

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 57

READT 030/12

IN THE MATTER OF

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

BETWEEN

**REAL ESTATE AGENTS
AUTHORITY (CAC 10064)**

Prosecutor

Applicant

AND

STEVE (HONN) JIN

Defendant (Licensee)

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

HEARD at AUCKLAND on 4 March 2013 (with subsequent series of final submissions)

DATE OF DECISION 8 July 2013

COUNSEL

Mr R M A McCoubrey, counsel for Authority as prosecutor
Mr T D Rea, counsel for the defendant

DECISION OF THE TRIBUNAL

Introduction

[1] Steve Jin (“the licensee”) faces three charges under s.73(a) of the Real Estate Agents Act 2008 of misconduct in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[2] The charges relate to the licensee’s role in the sale of a house when (allegedly) he:

- [a] Was aware of significant discord between the vendors and had a close relationship with a Mr Choi one of the vendors (the estranged husband vendor);
- [b] Assisted that estranged husband vendor to obtain the complainant’s agreement to disburse all the joint settlement funds to that vendor’s account; and

- [c] Failed to advise the solicitor (instructed by both vendors to disburse settlement funds to only the estranged husband vendor) of the significant discord between the vendors and/or threats made by the estranged husband vendor that he would burn down the house, kill the complainant, and/or commit suicide if the money were not disbursed to him only.

Precise Charges

- "1. Following a complaint by Kyoung Soon Kim (complainant), Complaints Assessment Committee 10064 charges Honn Jin, agent, 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

- "(a) Acting for the complainant and her husband, Mr Choi, in the sale of their house in circumstances where the licensee:*
- (i) Was aware of the significant discord between the complainant and Mr Choi; and*
 - (ii) Had a close personal relationship with Mr Choi, which included having lived together at times and Mr Choi having cared for the licensee's disabled father."*
- 2. Complaints Assessment Committee 10065 further charges Honn Jin, licensee, 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

- (a) Assisting Mr Choi to obtain the complainant's agreement to disburse all the joint settlement funds to Mr Choi's account, in the following ways:*
- (i) Witnessing the complainant's signature on a "Letter of Confirmation" recording the complainant's agreement to the joint settlement funds being disbursed to Mr Choi only;*
 - (ii) Making the following promise recorded on the "Letter of Confirmation":*

"After completion of the process Steve Jin will be responsible to get the certain amount of money for Kyoung Kim with best effort to make her become satisfied within month time." (sic)
- 3. Complaints Assessment Committee (CAC 10064) further charges Honn Jin, licensee, 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

- (a) *Knowing that the complainant and her former husband Mr Choi were instructing Mr Henry Feng, solicitor, to disburse joint settlement funds only to Mr Choi, failing to advise Mr Feng of:*
- (i) *Significant discord between the complainant and Mr Choi; and/or*
 - (ii) *Threats made by Mr Choi that he would burn down the house, kill the complainant, and/or commit suicide if the money were not disbursed to him only."*

Background

[3] The complainant is Kyoung Soon Kim, also known as Michaela Kim. She has known the licensee since 2003. At that time, Ms Kim was married to Yun Mook Choi who is also known as Michael Choi.

[4] In the years following 2003, Michael and Michaela separated, as did Steve Jin and his wife. For a while, Michael and Steve lived together at the same property.

[5] When Michael and Michaela separated, they decide to sell the property they jointly owned at 201 Kilkenny Drive, Dannemora. They listed the property with the licensee.

[6] They accepted an offer on the property of \$520,000. When settlement occurred, the licensee drove Michaela Kim and Michael Choi to the office of the lawyer acting for them by the name of Henry Feng.

[7] It is what happened on the way to Mr Feng's office, and at Mr Feng's office, that is key to this case.

[8] Ms Kim says that on the drive to the office, her ex-husband Mr Choi was angry that she had caused him to lose money by not accepting an earlier offer on the property. He made various threats to her and said that he would kill himself if she did not authorise the total amount from the sale of the house being transferred into his bank account.

[9] The licensee was driving the car and Ms Kim understands that he heard what was being said.

[10] Ms Kim states that the licensee showed her a "*letter of confirmation*" and said that she should sign the letter and that he would then help her get half of her money back. She signed the letter which was witnessed by the licensee.

[11] At the office, Mr Feng (the lawyer for the vendors) asked Ms Kim whether she was sure that she had no objection to all of the money going into Mr Choi's bank account. He asked her to sign a further authorisation which she did. Ms Kim states that she had no contact with the licensee after this meeting and he has left New Zealand and she has not received her share of the sale proceeds of the property.

[12] Mr Feng knows the licensee as a real estate agent, and, from time to time, people are referred to him by the licensee to do their conveyancing. His office

prepared a settlement statement on the property which confirms that \$125,800.82 was available to Mr Choi and Ms Kim after the payment of loans and other amounts owing.

[13] Mr Feng says that Ms Kim confirmed that she consented to all of the available proceeds from the property being transferred to Mr Choi's bank account and that, because it was to him an unusual situation, he asked her to confirm her lack of objection in the said handwritten note.

[14] Mr Feng also says that the licensee was present throughout the meeting and did not indicate that there were any problems between Ms Kim and Mr Choi.

[15] Subsequently, Mr Feng paid all of the money into Mr Choi's bank account.

Misconduct

[16] Misconduct is defined in s.73 of the Act 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.”*

[17] The test for whether the conduct of an agent's disgraceful or not has been succinctly set out by us in the well known case of *Downtown Apartments v CAC* [2010] NZREADT 06 as follows:

“At a high level of generality, therefore, it maybe said that s.72 requires proof of a departure from acceptable standards and s.73 requires something more – a marked or serious departure from acceptable standards.

The requirement to prove something more than a departure from acceptable standards does not mean it is necessary to prove a wrongful intention in order to prove misconduct. That would be inconsistent with the express language of s.73(a).

The word ‘disgraceful’ is in no sense a term of art. In accordance with the usual rules it is to be given its natural and popular meaning in the ordinary sense of

the word. But s.73(a) qualifies the ordinary meaning by reference to the reasonable regard of 'agents of good standing' or 'reasonable members of the public'.

So while the reasonable person is a mythical ideal person the Tribunal can consider inter alia the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the defendant."

Relevant Particular Evidence

The Evidence of Ms Kim

[18] The first witness for the prosecution was Ms Kim. She is a hairdresser in Auckland and first met the defendant as a family friend in 2003 and also knows him as "Steve". At that time she was married to Mr Choi who is also known as "Michael". Subsequently she and Mr Choi separated as did the defendant and his wife but for a period of some time the defendant and Mr Choi lived at the same property and Mr Choi looked after the defendant's ill father.

[19] In early 2009, Ms Kim and Mr Choi decided to sell their home at 201 Kilkenny Drive, Howick and in March 2009 accepted an offer of \$520,000 for it obtained by the defendant as their real estate agent. That contract was dated 30 March 2009 and settlement was due for 14 May 2009. On settlement day the defendant drove her and Mr Choi to the office of the lawyer Henry Feng who was acting for Ms Kim and Mr Choi as vendors. In her typed evidence in chief Ms Kim also stated:

"7. During the drive to Henry Feng's office Michael Choi said that I had caused him to lose money by not accepting an earlier offer on the property. He threatened that he would burn down the house that I was living in, would kill me, and would kill himself if I did not authorise all of the money from the sale of 201 Kilkenny Drive to be transferred into his bank account. Steve Jin was driving the car and heard what was being said.

8. The amount of money left over after settlement was \$125,800.82.

9. I asked Steve Jin to help with this situation. He showed me a letter which was headed "Letter of Confirmation". This letter said that I agreed for all of the money owing from the sale of 201 Kilkenny Drive to be transferred into Michael Choi's bank account. Steve Jin said that I should sign this letter and that he would then help me to get my half of the money back. I also believed that if I did not go ahead and do this there would be greater costs owing to Henry Feng. I signed the letter.

...

11. When we were in Henry Feng's office he asked me if I was sure that I had no objection to all of the money owing from the sale of house going to Michael Choi's bank account. When I said that I authorised this, Henry Feng asked me to sign a further authorisation which said that I authorised the transfer and had no objection to it. This authorisation is dated 14 May 2009.

I refer to this further authorisation of 14 May 2009 – exhibit ...”

[20] Ms Kim does not think she has had any contact with the defendant since 14 May 2009 and noted that Mr Choi left New Zealand and she has not received “my share of the money from the sale of 201 Kilkenny Drive”.

The Evidence of Mr Feng

[21] The prosecution also called Mr Henry Feng as a witness. As a lawyer he specialises in conveyancing and knows the defendant as a real estate agent who from time to time refers vendors or purchasers to him to become clients.

[22] Mr Feng covered how, in about late March 2009, he received the agreement for sale and purchase referred to above and he emphasised that he had nothing to do with its negotiation and did not know the vendors (Ms Kim and Mr Choi) previously but the defendant had referred them to him to be their lawyer on the sale of the property.

[23] Mr Feng also covered how he met those vendors with the defendant in his office on 14 May 2009 and he had Ms Kim and Mr Choi, as vendors, sign “*the Required Client Authority and Instruction for an Electronic Transfer (A & I) form*”. He said he then discovered that they were a separated couple. He stated that, on that day the proceeds from the sale of the property came into his trust account and after repayment of mortgages and other expenses there was a net sum of \$125,800.82 available to the vendors and he produced his settlement statement to that effect prepared that day. He then stated:

- “10. *At my office Kyoung Soon Kim said that she consented to all of the available proceeds from the property sale being transferred to Yun Mook Choi’s bank account only and had “no objection whatsoever” to this.*
11. *I checked this with Kyoung Soon Kim and asked her why I was not to give her half of the money and Yun Mook Choi half of the money. She said that it was no problem for me to pay all of the money to her husband’s account and that she trusted him.*
12. *This was an unusual situation so I also asked Kyoung Soon Kim to write that she had no objection to me transferring all of the money to Yun Mook Choi’s account.*

I refer to the handwritten authorisation note dated 14 May 2009 – exhibit “D”

13. *There was no indication that Kyoung Soon Kim was under any undue pressure to authorise all of the money to be paid to Yun Mook Choi.*
14. *During this meeting Steve Jin remained present. He did not indicate that there were any problems between Kyoung Soon Kim and Yun Mook Choi or that Yun Mook Choi had threatened to take any action if all of the money was not disbursed only to him.*
15. *I subsequently had the full available sale proceeds transferred to the bank account of Yun Mook Choi on 14 May 2009.*

I refer to ASB payment record of 14 May 2009 – exhibit “E”

The Evidence of Mr Jin (the defendant)

[24] Mr Jin gave evidence on his own behalf as defendant. He is a salesperson at the Manurewa branch of Barfoot & Thomson Ltd and, previously, was one of their salespersons at its Pakuranga branch.

[25] The defendant acknowledged that he was the real estate agent for Ms Kim and her former husband Mr Choi upon the sale of the said property. He acknowledged that he was friends with them both at all material times from 2003 but *“have never considered myself a friend of one over the other”*. However he accepts that he may have been seen to be closer to Mr Choi *“as we are both men”*, but noted that Ms Kim spent more time with his wife than did Mr Choi but said the four of them were all close family friends.

[26] He said he knew about issues between Mr Choi and Ms Kim and acknowledged that Mr Choi had stayed with him *“for a while”* when his father was ill to help look after him. The defendant stated that *“as is customary in Korean culture, and because I was friends with both of them, I did not want to get involved in their issues”*.

[27] The defendant covered how he drove Ms Kim and Mr Choi to the offices of Henry Feng on 14 May 2009 as stated above and then continued:

- “11. During the drive, Mr Choi and Mrs Kim had an argument. I chose not to get involved because it was none of my business. I was put in a tough position because they are my friends but I am also their agent. I tried to be as professional as I could in this difficult situation.*
- 12. I heard them arguing but I tried not to listen and just drove them to Mr Feng’s office. I remember that they were both shouting and not just Mr Choi.*

Letter of Confirmation

- 13. Ms Kim says that the Letter of Confirmation was prepared by me. That is absolutely not true. ...*
- 14. I could not have prepared it, because I didn’t know before they entered the car that they were going to have a fight about which account the money would go into. It was only in the car that I found this out. This is also confirmed in the Fortune Manning complaint letter and Ms Kim’s brief of evidence.*
- 15. You can see that my own English, in my handwritten ‘promise’, is not as good as the English used to type the Letter of Confirmation. I do not know who prepared that Letter of Confirmation but it was not me. It may have been Mr Choi.*
- 16. One of the charges against me is that I “assisted” Mr Choi to disburse all the joint settlement funds to Mr Choi only, and that I signed a promise that I will be “responsible for get the certain amount of money for Kyoung Kim with best effort to make her become satisfied within a month time”.*
- 17. I did not try to assist Mr Choi to disburse all the funds to him only. At Ms Kim’s request, I wrote down that the Tax with IRD is Mr Choi’s*

responsibility, and wrote down my promise to help her. As they both kept screaming at each other, they also screamed at me to witness the Letter of Confirmation.

18. *I promised Ms Kim to use my best effort. I did not promise to get her the money. When I made this promise, I meant that I can be the 'middle person' between them as their mutual friend. I did not guarantee that Mr Choi would pay the money. I had no power to do that.*
19. *As I say in my affidavit, I did not know how much Ms Kim wanted for settlement and so I had expected her to tell me, so that I can tell Mr Choi. She never did this, and never contacted me within one month. Because she did not contact me, I thought that Mr Choi had given her the money.*
20. *I also see that the Letter of Confirmation was faxed from Mr Feng's office to what I think was Fortune Manning. This means that Mr Feng would have seen a copy of the Letter of Confirmation.*

Failing to advise Mr Feng of the couple's problems

21. *As Mr Feng says in his brief of evidence, Mrs Kim herself agreed that it was no problem for Mr Feng to pay all of the money to her husband's account and that she trusted him.*
22. *Mr Feng also says that there was no sign that Ms Kim was under any undue pressure to authorise all of the money to be paid out.*
23. *I need to make it clear that there is a lot more that would have happened between the couple that I do not know about. This is another reason why I did not wish to get involved or take sides, but only try to help them through their property sale.*
24. *It is not my business, and not my job as an agent to tell a lawyer that there are issues between a couple. Their motivation is to sell the house. My job is to help them do that, and there is no difference in their motivation. If I have to tell their lawyer that they are fighting, I am surely breaching their privacy.*
25. *Anyway, their lawyer saw what was going on between them, as they had a fight at his office as well.*

Conclusion

26. *I can understand that Ms Kim is upset at how her relationship has ended with Mr Choi. She needed proper legal advice and I told her to get it. I don't think she did until a lot later.*
27. *I am now facing the blame for trying to use my best efforts to help two of my friends.*
28. *This complaint against me only came from Ms Kim after her lawyers, Fortune Manning, had used up all other options without success. I understand they also got a judgment against Mr Choi, but found out that there is no money left and that he had run away.*

29. *I feel this complaint has been motivated by a desire for money, instead of a genuine belief that I had done anything wrong."*

The Committee's Case

[28] It is submitted for the Committee that the starting point ought to be that the licensee simply should not have acted for both Ms Kim and Mr Choi in these circumstances; and that to do so is a marked and serious departure from acceptable standards. That is the basis of charge one.

[29] It is also put that the dangers of the licensee acting for both Ms Kim and Mr Choi were illustrated by what happened next; and that even on the licensee's case this was a discordant couple; and the risks of acting in these circumstances are obvious.

[30] The Committee's second charge relates to the licensee assisting Mr Choi. The starting point here is that the arrangement was so obviously to Mr Choi's benefit that the licensee's subsequent actions were similarly a marked and serious departure from acceptable standards.

[31] Mr McCoubrey further submits that, similarly, the third charge cannot be seen in isolation and that the context and background to what happened in Mr Feng's office is important. He submits that it was a marked and serious departure from acceptable standards for the licensee to not advise Mr Feng of what had happened in the car in the way to his office.

[32] For all of those reasons, the prosecution submits that the licensee has acted disgracefully in these three respects.

[33] In final submissions Mr McCoubrey put it that:

“Charge 1

A licensee has for a year or so been living under the same roof as one half of a separated couple – the husband. There is, at the very least, bad blood between husband and wife. Should he act for the couple in the sale of the matrimonial home in those circumstances?

Charge 2

In those circumstances, should a licensee draw up a document authorising the whole proceeds of sale of the matrimonial home to go to the husband? Alternatively, should he have anything to do with that document at all?

Charge 3

Knowing what he knew, should the licensee have told the solicitor authorising the transfer of the funds to the husband exclusively that the wife had been threatened and did not approve of the arrangement?

The Committee's submission is that, on the evidence presented to the Tribunal, Mr Jin's conduct on each charge was a marked and serious departure from acceptable standard. Accordingly, the Tribunal should find Mr Jin guilty of misconduct on each charge.

The Committee's submission is not that there is an absolute bar on acting for a separated or separating couple. Each case will turn on its facts and own circumstances. What happened in this case showed the dangers of acting which were obvious – or should have been – from the beginning. The Committee's case is that MR Jin assisted in the result, that Mr Choi ended up with all of the money."

The Defence

[34] The licensee states he was friends with both Ms Kim and Mr Choi and has never considered himself a friend of one over the other. He denies Ms Kim's version of events. We summarise his evidence above.

[35] In short, there is a conflict of evidence on what happened during the drive to Mr Feng's office, and in Mr Feng's office. The licensee states that he wanted to stay out of the personal issues. He further states that at Mr Feng's office there was a heated debate which was not one sided as the couple were screaming at each other.

[36] He says that he did not prepare the letter of confirmation. He does, however, accept that he made the handwritten amendments on it.

[37] The licensee further states that there was no need to advise Mr Feng of any discord as this would have been obvious from the argument between the couple in his office.

[38] Mr Rea submits that there are some matters that are the subject of factual disputes but, in any case the charges, as framed, purport to impose duties on licensees which do not exist as a matter of law, and which would conflict with Mr Jin's express duty to the vendors.

[39] Mr Rea submits that Mr Jin acknowledges that he was aware of discord between the vendors but, that in itself, does not impose a duty for a salesperson to disclose that.

[40] Mr Rea submits that in respect of subparagraph (i) of charge 1, it cannot be said that acting for a couple who are having marital problems would reasonably be regarded by agents of good standing, or reasonable members of the public as disgraceful. He puts it that, to the contrary, real estate agents routinely act on behalf of couples who are splitting up, and it would be unsatisfactory for agents to refuse to receive such instructions, or to purport to require that each must engage in a separate agency to represent them.

[41] Mr Rea puts it also that subparagraph (ii) of charge 1 suggests that a salesperson who has a close relationship with one half of a couple wishing to sell their property should not do so, for fear of a charge of misconduct against that salesperson; but there is no proper legal basis for this aspect of the charge; the interests of vendors in selling their property are aligned, regardless of whether they are separating, and irrespective of whether their agent may be closer to one than to the other; and there is no actual, or even potential conflict of interest in respect of the real estate transaction, and no proper basis on which to assert that an agent should refuse to receive their joint instructions.

[42] Ms Kim herself acknowledges that *"When we separated Michael and I owned the property ... we decided to sell this property and listed it with Steve Jin"*. Mr Rea

submits this was a decision that Ms Kim and Mr Choi were quite entitled to make, and there would have been no proper reason for Mr Jin to have refused to accept their instructions.

[43] It is put that Mr Jin witnessed Ms Kim's signature because he was asked to do so. Mr Rea submits that cannot be described as conduct that would reasonably be regarded by agents of good standing, or reasonable members of the public as disgraceful.

[44] Mr Feng's evidence is that Ms Kim consented to all of the available proceeds from the property sale being transferred to Mr Choi's bank account only and had "*no objection whatsoever*" to this. When Mr Feng followed up on this, Ms Kim told him that it was no problem for him to pay all the money to Mr Choi's account and that she trusted him. Accordingly, Mr Rea submits that in light of Ms Kim's consent, it cannot be Mr Jin's duty to get involved in an arrangement between the vendors as to the disbursement of the sale proceeds; and it is not Mr Jin's duty as a salesperson to provide Ms Kim with legal advice.

[45] As Mr Rea also put it, there is no evidence that Mr Jin was aware that Mr Choi would abscond with the settlement funds and not transfer Ms Kim's half to her; there is also no evidence that Mr Jin witnessed the signatures to assist Mr Choi; however, as a mutual friend to the vendors, he tried to assist Ms Kim with her concerns, and this came at Ms Kim's request.

[46] Mr Rea submits that all this does not reach the threshold of conduct that would reasonably be regarded by agents of good standing, or reasonable members of the public as disgraceful. He notes the CAC's position as that the charges cannot be seen in isolation and represent a marked and serious departure from acceptable standards for Mr Jin to do nothing to advise Mr Feng of the fight that the vendors had in the car on the way to his office.

[47] However, Mr Jin's evidence is that there was an argument in the car between Ms Kim and Mr Choi, and the argument was not one-sided and it continued in the office with Mr Feng. Mr Jin denies that he heard any threats as have been alleged by Ms Kim. It is accepted that if Mr Jin had heard the alleged threats which Ms Kim says were made, then he should have done something further. Mr Jin's evidence is that if what is alleged by Ms Kim did occur, then he would have contacted the Police.

[48] With regard to the "*significant discord*" (particular (a)(i)), Mr Rea puts it that this aspect of the charge suggests that Mr Jin should have breached the vendors' privacy and informed the vendors' solicitor of their marital problems; but the defence does not accept that any such duty exists, and puts it that disclosure would have been contrary to Mr Jin's express duty under Rule 9.21 of the Real Estate Agents (Professional Conduct and Client Care) Rules 2009.

[49] Mr Feng's evidence is that "*there was no indication that Kyoung Soon Kim was under any undue pressure to authorise all of the money to be paid to Yun Mook Chair*". Mr Jin's evidence is that the vendors continued to fight at Mr Feng's office. Whether or not in these circumstances Mr Jin should have notified Mr Feng of potential issues, Mr Feng must have been already aware that the vendors were having marital problems.

[50] Mr Rea submits that, in considering the CAC's charges against the evidence in this proceeding, the CAC's submission that "*the licensee has acted disgracefully*" cannot be sustained and submits:

- [a] Mr Jin was a friend of both Ms Kim and Mr Choi; he acted for them in selling their house; there was no objection to this at the time; and there was nothing improper in this;
- [b] He witnessed Ms Kim's signature at her request and promised use his best efforts to obtain her a share of the sale proceeds; and there was also no objection to this at the time, nor anything improper;
- [c] Mr Jin did not tell the vendors' solicitor that the vendors were fighting on the way to his office, as he did not feel that it was appropriate for him to do so; and if Ms Kim felt threatened, she should have told Mr Feng, or the Police, or her family immediately upon returning from Mr Feng's office.

[51] Frankly, it is difficult to disagree with Mr Rea's submissions.

Law to be Applied

[52] This conduct is alleged to have taken place before the Real Estate Agents Act 2008 came into force on 17 November 2009.

[53] Section 172 of the Act applies to allegations about a licensee's conduct which occurred before that date. The effect of s.172 is to create a three step process in respect of allegations concerning conduct pre-dating the Act where the licensee complained about was licensed or approved under the 1976 Act and has not been "*dealt with*" in respect of the conduct alleged under the 1976 Act, namely:

- [a] Could the licensee have been complained about or charge under the 1976 Act in respect of the conduct?
- [b] If so, does the conduct amount to unsatisfactory conduct or misconduct under ss.72 or 73 of the 2008 Act?
- [c] If so, only orders which could have been made against the licensee under the 1976 Act in respect of the conduct may be made.

[54] In summary, the effect of these provisions is that the Committee has jurisdiction to hear the complaint, but only has power to impose penalties available under the 1976 Act in respect of the conduct.

Discussion

[55] The prosecution accepts that the conclusions in this case will turn to a degree on our view of the evidence. The allegations are serious.

[56] The prosecution submits that the following version of events is available on the evidence and should be accepted:

- [a] The licensee was much closer to Mr Choi than he was to Ms Kim and tried to downplay that, and they lived under the same roof for a year or so before May 2009 and would have discussed their respective relationship situations;

- [b] The licensee and Mr Choi were still living under the same roof at material times in May 2009. The licensee and Mr Choi drove from their house in Manurewa to Ms Kim's house in Botany before proceeding to the lawyer, Mr Feng's office in Greenlane.
- [c] It is for us to determine what took place in the car on the way to Mr Feng's office. The prosecution submits that it is plain that there was, at the very least, a significant argument between Mr Choi and Ms Kim; and that the licensee's evidence on this is unsatisfactory in that he tried at the same time to suggest both that there was not a serious argument and there was a serious argument, but that he attempted (successfully) to close his ears to it;
- [d] At some point before getting into Mr Feng's office, Mr Choi and Ms Kim signed the "*letter of confirmation*". The licensee witnessed the signatures and added the handwritten entries which appear on the letter. (It is not in dispute that the licensee signed the letter, nor that it is his handwriting on the document). The prosecution submits that the letter was signed before the parties got into Mr Feng's office; because, otherwise, there would have been no reason for Mr Feng to complete the document he did. This is because had the parties signed the document in front of Mr Feng, he would have had no need to demonstrate Ms Kim's consent to the transfer to Mr Choi's account by a further document;
- [e] There was no further argument in Mr Feng's office; nor did the licensee say or do anything to alert Mr Feng to the significant discord between Mr Choi and Ms Kim. That discord must have been apparent to the licensee from the fact that the licensee and Mr Choi lived under the same roof. More obviously, it would have been apparent from the car journey to Mr Feng's office;
- [f] Following the meeting at Mr Feng's office, the money was transferred into an account held by Mr Choi alone.

[57] It was submitted on the licensee's behalf that Ms Kim was an unreliable witness; and that she did not feel keenly the threats said to be made against her, in as much as she knew that Mr Choi could not carry them out. It is put that it is for us to make of Ms Kim what we will. Mr McCoubrey submits that, during the hearing, she was doing her best to recall what was a stressful and fearful day, and did so accurately.

[58] It has been suggested that the complaint (made some time later) to the Real Estate Agents Authority was made to retaliate against Mr Choi. The prosecution submits that the motivation for making the complaint is irrelevant. That is correct to the extent that either the complaint is well-founded or it is not.

[59] There is no dispute that Ms Kim has still not received any proceeds of the sale of her matrimonial home.

[60] The prosecution submits that, even on the most favourable version of the facts, the licensee reveals his conduct to be seriously wanting and it is difficult to see why he had any involvement whatsoever in the "*letter of confirmation*". His evidence on this latter point – that he did not really have any involvement and was just writing what his clients told him to – is (Mr McCoubrey puts it) wholly unconvincing and is

another example of the licensee seeking to distance himself from a situation in which he was closely involved.

[61] Mr McCoubrey notes that, in opening submissions on behalf of the licensee, it was put that the prosecution's allegations placed duties on a licensee which do not, in fact, exist and could not. However, Mr McCoubrey submits that they simply require a licensee to act fairly to his clients and ensure that one client does not benefit to the disadvantage of the other; and that the licensee singularly failed to do in this case.

[62] Accordingly, the prosecution submits that he is guilty of misconduct in respect of the three charges before us.

[63] The defence put the following further views.

[64] It is not accepted by the defendant that there is any duty imposed on a licensee to decline to act on behalf of a couple selling a matrimonial home, regardless of whether there is marital discord, and irrespective of whether the licensee may be closer to one of the couple than the other. There is no evidence on which it could reasonably be argued that the defendant could have anticipated the occurrence of anything at all resembling the circumstances of this case. In theory that may be so, but a licensee must comply with the Act and its regulations.

[65] Counsel for the prosecution makes much of the fact that the defendant had provided accommodation to Mr Choi, and on that basis must have been closer to Mr Choi than Ms Kim. However, Mr Rea puts it that the evidence shows that the defendant was also on friendly terms with Ms Kim who gave evidence under cross-examination of ongoing cordial communications with the defendant well after the transaction in issue, including his queries as to how she was doing. The defendant's evidence was that she would seek, and he would offer, relationship advice. As for allowing Mr Choi to live in his house, the defendant's evidence was that this is simply what one does to help out their friends.

[66] Mr Rea also submitted for Mr Jin that the interests of the vendors in selling their property are aligned, regardless of whether they are separating, and irrespective of whether their agent may be closer to one than to the other; and there is no actual, or even potential conflict of interest in respect of the real estate transaction, and no proper basis on which to assert that an agent should refuse to receive their joint instructions. Receiving joint instructions of the couple could certainly not be said to be "*disgraceful*" in the view of agents of good standing or reasonable members of the public. We think that submission is valid in theory but risks need to be monitored by the licensee.

[67] Mr Rea submits that it is not open to the prosecution in closing submissions, to assert a new allegation to the effect that the defendant assisted Mr Choi by "*drawing up*" the document; and if that was the allegation intended, it should have been included in the charge. We agree, but it is not clear who drafted the so-called letter of confirmation; probably, it was Mr Choi.

[68] In any event, it is submitted also by Mr Rea that there is insufficient evidence to support a finding that it was the defendant who prepared the document; and that an implication and of a line of cross-examination of the defendant at the hearing is that the case is one of premeditated collusion between Mr Choi and Mr Jin. However, Mr Rea submits that is not the charge that has been laid and that it is also difficult to see what realistic motive the defendant could possibly have had to collude with

Mr Choi in this matter. It would also be inconsistent with the evidence of the friendly relationship between the defendant and Ms Kim, including his ongoing relationship advice to her. We concur with those submissions.

[69] Mr Rea submitted that if the starting point for the charge is the proposition that *“the arrangement was so obviously to Mr Choi’s benefit”*, it was incumbent on the prosecution to ascertain what the position was regarding the extent of any tax liability, and to adduce at least some evidence to the effect that the defendant was aware of it; and no such evidence was adduced, nor was the defendant cross-examined at all on this issue. There was also no evidence adduced, nor any cross-examined of the defendant, as to whether he had any information regarding the amount of the vendors’ equity in the property after discharge of the mortgage and payment of real estate commission, legal fees and other costs.

[70] The issue of tax liability only came out in cross-examination of Ms Kim, and her recollection was that the tax liability was not significant. However, it was clearly significant enough for Ms Kim to instruct the defendant to make the handwritten notation on the document to the effect that Mr Choi would assume liability for it.

[71] Similarly, while the letter of confirmation records that the defendant was to help Ms Kim get back *“the certain amount of money”*, there was no evidence given by Ms Kim about how much she wanted to get back, nor any evidence that she ever made this known to the defendant.

[72] Mr Rea submits that, in summary, there is no evidence capable of supporting the prosecution’s submission that the arrangement envisaged by the letter of confirmation, as it was signed by the parties, was an obviously one-sided arrangement; and that, for all the defendant knew on the evidence taking into account Mr Choi’s assumption of the tax liability, the arrangement may have been fairly balanced.

[73] Mr Rea submits that in light of the lack of evidence to establish the *“starting point”* for charge 2 and the particulars of the charge 2 as it is actually formulated (witnessing a signature and inserting provisions which, on their face, are designed to assist Ms Kim), it cannot reasonably be argued that the defendant’s conduct, so far as relates to charge 2, was *“disgraceful”* in terms of s.73. We agree.

[74] It is also submitted by Mr Rea that the prosecution evidence regarding alleged threats made by Mr Choi was entirely unreliable; and that Ms Kim did not come up to brief and not even in supplementary questions by counsel for the prosecution, when Ms Kim put it that Mr Choi had threatened that he would hinder the process of settlement of the sale, and that this might result in further costs being incurred.

[75] We accept that there were evasive responses of Ms Kim in her cross-examination on this issue when she continued to be very reluctant to confirm the contents of her written brief, and she confirmed that even if such threats had been made, she would not have felt threatened by them because she knew that her husband of 27 years would not carry out any such threats.

[76] Mr Rea submits that no such threats were made and, if they had been and Ms Kim genuinely felt under undue pressure, then the tension in the meeting with Mr Feng would have been such that he would have remembered at least some small piece of information about the day (which he did not). That is, certainly, a valid point.

[77] We agree with Mr Rea that other matters significantly undermining the evidence of the alleged threats include:

- [a] The unexplained delay in making the complaint (approximately 1.5 years after settlement), or in raising any issue at all with the defendant, notwithstanding that on Ms Kim's own evidence (under cross-examination, in contrast with her written evidence) she continued to have ongoing communications with the defendant; and
- [b] Ms Kim's admission, under cross-examination, of her motives in making the complaint, particularly, that Mr Choi allegedly told her at some unknown point in time that:
 - [i] The defendant told him that he should not give her any money;
 - [ii] The defendant borrowed money from Mr Choi which he did not repay;
 - [iii] The defendant kicked him out of the house.

[78] As for the discord between Mr Choi and Ms Kim, this must have been apparent to Mr Feng who gave evidence that he knew that the couple were separated. Mr Feng did not need the defendant to tell him of this discord and should have recommended that Ms Kim seek independent legal advice.

[79] Also Mr Feng was an unconvincing witness who could not even remember how he had come into possession of the original letter of confirmation which he was surprised to find in his file during his evidence, notwithstanding that he had previously sent a copy of it by facsimile to Ms Kim's lawyers, Fortune Manning, prior to Ms Kim's complaint. Mr Feng also accepted, under cross-examination, that due to his lack of recollection of events on the day, he would be unable to give evidence to contradict the evidence of the defendant that there was continuing argument between Ms Kim and Mr Choi in his presence at his office.

Our Views

[80] Although the standard of proof under the Real Estate Agents Act 2008 is that of the balance of probability, misconduct is a very serious charge and needs to be proved to that standard convincingly. The charges against the defendant are serious. Having carefully absorbed the evidence and credibility aspects, in terms of our experience we are not at all satisfied that Ms Kim was influenced by the defendant in allowing her estranged husband to be paid the entire net proceeds of their former family home. She is not by any means a cowering or submitting type of person. Also, she was firmly advised by an experienced solicitor before signing a written authority as to the disbursement of those funds. She may have remedies under our civil law.

[81] We are concerned with the conduct of the licensee. Is he guilty of misconduct?

[82] It is disturbing that Ms Kim seems to have lost her share of the equity in her former home; although we do not have the full facts about that. However, she is intelligent and sensible and was advised by the lawyer Mr Feng.

[83] It has not been proved on the balance of probability that any injustice to her was caused or contributed to by the defendant. We find that none of the charges against him have been proved. However, on the prima facie case raised by the complaint, the Authority had a duty to prosecute on this rather unusual and suspicious set of facts.

[84] We find that misconduct has not been proved against the defendant. Accordingly the charges are dismissed.

[85] 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

Mr J Gaukrodger
Member

Mr G Denley
Member