BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 8

READT 022/12

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE 20006**
	Prosecutor
AND	**PHILLIP SPENCER (salesperson)**
	Defendant

MEMBERS OF TRIBUNAL

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

HEARD AT WHANGAREI 20 November 2012

DATE OF DECISION: 23 January 2013

COUNSEL

Mr L J Clancy, for Prosecution
Mr T D Rea, for defendant

DECISION OF THE TRIBUNAL

Charges

[1] The defendant, licensed salesperson Phillip Spencer, faces two charges of misconduct brought by Complaints Assessment Committee 20006 of the Real Estate Agents Authority.

[2] The charges are:

> *"Charge 1*
> *Complaints Assessment Committee 20006 (CAC 20006) charges Phil Spencer, with misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008 (the Act), in that his conduct consisted of a wilful or reckless contravention of the rules made under the Act.*

Particulars:

On or about 28 July 2011, the defendant wilfully or recklessly contravened rule 9.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 in that he acted in a manner that put Mr Bert van Vliet and Ms Beverley Callaghan under undue or unfair pressure.

Charge 2

CAC 20006 further charges the defendant with misconduct under s 73(b) of the Act, in that his conduct relating to the potential purchase by Mr Bert van Vliet and Ms Beverley Callaghan of Lot 44, 40 Alderton Drive, Kerikeri, constituted seriously incompetent or seriously negligent real estate agency work.

Particulars:

(a) Failing to accurately communicate to the vendor the offer made by Mr van Vliet and Ms Callaghan.

(b) Misrepresenting the vendor's acceptance of the offer.

(c) Failing to obtain written confirmation of the acceptance of the offer in circumstances where Mr van Vliet and Ms Callaghan were reliant on such acceptance before proceeding with the sale of their property.

(d) Failing to disclose that he was not one of the agents/licensees authorised by the vendor to sell sections at 40 Alderton Drive and therefore he did not have intimate knowledge of the acceptable terms of any sale."

Background

Summary of facts not in dispute

[3] Bert van Vliet and Beverley Callaghan (the complainants) listed their property at 15 Alderton Drive, Kerikeri, for sale with Barfoot & Thompson Ltd in April 2011. The listing price was initially $530,000 (later reduced to $495,000) and the listing agent was Pamela Holley. Although this decision refers to the actions of the complainants together for convenience, all transactions were in Ms Callaghan's name only.

[4] The defendant, a licensed salesperson working for Barfoot & Thompson Ltd from its Kerikeri Road office, approached the complainants in July 2011 about interest in their property from Michael and Marguerite Goodchild, who were relocating from Christchurch and had a budget of around $450,000. The Goodchilds viewed the property on 27 July 2011.

[5] On 28 July 2011 the defendant and the complainants discussed both a possible offer of $450,000 by the Goodchilds for the property and the complainants' interest in purchasing a section in a subdivision development at Alderton Park, namely Lot 44. The complainants told the defendant that they only wished to proceed with such an offer from the Goodchilds for the property if they could purchase Lot 44 Alderton Park.

[6] At the complainants' request, the defendant contacted Wayne Brown, representative of the company selling Lot 44 Alderton Park, Waahi Paraone Ltd, to discuss the complainants' interest in the lot. Contact was by text message and telephone.

[7] Later the same day (28 July 2011), the defendant presented an offer from the Goodchilds for the property at $450,000 and the complainants accepted that offer. The complainants also signed an offer for Lot 44 Alderton Park of $90,000, including a special condition that the vendor would provide $20,000 towards building costs should the purchaser commence construction of a permitted and approved dwelling on the lot within 12 months.

[8] The agreement for sale of the complainant's property was not conditional on their offer for Lot 44 Alderton Park being accepted. That offer was presented to Mr Brown on 29 July 2011 but he counter-offered, reducing the cash-back clause amount to $5,000. The counter offer was not accepted by the complainants.

[9] On 30 July 2011 the complainants raised concerns as to the defendant's conduct with his manager at Barfoot & Thompson Ltd.

[10] On 31 July 2011, the Goodchilds confirmed that they were not willing to amend the agreement for sale and purchase of the house property to make it conditional on the complainants' purchase of Lot 44 Alderton Park.

Facts in Dispute

[11] The defendant does not accept all the evidence of the Committee's witnesses. In particular, there are conflicts of evidence in the following key areas:

[a] Whether the defendant told Mr Brown that the complainants' $90,000 offer for Lot 44 Alderton Park (a section) included the $20,000 cash-back clause.

[b] Whether Mr Brown told the defendant, by telephone on 28 July 2011, that he would accept the complainants' offer for Lot 44 Alderton Park.

[c] Whether the defendant refused, following a request by the complainants, to include a condition making the agreement for sale and their house property conditional on their purchasing Lot 44 Alderton Park. The defendant accepts that the complainants made this request but states that they decided not to pursue the condition after discussion with him and between themselves as to the likelihood of the Goodchilds accepting it.

[d] Whether the defendant used a *"forceful, bullying manner"* when the Goodchilds' offer was presented by him to the complainants on the evening of 28 July 2011.

[e] Whether the complainants expressed a wish to take legal advice before accepting the Goodchilds' offer on the evening of 28 July 2011.

[f] Whether the complainants asked the defendant to obtain confirmation of Mr Brown's acceptance of their offer in writing and whether the defendant stated that Mr Brown's verbal confirmation could be *"trusted 100 per cent".*

Misconduct

[12] The question arises whether the conduct of the defendant amounts to misconduct under ss.73(b) and/or 73(c) of the Real Estate Agents Act 2008 ("the Act"). Section 110(4) of the Act provides that if, after hearing any charge against a licensee, we are satisfied that the licensee, although not guilty of misconduct, has engaged in unsatisfactory conduct, we may make any of the orders that a complaints assessment committee may make under s.93.

Charge 1

[13] Rule 9.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2008 ("the Rules") provides that licensees *"must not engage in conduct that would put a client, prospective client or customer under undue or unfair pressure"*.

[14] If we are satisfied that the complainants were placed under undue or unfair pressure by the defendant on 28 July 2011, we must then consider whether that was done wilfully or recklessly, in which case a finding of misconduct under s 72(c)(iii) would be appropriate. Breaches of the Rules that are not committed intentionally will nevertheless, automatically, amount to unsatisfactory conduct under s 72(b), subject to a defence of total absence of fault.

[15] As we held in *Evans v REAA and Orr* [2012] NZREADT 67:

> *"[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. It is submitted for the Authority that this does not assist Mr Orr."*

[16] There is no dispute that the defendant met with Ms Callaghan and Mr van Vliet during the early evening of 28 July 2011 to present the Goodchilds' offer for 15 Alderton Drive. There is no dispute that Ms Callaghan signed the offer during that meeting.

[17] There is, however, a significant conflict of evidence between the complainants and the defendant as to exactly what occurred at that meeting and we cover the evidence below.

[18] Mr Clancy submits for the Prosecution that if we accept the evidence of the complainants, charge 1 should be found proved on the basis that the defendant

wilfully or recklessly breached r 9.2 of the Rules by putting undue or unfair pressure on the complainants.

[19] Mr Clancy, very helpfully, emphasised the complainants' evidence that:

[a] The defendant refused to add a clause to the sale and purchase agreement for the property to make it conditional on the complainants' purchase of Lot 44 in the Alderton Park subdivision.

[b] The defendant was insistent that the agreement be signed that night, saying words to the effect, *"I've seen too many deals like this go belly up when left over night" and "this is a one in one hundred cash deal, unlikely to come again"*.

[c] The defendant remained seated and made no indication that he was willing to leave before the offer was signed. Mr van Vliet put it that the defendant was, *"hanging around until he got his way"*.

[d] The defendant questioned the complainants' wish for written confirmation of the acceptance of their offer for Lot 44 from Mr Brown, stating, on Ms Callaghan's evidence, *"if you don't believe me, contact Mr Brown"*.

[20] Overall, the complainants found the defendant's manner to be forceful and bullying.

[21] The defendant, on the other hand, states that:

[a] While he advised the complainants that the Goodchilds were unlikely to accept any conditions, the decision not to include a clause making the sale of the property conditional on the complainants' purchase of Lot 44 was made by the complainants.

[b] He told the complainants, *"There was no need to make a decision that evening"*.

[c] The complainants did not ask for written confirmation of Mr Brown's acceptance of their offer for Lot 44.

[22] The defendant's evidence was that he did not pressure Ms Callaghan into accepting the Goodchilds' offer and that, at all times, he acted in Ms Callaghan's best interests.

[23] Mr Clancy puts it that we should note the following when assessing the evidence in respect of charge 1:

[a] It is accepted that Mr van Vliet suggested that a clause be added to the sale and purchase agreement, making it conditional on the purchase of Lot 44. He submits that it is more likely, on the evidence, that the complainants were talked out of this by the defendant than that they simply changed their minds.

[b] It is inherently unlikely that the complainants did not ask for written confirmation of Mr Brown's acceptance of their offer for Lot 44. Mr van Vliet gave credible evidence that, due to minor issues with a previous property purchased from Mr Brown, he had learned a *"life lesson"* that agreements should be recorded in writing to avoid disputes later.

[c] Both Ms Callaghan and Mr van Vliet were clear in their evidence that the defendant did not tell them that the Goodchilds had instructed him that they would not accept any conditions. In Mr van Vliet's words, that was *"not the way it went"*. Both were clear that the defendant said *he* wanted a *"clean contract"*, or that he did not want to *"dirty up the contract"*.

[d] It is accepted that the defendant, as Ms Callaghan's agent, did not take an amended agreement back to the Goodchilds, or even contact the Goodchilds to ask whether they would entertain an amended agreement. The discussion between the defendant and the complainants was about signing the original offer.

[e] The defendant accepted in evidence that he had said something similar to "I've seen too many deals fall over when left overnight", and that he had felt the agreement should be signed that night.

[f] The defendant's initial account of his meeting with the complainants is expressed in markedly more emphatic terms than his evidence to the Tribunal. In the initial account he states, *"I advised [the complainants] that the purchaser had clearly stated he wanted a clean offer, any changes would not be accepted, and the offer would be at an end, the buyers were returning to Christchurch, and required an early decision".* There is no mention, for example, of telling the complainants that a decision did not have to be made that night or that a condition *could* be inserted if that was the complainants' decision.

[24] Mr Clancy submits for the Committee that, on the evidence, it is more likely than not that the defendant did put pressure on the complainants to sign the agreement that night, without a condition making it conditional on the purchase of Lot 44; and that pressure was unfair and undue given the defendant's role as agent for Ms Callaghan.

[25] It was open to the defendant to simply act on the complainants' instructions and take an amended offer back to the Goodchilds. He could then have sought to persuade the Goodchilds to accept the amended agreement, particularly if he was sure that Mr Brown had accepted the complainants' offer for Lot 44 and therefore that the condition added to the agreement would easily be satisfied. The defendant was under a duty to act in accordance with Ms Callaghan's instructions, even if he did not agree with them.

<u>Charge 2</u>

[26] For a finding of misconduct in respect of charge 2, we need to be satisfied that the defendant's conduct was *seriously* incompetent or *seriously* negligent real estate agency work. Merely negligent or incompetent real estate agency work will be unsatisfactory conduct under s 72(c).

[27] We considered the scope of misconduct in the context of serious negligence recently in *CAC 10063 v Jenner Real Estate Ltd* [2012] NZREADT 68. There, we followed our earlier decision in *Cooke v CAC 10031* [2011] NZREADT 27, and noted with approval the following definition of misconduct, set out in a decision of the New South Wales Court of Appeal, *Pillai and Messiter* (No 2) (1989) 16 NSWLR 197:

> *"Professional misconduct does not arise where there is mere professional incompetence nor deficiencies in the practice of the profession by a practitioner. More is required. Such misconduct includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration ..."*

[28] In this case, if we accept the facts as alleged by the Committee's witnesses, a finding of serious negligence in terms of *Jenner* and *Pillai* would be available.

[29] What is alleged is that the defendant made a number of serious errors, leaving the complainants in a position where they were legally bound to complete the sale of the property, with no protection should their offer for Lot 44 Alderton Park be rejected (which, in fact, was what occurred). This was in spite of the fact that the defendant knew the complainants only wished to sell the property if they could buy Lot 44 Alderton Park.

[30] Given the nature of the errors alleged (failing to accurately communicate the complainants' offer, misrepresenting Mr Brown's verbal response, failing to obtain confirmation in writing), should the prosecution evidence be accepted, the defendant's conduct did portray indifference or an abuse of the privileges which accompany being licensed as a salesperson so that his conduct amounted to serious negligence or serious incompetence under the Act.

[31] Charge 2 alleges that the defendant engaged in seriously negligent or seriously incompetent real estate agency work by:

[a] Failing to accurately communicate to Mr Brown the offer for Lot 44 made by the complainants;

[b] Misrepresenting Mr Brown's acceptance of that offer;

[c] Failing to obtain written confirmation of the acceptance of the offer in circumstances where the complainants were reliant on that acceptance before agreeing to sell their property to the Goodchilds;

[d] Failing to disclose to the complainants that he was not one of the "agents/licensees authorised by the vendor to sell sections at 40 Alderton Drive and that he did not have intimate knowledge of the acceptable terms of any sale".

[32] We conclude that the terms of Ms Callaghan's offer were not, as a matter of fact, fully and accurately conveyed to Mr Brown during the telephone call from the defendant on 28 July 2011.

[33] Mr Brown was very clear in his evidence as to his instructions in respect of the subdivision: he would accept an effective sale price of no less than $20,000 below the list price set out in the addendum to his listing/agency agreement. While he was prepared to offer $20,000 towards building costs to purchasers in certain circumstances, a *"cash-back"* clause which took the effective price more than $20,000 below the list price would not be accepted.

[34] Ms Holley was clear in her evidence that these were her instructions from Mr Brown. She accepted that she would have been aware that Ms Callaghan's offer for Lot 44 ($90,000 plus a $20,000 cash-back, against a list price of $105,000) would not have been acceptable to the vendor. She did say that she would, nevertheless, have presented the offer.

[35] The documentary evidence before us is consistent with Mr Brown's account. Ms Callaghan's initial offer was refused, but accepted with an amended $5,000 cash-back clause (an effective sale price of $85,000 against a list price of $105,000). An offer of $95,000 with no cash-back clause was accepted for Lot 16, against a list price of $115,000. If Mr Brown had been advised clearly by the defendant that the complainants' offer was $90,000 with $20,000 cash-back, that is an effective sale price of $70,000. The evidence is that it would have been rejected out of hand by Mr Brown.

[36] Mr Brown accepted in his evidence that he may have misunderstood the defendant to be saying that the offer was $90,000 *including* cash-back, which would have been an offer of $110,000 with a $20,000 cash-back clause, and that he might have responded "go for it" (in terms of the defendant's evidence) meaning go ahead and draw up an offer for me to look at.

[37] A misunderstanding seems to have occurred.

[38] In any case, Mr Clancy submits that the defendant did not accurately communicate to Mr Brown the offer made by the complainants; and if he had, there would have been no room for confusion, the offer simply would not have been accepted, verbally otherwise. That seems very probable to us.

[39] We note that the text message sent by the defendant to Mr Brown makes no mention of a cash-back component at all, it simply refers to a *"90k offer"*.

[40] The defendant accepts that, following his conversation with Mr Brown, he told the complainants that their offer had been accepted. Mr Clancy again submits that, even if it is accepted that there was a genuine miscommunication between the defendant and Mr Brown, the defendant, as a matter of fact, misrepresented Mr Brown's acceptance of their offer of $90,000 with $20,000 cash-back.

[41] We accept that it was the defendant's responsibility as agent to accurately convey the offer to Mr Brown and to accurately convey his response to the complainants. That did not occur.

[42] Mr Clancy submits that, in all the circumstances, it was seriously negligent and/or seriously incompetent for the defendant to have failed to obtain written confirmation of Mr Brown's acceptance of the offer. We think that the context is not so simple.

[43] The defendant accepts that he was aware that the complainants were only prepared to accept the Goodchilds' offer of $450,000 for the property on the basis that they could purchase Lot 44 for $90,000 plus $20,000 cash-back.

[44] The property had been appraised by Pam Holley at $480,000 to $500,000. Ms Callaghan had reduced her initial listing price of $530,000 to $495,000. The offer at $450,000 was therefore considerably less than the complainants had hoped for and was only considered due to the possibility of acquiring Lot 44 for $90,000 with $20,000 cash-back.

[45] The defendant states that the complainants never asked for written confirmation of Mr Brown's acceptance of the offer. Mr Clancy puts it that it is inherently incredible given the complainants' reliance on purchasing the section at the price they wanted. However, they relied on the defendant to act professionally.

[46] As noted above, Mr van Vliet gave convincing evidence that, due to issues with the house property (which had been purchased from and built by Mr Brown), he had learned a life lesson that agreements should be recorded in writing to avoid disputes later on. He said they had asked for written confirmation: "absolutely, without a doubt".

[47] Ms Callaghan was equally sure in her evidence that the complainants had asked for written confirmation, but that the defendant had been adamant that the acceptance by Mr Brown by telephone was sufficient. In Ms Callaghan's words: *"he gave us his word, we trusted him – we shouldn't have"*.

[48] The complainants' account regarding their request for written confirmation is consistent with their initial complaints to Barfoot & Thompson Ltd.

[49] Mr Clancy put it that the defendant's failure to obtain written confirmation of Mr Brown's acceptance of the offer is particularly serious given the complainants' request to make the agreement for sale and purchase of the property conditional on their purchase of Lot 44, a request that (he also puts it) was not carried out. He added that the failure is also serious given the defendant's own evidence that Mr Brown could be difficult to get hold of and deal with.

[50] In cross-examination, the defendant said that the situation was *"not ideal"* and that, as an experienced salesperson, alarm bells would have been ringing for him given that his clients had signed an agreement to sell the house property based on only a verbal understanding that they would be able to purchase Lot 44 at the price they needed to.

[51] Mr Clancy submits that, in all the circumstances, significantly more was required of the defendant; and that in apparently assuring the complainants that Mr Brown's verbal acceptance, as he understood it, could be relied upon and by not adding a condition to the agreement for the property as suggested by the complainants, the defendant left his client seriously exposed to risk; and his conduct, even if not found to be deliberate, portrays an inaccurate casualness from a licensed salesperson.

[52] In respect of particular (d) of charge 2, the Prosecution accepts that, although the defendant was not one of the listing salespersons, he was "authorised", as a

salesperson employed by Barfoot & Thompson Ltd, to present an offer for Lot 44 to Mr Brown. What is alleged, however, is that he did not disclose to *the complainants* that he was not one of the salespersons specifically authorised or instructed by the vendor and that, therefore, he did not have intimate knowledge of the acceptable terms of any sale.

[53] The defendant accepts that no such disclosure was made but asserts that he was under no duty to do so. We agree with him on that point.

[54] The evidence confirms that the defendant was not fully acquainted with Mr Brown's instructions in respect of the subdivision, and this disadvantaged the complainants. The defendant stated in evidence that he was unaware that Mr Brown had a "bottom line". He was unaware Mr Brown had instructed that he would not accept less than $20,000 below list price. These instructions do not appear to have been recorded on Barfoot & Thompson Ltd's electronic database. Had the defendant been aware of those instructions (as Ms Holley clearly was), there would have been much less scope for misunderstanding when the complainants' offer was communicated to Mr Brown.

[55] Given his knowledge of the complainants' reliance on the offer being accepted, and had he known Mr Brown's clear price expectations, the defendant would have been likely to carefully explain that the offer was at an effective level of $70,000 and considerably below Mr Brown's bottom line. Had that been done, it is unlikely any misunderstanding would have occurred.

[56] Another telling piece of evidence is the amendment to the commission provision on Ms Callaghan's offer for Lot 44. Mr Brown's evidence was that the defendant presented the offer showing a minimum commission of $8,000, which was outside the terms he had agreed with Ms Holley. The defendant's evidence was that he amended the commission figure without input from Mr Brown whose account was convincing and consistent with the hand-amended document. The mistake by the defendant as to the commission is indicative of his lack of detailed knowledge of the vendor's instructions.

The Overall Stance of the Prosecution

[57] For the above reasons, the Prosecution submits that both charges should be found proved.

[58] Without making any concession, in respect of charge 1, the Prosecution notes that if we conclude that the complainants were put under undue or unfair pressure by the defendant, but that this was not done wilfully or recklessly, it would be open for us to make a finding of unsatisfactory conduct under s 110(4) rather than a finding of misconduct.

[59] Similarly, in respect of charge 2, if we conclude that the defendant's conduct, while negligent or incompetent, was not *seriously* negligent or incompetent, a finding of unsatisfactory conduct would be available.

[60] We record that the Committee filed signed Briefs of Evidence for Messrs Wayne Brown, Bert van Vliet, Ms Beverley Callaghan, Ms Marguerite Goodchild, and Andrew Eales (an investigator for the Authority). There was cross-examination of them

except for Mrs Goodchild who did not give oral evidence. There were also defence Briefs filed for the defendant, Michael Goodchild, and Pamela Holley. Other than Mr Goodchild, they were cross-examined.

Specific Evidence

[61] Although the above sufficiently covers the rather detailed evidence in this case, we cover the following.

Ms Callaghan

[62] Ms Callaghan felt that the defendant subjected her to much pressure to quickly sign the offer he had brought to her and Mr van Vliet. She recorded his emphasis that otherwise the purchasers "will walk away". She felt he was "overbearing and persistent". She said that she and Mr van Vliet had sold many homes in the past and had never felt so pressured and she now wishes they had telephoned Ms Holley of that Barfoot & Thompson firm.

[63] She said that they knew they should not have signed the offer brought by the defendant "as all the conditions we wanted were not there". She maintained that the defendant was manipulative and was only concerned to achieve a sale of their property in terms of the offer he had tendered to them and would not leave their kitchen table until they signed. They did that and then said to themselves *"Oh what have we done"*. She said they knew they should have gone to their solicitor but as it was after 5.00 pm on the day, they did not. She asserted, *"We should have been entitled to more time and not had that pressure put on us"*.

[64] Mr Rea thoroughly cross-examined Ms Callaghan inter alia on the theme that she did not seek written confirmation from Mr Brown that he would sell them Lot 44; only telephoned advice to that effect. It was put to her that she is an experienced businesswoman and elected to sign the offer to sell the house property. She responded, *"He was overbearing and we trusted him and we should not have"*. She did not seem to recall certain aspects about that meeting with the defendant. For instance, she did not recall the defendant stressing that the purchasers (the Goodchilds) needed to purchase that weekend and return to Christchurch. She thought the defendant may have said that but did not recall it.

[65] Mr Rea also put it to her that the offer from the Goodchilds was cash and only subject to a LIM report so that there would seem to be little for her to discuss with her solicitor. She said that she felt that the defendant was working for the Goodchilds as buyers rather than for her as a vendor. She maintained that the defendant had assured the vendors they could purchase the section from Mr Brown at their offered price: "but it turned out we could not". Mr Rea put it to her that, but for the defendant, she would have lost the Goodchilds as purchasers? Her response was, *"well, we lost money and we are still renting"*. It seems that they have elected to rent for a time before building on another section they have since purchased from Mr Brown.

[66] We found Ms Callaghan somewhat vague as a witness.

Mr van Vliet

[67] Mr van Vliet was also, of course, thoroughly and carefully cross-examined by Mr Rea. He did not seem to have understood, at material times, that the Goodchilds wanted a quick signed acceptance of their offer so they could forthwith to Christchurch and they wanted no other conditions or alterations made to their offer. Mr van Vliet did seem to remember that the defendant would not insert a condition into the Goodchilds' offer that the vendors be able to purchase Lot 44 from Mr Brown on their particular terms. As Mr van Vliet put it, the defendant wished to keep those two transactions separate and not link them, despite the insistence of the vendors to link them. It emerged that relations between those vendors and Mr Brown had become a little strained as a consequence of a building dispute a few years previously when Mr Brown built the house in question.

[68] Mr van Vliet seemed to be saying that he had been bullied by the defendant into accepting the Goodchilds' offer and that the defendant's "whole demeanour was unacceptable at the time", and he seemed to be referring to the defendant's body language, and he observed that there are different ways of bullying.

[69] Mr van Vliet insisted that the defendant would not do what the vendors instructed him to do and "hung around" until he got his way. Mr van Vliet added, "as far as I am concerned that is bullying". He referred to the stress caused to Ms Callaghan and him over the sale transaction.

[70] For all that, Mr van Vliet also seemed a little vague as a witness.

The Defendant

[71] The defendant's typed brief, oral evidence and cross examination were quite detailed, but we only mention salient points at this stage. He has been a full time salesperson since 2008. Prior to that he worked in the motor trade industry for 40 years with approximately 30 years as a licensed motor vehicle dealer. He has never previously appeared before us or any predecessor of ours, nor been the subject of any investigation or disciplinary complaint. Nor was he as a motor vehicle dealer. He referred to the events basic to this appeal in much detail, but we consider they have been adequately covered above.

[72] Included in his evidence is the statement *"in particular, I told Mr Brown that Ms Callaghan wanted to purchase Lot 44 for $90,000, that the $20,000 cash back condition was to be included in the terms of sale, and that Ms Callaghan was considering accepting a reduced offer for her property on the basis of this offer [to Mr Brown]".* He said that Mr Brown agreed to Ms Callaghan's offer and told the defendant to *"go for it"*. The defendant added: *"I was fully aware of the standard terms of sale given to Barfoot and Thompson, which included the cash back clause, and this had also been expressly discussed with Ms Callaghan and Mr van Vliet. There is absolutely no reason why I would not have discussed this with Mr Brown as it was one of the fundamental terms of the offer"*. He said that, for the sake of caution, he recommended to Ms Callaghan that she contact Mr Brown directly and discuss the matter or contact the listing agent, Pam Holley, but Ms Callaghan chose not to do so.

[73] The defendant acknowledged that, in the circumstances, Ms Callaghan would naturally have felt some pressure but he insists that at no time did he pressure her to accept the Goodchilds' offer. He said that his objective was to provide her with all the information so that she could make a fully informed decision as to whether or not she wanted to accept the Goodchilds' offer or make a counter offer.

[74] He said that after that meeting with Ms Callaghan and Mr van Vliet, he telephoned Mr and Mrs Goodchild and told them that their offer had been accepted and he also sent a text to Mr Brown saying *"Callaghan have cash contract on house as discussed. I have 90 k offer on Lot 44 for your signature can we meet in the morning?"* However, the next morning Mr van Vliet required that the $20,000 *"cash back"* was *"to be held in trust by Law North"*. This would have meant that the vendor of the section (a company of Mr Brown's) would have needed to pay $20,000 to Ms Callaghan's solicitors on acceptance of the offer for the section, rather than at the much later time of her (and Mr van Vliet's) construction of a house on it. It was clear to us from the evidence of Mr Brown that, this new condition was totally unacceptable to Mr Brown. Mr Spencer understood that eventually, Mrs Callaghan did purchase Lot 44 for $90,000 but he is unaware of the particular terms.

[75] It became clear that the defendant had not realised that Mr Brown seems rather rigid in his business attitudes.

[76] As the defendant said, he did not realise that Mr Brown did not negotiate beyond limits he had initially set with Ms Holley. Among other things, the defendant said that when the vendors asked him to *"run their offer for Lot 44 past Mr Brown"*, he did by phone and gave them Mr Brown's reply but advised them to deal direct with Mr Brown for confirmation of the position or otherwise deal through his colleague, Ms Holley, the listing agent for Mr Brown because, the defendant told them, he was not comfortable with Mr Brown's verbal comment over the phone of *"go for it"*.

[77] The defendant said the vendors were most reluctant to talk to Mr Brown themselves. The defendant said he made it clear to the vendors that he, the defendant, was not comfortable with the response and position of Mr Brown and he felt that the vendors did not trust Mr Brown.

[78] The defendant maintained that the vendors signed the offer from the Goodchilds entirely of their own accord and he said: *"I put no pressure on them but Mr van Vliet put pressure on Ms Callaghan to sign"*. He also asserted that the vendors seemed happy that he remained with them while they considered whether or not to accept the offer from the Goodchilds. He denied that they had asked for written confirmation from Mr Brown that he would sell the section, Lot 44, to them. The defendant insisted that he did not tell them that a verbal agreement with Mr Brown was satisfactory but said he would have emphasised that the Goodchilds could change their mind overnight and withdraw their offer and would likely do so if it was not accepted as they had tendered it. He said he advised the vendors of the precise stance of the Goodchilds and *"To be honest, I would not like to think I pressured them"*. He said that he emphasised that the Goodchilds wanted to return to Christchurch immediately so that their offer could evaporate. He asserts that the vendors *"accepted the Goodchilds offer without pressure from me"*.

[79] The defendant, inter alia, insists that he made it absolutely clear to Mr Brown that the $90,000 price offered by the complainants for Lot 44 was subject to there being a further $20,000 reduction in due course when a house was built on the section and that Mr Brown's response was "go for it". The defendant also insists that he was prepared to put a condition into the Goodchilds' offer as requested by the vendors, but advised them that if so they strongly risked losing a sale to the Goodchilds.

[80] We can accept that the vendors felt pressured by the defendant in all the circumstances, but we found him an impressive witness and have no reason to doubt his credibility.

Mr Brown

[81] It was helpful that Ms Holley and Mr Brown made themselves available for cross-examination. The cross-examination of Mr Brown was extensive. He made it clear that on 28 July 2011 he received a text message from the defendant mentioning an offer of $90,000 for Lot 44 and they spoke on the telephone that day about it. He told the defendant he would come and look at the offer but, when he did, he saw it was for a net $70,000 rather than his minimum of $85,000. He then met with the complainants and told them he had understood that the offer for the section was $90,000 and he did not (and would not) accept it at a net $70,000. In his long cross-examination, he said he thought the offer put to him by the defendant was at $110,000 less the said $20,000 conditional reduction. Mr Brown had said *"go ahead"* to the defendant over the telephone because $90,000 net was acceptable to him but he said that he also added *"put it in writing for me to sign"*, but when he saw the written offer he deemed it unacceptable.

Final Submission for the Defendant

[82] Put generally, Mr Rea submitted that there is no convincing evidence that the defendant placed the complaints under undue or unfair pressure and similarly with regard to the allegation of *"bullying"*.

[83] Mr Rea submitted that it is much more likely than not that the defendant did say to Mr Brown that the offer for the section was *"$90,000, including the cash back clause"* or words to that effect and that there seems to have been a misunderstanding by Mr Brown who heard what he expected to hear, namely, that the bottom line was $90,000 because in terms of his instructions to Ms Holley he would never have expected to have been presented with an offer for a net amount of $70,000. Mr Rea seemed to be putting that the fact there was apparent miscommunication between Messrs Spencer and Brown, which certainly led to an unsatisfactory result, does not necessarily require Mr Spencer to be disciplined.

[84] Mr Rea also seemed to be submitting that the defendant did not misrepresent Mr Brown's attitude to the complainants in that the words *"go for it"* would be taken, in the circumstances, to mean that Mr Brown accepted the offer rather than that Mr Brown simply invited Mr Spencer to bring him the written offer for inspection.

[85] Towards the end of his closing submissions of 7 December 2012 Mr Rea put it:

> *"**Unsatisfactory conduct***
>
> *53 Mr Spencer accepted in his evidence that he heard "alarm bells", and for that reason he advised Ms Callaghan and Mr van Vliet to call Ms Holley or Mr Brown. Both Ms Callaghan and Mr van Vliet accepted in their evidence that Mr Spencer suggested they call Ms Holley or Mr Brown, but they did not do so. If they had done, then it is very likely that:*
>
> *(a) Ms Holley, if she had been called, would have told him that a net price of $70,000 would never be acceptable to Mr Brown, given Ms Holley's knowledge of that;*
> *(b) Mr Brown, if he had been called by Ms Callaghan or Mr van Vliet, would have said the same.*
>
> *54 Even though Mr Spencer suggested that these further enquiries be made, all risk of miscommunication would have been avoided if Mr Brown's written acceptance had been obtained. With the benefit of hindsight, it can certainly be appreciated that it would have been better if acceptance of the offer from the Goodchilds could have been deferred until Mr Spencer was able to meet with Mr Brown.*
>
> *55 It is accepted, in the circumstances, that a finding of unsatisfactory conduct is available under s.72(a). However, it is submitted that it should be recognised in any decision that Mr Spencer acted in good faith in conveying what he believed was Mr Brown's oral acceptance of the offer, and it was not unreasonable for Mr Spencer to have held that belief, given the reason for the miscommunication, which was unknown to Mr Spencer.*
>
> *56 Nevertheless, given the significance of obtaining confirmation, it fell short of a standard that Ms Callaghan and Mr van Vliet were entitled to expect, and Mr Spencer ought to have insisted that written confirmation was needed, given the possible risk of miscommunication.*
>
> ***Conclusion***
>
> *57 For the above reasons, it is submitted that the charges of misconduct ought not to be upheld, however, the Tribunal may be satisfied that Mr Spencer, although not guilty of misconduct, has engaged in unsatisfactory conduct, as outlined above ..."*

Our Conclusions

[86] We record our appreciation to both counsel for clear and relevant submissions in terms of the evidence.

[87] Simply put, Charge 1 alleges that, at material times, the defendant wilfully or recklessly breached rule 9.2 by putting undue or unfair pressure on the said vendors Mr van Vliet and Ms Callaghan. We feel that one could describe the relevant conduct of the defendant as putting some degree of pressure on those vendors to accept the offer tendered through him from Mr and Mrs Goodchild without altering it in any way.

However, we do not think that any such pressure could be regarded as undue or unfair.

[88] Charge 2 focuses on allegations from the complainants that the defendant failed to accurately put to Mr Brown the terms and effect of the verbal offer from Mr van Vliet and Ms Callaghan to buy Lot 44 and that, allegedly, the defendant misrepresented to them that Mr Brown had accepted their offer; and that should have been dealt with by a written agreement from Mr Brown with Mr van Vliet and Ms Callaghan as it was pivotal to their being prepared to sell their home property to Mr and Mrs Goodchild; and that the defendant should have disclosed that he was not knowledgeable about Mr Brown's requirements for selling his sections.

[89] It seems to us that the defendant passed on to the complainants the response of Mr Brown but that, on the balance of probabilities, he did not satisfactorily communicate their offer clearly to Mr Brown so that the response of Mr Brown was puzzling and not certain enough in terms of the importance to the complainants of being able to purchase Lot 44 before selling their house property.

[90] We also consider that although it may have led to the Goodchilds walking away from purchasing the complainants' property, the complainants' need to purchase Lot 44 was so pivotal to them that it needed to form a condition to be added to the Goodchilds' offer; i.e. the complainants needed to counter-offer that the sale to the Goodchilds was conditional on their purchasing Lot 44 from Mr Brown on their terms. However, it seems from the defendant's evidence that he was prepared to implement that, even though he felt it could lead to the Goodchilds withdrawing from the transaction. It also seems that the complainants elected to sign and accept the Goodchilds' offer in all the circumstances. We take into account that Mr van Vliet's said rider about $20,000 being deposited with Law North was an anathema to Mr Brown.

[91] For all that, we do not think that the conduct of the defendant in terms of the ingredients of charge 2 amounted to seriously incompetent or seriously negligent real estate agency work.

[92] Accordingly, we find that both these charges of misconduct must be dismissed but, in terms of s 110(4) of the Act, having heard these charges we are satisfied, on the balance of probabilities, that the defendant although not guilty of misconduct, has engaged in unsatisfactory conduct. This is broadly along the lines that he did not accurately communicate to Mr Brown the offer being made by the complainants regarding Lot 44. He should not have allowed them to be exposed to the consequence of having sold their property at a much lower price than they intended but being unable to recover that situation, from their point of view, by purchasing Lot 44 from Mr Brown on their particular terms. Also, the defendant should have liaised with Ms Holley to obtain a better grip on Mr Brown's listing instructions and conditions regarding the marketing of his sections and to understand Mr Brown's method of response to offers.

[93] All in all, in terms of the overall facts covered above, we consider that the defendant is guilty of unsatisfactory conduct but at rather the lower end of the scale so to speak. Presently, we would contemplate simply that he be fined $1250 to be payable to the Authority within one calendar month. However, the parties are entitled to make submissions about penalty so that we direct the Registrar to arrange a

fixture for that in the usual way. It would be sufficient if succinct typed submissions are tendered from each party on the day and responded to orally. However, if our current sentencing indication is acceptable to both parties and there is a joint memo to that effect from counsel, the matter can be concluded accordingly on the papers.

[94] In terms of drawing some principles out of the quite detailed facts of this case, we can only put it that real estate agents need to be scrupulous in having vendors make a decision on the risk factors of a particular offer situation. It is the duty of the licensee agent to spell out the advantages and disadvantages of a particular purchase offer in the light of his or her listing instructions and to spell out risks. The licensee must be careful not to be influenced by the prospect of commission for a successful sale. Where it is obvious that in the minds of the vendor principals there is a condition which must be met, in this case their purchase of Lot 44 from Mr Brown on certain terms, it is imprudent to allow them to be bound at law to selling their home when they do not have an enforceable contract to so purchase from Mr Brown. This would be so even if there had been no miscommunication about Mr Brown's attitude.

[95] It is understandable that even mature and experienced vendors will trust their agent. It is important that the agent act in an independent and professional manner and that the overall objectives of the vendors are paramount. The agent's desire for a sale, with consequential commission to the agent, must not become influencing factors in the advice from the agent, as a fiduciary, to his or her principal.

[96] 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 J Robson
Member

_____

Mr J Gaukrodger
Member