in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars:

Having been engaged by Julie Smillie (Julie Fox) to market and sell her property at 19 Kahikatea Street, Inglewood, the Defendant published a testimonial on the website open2view.com, and/or in promotional flyers, for his Ray White franchise, purportedly from Julie Smillie, without Julie Smillie's knowledge or consent."

[28] Charge 5 alleges that the Defendant published a testimonial purporting to be from Julie Smillie when Ms Smillie neither knew of nor consented to this.

[29] The relevant witnesses are: Julie Smillie and Gerald Gallacher.

[30] We find that the evidence of Ms Smillie proves Charge 5 as follows:

(a) **Julie Smillie:** Ms Smillie sold her property with the Defendant's assistance. She complained about various matters and negotiated a $2,000 refund in commission (the Defendant initially offered her $500). Some time later Ms Smillie saw a testimonial on the Ray White website with her name on it. The testimonial recorded:

"Hi Mark and team. I have to say a big thank you to you both. After having our home on the market for months with other real estates we are so happy to have finally sold and for a GREAT PRICE! Brilliant. Julie – Kahikatea Street."

(b) Ms Smillie deposes she did not say or write any of the words quoted at any time and nor did she authorise the publication of a testimonial.

[31] We accept the evidence of Ms Smillie that Charge 5 is proven. The conduct amounts to misconduct as conduct which would be regarded as disgraceful by agents of good standing or by reasonable members of the public (s 73(a)) because:

(a) The Defendant created a false statement which he purported to be from his client.

(b) Ms Smillie neither knew of the testimonial nor authorised any testimonial being given under her auspices.

(c) Moreover, the conduct was in the context of a client who the Defendant knew was not satisfied with his services and to whom he had given a $2,000 refund in commission.

Charge 6

[32] Charge 6 provides:

"CAC 10056 further charges the Defendant with misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008, in that his conduct consists of a wilful or reckless contravention of Rules 9.1 and/or 9.9 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.

Particulars

When inviting the parties to sign documents authorising the early release of deposit monies, the Defendant failed to properly explain the effect of the document and/or failed to ensure that the parties were aware that they could, or may need to, seek legal or other advice and information, and failed to ensure that the parties had a reasonable opportunity to do so before signing:

(a) The Second Complainant [Dorothy Butler];

(b) Susan Frances and Gary Armstrong (purchasers of Property 2);

(c) Ian Law (purchaser of Property 3)."

[33] Charge 6 alleges that the Defendant did not properly discharge his duties under Rule 9.1 in relation to Ian Law, Gary Armstrong and Susan Frances, and Dorothy Butler.

[34] The relevant witnesses are: Ian Law, Gary Armstrong, Dorothy Butler, and Gerald Gallacher.

[35] We find that the above witnesses prove Charge 6 as follows:

(a) **Ian Law:** Mr Law deposes that he does not remember signing the early release of deposit form dated 27 August 2009 or having any discussion with the Defendant about it. He does not believe the Defendant explained the effect of the form to him or suggested that he might need to take legal advice before signing it.

(b) **Gary Armstrong:** Mr Armstrong bought 6 Tawa Place from Dorothy Butler on 17 January 2011 and paid the deposit on 18 January 2011. Mr Armstrong deposes that the day the agreement was signed the Defendant faxed him an early release of deposit form. Mr Armstrong remembers signing the early release form. In hindsight, he was not happy about having signed the form as he had not realised the consequences at the time he did so. He deposes that the Defendant never told them what the consequences were of signing the form or that they could seek legal advice before doing so. The Defendant did not tell him that his commission would be deducted from the deposit monies released early.

(c) **Dorothy Butler:** Ms Butler was given an early release of deposit monies to sign in January 2011. She signed it believing that it was a normal part of the sale process and deposes that the Defendant never explained to

her that it was special or significant, its effect, or that she might need to seek legal or other advice before signing it.

(d) **Gerald Gallacher:** As set out above, the Defendant has previously been found guilty of unsatisfactory conduct for failing to satisfactorily advise two other complainants as to the implications of signing forms authorising the early release of deposit funds. Again, the previous findings show the Defendant's propensity to engage in conduct of this type, but we do not need to rely on propensity evidence.

[36] We accept this evidence so that Charge 6 is proven. The conduct amounts to misconduct under s 73(c)(iii) as a wilful or reckless contravention of Rule 9.1 or 9.9 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 because:

(a) The purpose of the 2008 Act is consumer protection and the duties imposed on licensees to help ensure their clients or customers are fully informed helps achieve this purpose.

(b) The requirements of rules 9.1 and 9.9 are clear. They provide:

"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."

And

"9.9 When inviting signature of an agency agreement or a sale and purchase agreement, or other contractual document, a licensee must ensure that a prospective client, client, and/or customer is aware that he or she can, and may need to, seek legal, technical, or other advice and information, and allow the prospective client, client, and/or customer a reasonable opportunity to do so."

(c) On the evidence in the affidavits of Mr Law, Mr Armstrong, and Ms Butler, the licensee failed to explain the implications of signing the forms and failed to advise the parties that they could, or may need to, seek legal or other advice before signing.

(d) The Defendant has been found to have breached his duties in respect of similar early release forms on other occasions.

Defendant's financial means

[37] We are advised that the defendant was declared bankrupt on 31 October 2012. This means that proceedings for monetary orders against the defendant cannot continue without the leave of the High Court (s 76, Insolvency Act 2006).

[38] Accordingly, neither a fine nor compensation may be ordered against the defendant.

[39] Were it not for the defendant's bankruptcy, we would have contemplated making a compensation order in favour of the complainant Dorothy Butler in charge 3

in the amount of $500. This reflects the value of the voucher Mrs Butler was promised but not provided with by the defendant.

[40] The other charge where compensation was in issue is charge 1. This relates to the defendant's disgraceful behaviour in breaching his fiduciary duty to Mr and Mrs McGrory in making critical comments about their property being a "P house" and/or a "drug house" to prospective purchasers after the defendant had lost the listing for the property. We probably would have ordered compensation of $20,000 to be paid by the defendant to Mr and Mrs McGrory, but for the defendant's bankruptcy.

[41] Jason McGrory deposes in his affidavit that he and his wife listed their property for sale at $209,000 on the defendant's advice. Sean Warren deposes in his affidavit that he would have been prepared to offer up to $205,000, close to the listing price, in order to purchase the property. However, the defendant told him "not to touch the property with a bargepole" and that "there have been some serious drug issues with that place". As a result, Mr Warren was only prepared to offer $185,000 to purchase the property. Mr Warren deposes that he offered that lower price on the property having heard about the purported drug issues. Of course, a subsequent drug test on the property came back negative.

[42] Mr Warren also deposes that the defendant had mentioned the purported drug issue to another potential purchaser, who ultimately purchased another property on the same street.

[43] We could have ordered compensation of $20,000, being the difference between the $205,000 Mr Warren was prepared to offer and the $185,000 he offered after he (and at least another possible purchaser) were told about the purported drug issues.

[44] In light of the defendant's disgraceful conduct, the benefit of any doubt about quantum of compensation should probably be given to Mr and Mrs McGrory. Furthermore, applying loss of chance principles, the evidence establishes, on the balance of probabilities, that Mr and Mrs McGrory would have been able to obtain a higher price for their property from Mr Warren, and that $20,000 is an appropriate assessment of the quantum of loss. However, as set out above, compensation cannot be ordered because of the defendant's bankruptcy.

Discussion

[45] We accept the prosecution evidence and find all charges proven on the balance of probability.

[46] Each of the above charges raises issues of dishonesty concerning Mr Ferguson. Some of the offending is very serious and one or two aspects are, perhaps, at the lower end of the scale in terms of misconduct and in terms of offending at a lower level than that amounting to unsatisfactory conduct. Of course, the Act defines both concepts. *"Misconduct"* is defined in s 73 of the Act which is set out above and *"unsatisfactory conduct"* is defined in s 72 of the Act as follows:

*"**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."

[47] In that context though, we shall in due course stand back and look at the overall offending in terms of each particular charge in order to consider penalty.

[48] The first charge, to blacken the character of a former principal's property untruthfully, is a fundamental act of dishonesty and breach of a fiduciary duty, i.e. in acting contrary to the former customer's interests. Of course, in the ordinary course, liability for compensation would be attracted to any demonstrable loss to the fiduciary.

[49] With regard to the second offence, not only was an appraisal not provided by the licensee to the customers but there was an attempt to cover up that deficiency by completing an appraisal later and maintaining that it had been provided to the customers at material times. The totality of that cannot be treated merely as unsatisfactory conduct but is misconduct. A further disturbing part of the context is that the McGrorys had come to trust the licensee over dealing with him. Even if we could be satisfied that there was no dishonest intent over this lack of appraisal situation, and in the absence of evidence for the defence we cannot be so satisfied, there would be reckless conduct and, hence, misconduct.

[50] In terms of the Charge and Offence 3, where the Defendant did not provide a vendor with a $500 travel voucher as promised, it is concerning that the vendor was induced to list with the licensee by that promise on which he then reneged. That is dishonest conduct and although, perhaps, rather minor with the other offending now before us, it shows a type of dishonesty which must be stamped out from the real estate profession and industry.

[51] Charge and Offence 4, that the Defendant disclosed a LIM report from which he had deliberately omitted some pages, show real and appalling dishonesty. We have noted that offending came under the 1976 Act so that our powers of penalty are somewhat limited in comparison with our jurisdiction under the 2008 Act.

[52] The fifth offence, about publishing a false testimonial, confirms that in his conduct as a real estate agent the Defendant has been fundamentally dishonest and must be kept out of the industry. The nature of the sixth offence, as outlined above, confirms that view of ours.

[53] We have been firmly advised that the Defendant will not take any further part in these prosecutions.

[54] It must follow from the overall offending that his licence be cancelled. If we cannot formally cancel a licence which, apparently, has been surrendered and, apparently, then cancelled, we record that it would be most disturbing if the

Defendant were to be considered as suitable as a licensee at any time in the future should he so apply. It seems that his licence now stands cancelled indefinitely at law.

[55] We reiterate that the best view which could possibly be taken of the Defendant's conduct, in the various circumstances covered above, is that he showed a reckless disregard for his duties as a licensee. However, we consider that we must assess his conduct as amounting to a pattern of disturbing dishonesty.

[56] Our member Mr Gaukrodger raised the point that there must be some responsibility on the Ray White franchise for failure to supervise the activities of this particular Defendant, possibly even extending to penalty and liability for compensation should such a failure be proved in all the circumstances. We understand that, in due course, Mr Hodge will let us have the view of the Authority on this concept of our concern about possible responsibility of the Ray White franchise in terms of the Defendant's activities referred to above.

[57] Having said all that, we consider that (despite the negative attitude of the Defendant to these prosecutions so far) in the interests of natural justice we shall, of course, have him served with this decision and allow him one calendar month to make submissions on the aspect of penalty. Should he make such submissions, we direct the Registrar to arrange a short fixture for him to address us personally on that aspect should he wish to do so. In any case, we invite submissions on penalty from the Prosecution in the usual way. If the Defendant declines to make submissions on penalty or rests on written submissions we shall deal with that issue when and as we think appropriate.

[58] 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.

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Judge P F Barber
Chairperson

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Ms J Robson
Member

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Mr J Gaukrodger
Member