

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 91

READT 024/12

IN THE MATTER OF

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

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE 10054**

Prosecutor

AND

WILLIAM HUME

Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms N Dangen - Member

HEARD at WANGANUI on 14 July 2013 (but with subsequent written submissions)

DATE OF DECISION

17 October 2013

APPEARANCES

Mr L J Clancy, counsel for the prosecution
The defendant on his own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] William Hume (“the defendant”) faces charges of misconduct laid by Complaints Assessment Committee 10054 under ss.73(a), 73(b) and/or 73(c)(iii) of the Real Estate Agents Act 2008 (“Act”).

Charges

[2] The charges are detailed and cover a number of allegations but, in summary, it is alleged that the defendant:

- [a] threatened, and on one occasion assaulted, the principals of three real estate firms he worked for between 2008 and 2011 (five incidents: charges 1.1, 1.2, 1.3(b), 1.4 and 1.5(a));
- [b] took property from the office of his employer without authority (charge 1.3(a));
- [c] engaged in seriously negligent or incompetent real estate agency work and/or wilfully or recklessly engaged in conduct likely to bring the real

estate industry into disrepute. The evidential foundation for that allegation is a series of complaints to his employers and disciplinary action between 2007 and 2009 (charge 2).

[3] The charges read in full as follows:

Charge 1

Complaints Assessment Committee 10054 (CAC 10026) charges William Hume (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

1.1 *On or about 16 December 2008, the defendant threatened licensee Ms X, branch manager of X X Ltd, saying words to effect of:*

“You’ve f...d with me once too many. I am going to destroy you, I’m going to take you out”.

1.2 *On or about 22 December 2009, the defendant threatened licensee Steven Ellis, principal of X X Ltd, saying words to effect of:*

“I feel like coming over there and smashing you”, and “I don’t make threats I’m not prepared to carry out”.

1.3 *On or about 28 February 2011, the defendant:*

(a) *Took property from the offices X X Limited without authority, including:*

(i) *A deposit cheque for \$20,000.*

(ii) *An open homes register;*

(iii) *Keys.*

(b) *Assaulted Mr W, a licensee and director of X X Limited, by pushing or throwing him backwards on two occasions;*

1.4 *On or about 17 May 2011, the defendant threatened Mr W, saying words to effect of:*

“I’m going to escalate it you mother...er – I’m going to kill you”.

1.5 *On or about 27 July 2011, the defendant:*

(a) *Threatened Ms Q, a director of X X Limited, saying words to effect of:*

“I’m coming to get ya, pay me ya bastards, I’m gunna kill ya both”,

(b) *Went to the offices of X X Limited with a sign reading:*

“X stole \$30,000 from us”.

Charge 2

CAC 10054 further charges the defendant with misconduct under s.73(b) and/or s.73(c)(iii) of the Real Estate Agents Act 2008, in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work, and/or that he wilfully or recklessly engaged in conduct likely to bring the industry into disrepute, contrary to Rule 13.1 of the Rules of the Real Estate Institute of New Zealand Incorporated and Rule 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.

Particulars:

2.1 *Between June 2007 and December 2008, while working for X X Limited, the defendant was the subject of a number of complaints to his employer and disciplinary action, including:*

- (a) *The defendant was subject of a verbal complaint to his employer from a client who alleged that he had harassed her for payment in respect of ‘Open2View’ photographs the defendant had arranged to be taken;*
- (b) *The defendant was warned by his employer not to refer to a client as a “f...ing wanker” in front of colleagues;*
- (c) *On or around 6 August 2008, the defendant received a written warning from his employer for disruptive behaviour, altering new listing allocations without authority and threatening a colleague;*
- (d) *Between 8 and 10 September 2008, the defendant was subject of a written complaint from a client, Mark Agnew, and a verbal complaint from a solicitor, Sue McKnight, relating to a property at 194 Kaitoki Road;*
- (e) *On or about 16 September 2008, the defendant received a further warning from his employer following the complaint by Mark Agnew;*
- (f) *In or around November 2008, the defendant was asked to leave his employment with X X Limited following a disagreement between the defendant, the neighbour of a client and a tree feller in respect of a property at 32 Montgomery Road;*

2.2 *Between November 2008 and December 2009, while working for X X Limited, the defendant was the subject of a number of complaints to his employer and disciplinary action, including:*

- (a) *In or around March 2009, the defendant was subject of a written complaint from Ms X relating to, among other things, a call made by the defendant to Cynthia Mitchell-Anyon on 17 February 2009 during which he stated that he had told the Police that Ms X had sexually harassed him;*

- (b) *Between 23 and 24 May 2009, the defendant was subject of a complaint by Terry Gaskin to Ms X, alleging that the defendant had made disparaging comments about Ms X and that the defendant had been 'pushy and blunt' in asking about Mr Gaskin's listing of his property at 19 Smart Terrace with Ms X;*
- (c) *On or about 1 December 2009, the defendant was subject of a verbal complaint to his employer from a member of the public selling a property privately, who alleged that the defendant had intimidated her in trying to persuade her to list the property with him;*
- (d) *In or around December 2009, the defendant failed to present an offer to a client against the direct instructions of his employer."*

A Summary of Relevant Evidence for the Prosecution

Evidence of Mr W

[4] Mr W works as a licensed agent at X X X Wanganui trading as X X (Wanganui) Ltd. He has been a Justice of the Peace for about 30 years.

[5] In an affidavit of 3 August 2011 Mr W had deposed, inter alia, that the defendant had joined X X Ltd as a licensed salesperson in January 2011. The deponent advised of being informed about a number of complaints made against the defendant as a real estate agent in then recent times. The deponent had found the defendant's behaviour appropriate on the whole but there were complaints and some of them were unfounded.

[6] The deponent said the defendant became increasingly difficult to manage after he arranged for his then girlfriend to work with him as his personal assistant. The deponent alleged that the defendant became erratic with temper tantrums to the point of abuse, vindictiveness and threats to fellow staff so that the deponent wrote to the defendant about such behaviour on 27 January 2011.

[7] There were various difficulties between them and the deponent decided, with his co-owner and life partner (Ms Q), that the defendant must fit in with their method of work or leave the business. He arranged a 6.00 pm meeting in his office on 28 February 2011 with the defendant who arrived early, with his two young children, and asked if he was fired. He went into a rage and started to clear out files. The deponent then noticed a deposit cheque for \$20,000 in the defendant's top drawer. The defendant picked it up and waved it in front of the deponent and said "*this is money that you are never going to f...ing see*" and put the cheque in his top pocket. He removed data belonging to the employer. The deponent tried to stop him but was sworn at by the defendant who suddenly gripped both the deponent's arms, shook him twice, and forcibly threw him backwards shouting abuse at him. That was followed by subsequent threatening statements to the deponent from the defendant. The deponent was blocking the defendant's way at one stage and the defendant suddenly grabbed the deponent and threw him against the photocopier while still abusing him. The Police were called.

[8] The defendant made it clear to the deponent that, if he made a complaint to the Police, the defendant would file a counter-complaint that, the deponent had attacked the defendant's daughter; and that is denied by the deponent.

[9] The deponent detailed allegations that the defendant had interfered with a number of advertising signs at various properties which the deponent's firm was marketing. He gave evidence about being unable to obtain from the defendant the said \$20,000 deposit cheque which should have been paid into the employer's trust account.

[10] On 17 May 2011 Mr W worked at X Wanganui as its licensed agent. He said that at 9.39 am that day he answered the telephone and immediately recognised the voice of the defendant who, inter alia, threatened to kill him and his staff and then hung up. Mr W produced Telecom evidence of such a telephone call as coming from the defendant's telephone number. Mr W was so shaken by this telephone call that, a short while later that morning, he advised the Authority of it by email .

[11] The deponent had Police issue a trespass notice against the defendant to stay away from the deponent's home and office as a result of the defendant and his two children being at the deponent's home on 27 July 2011 waving placards reading "*X stole \$30,000 off us*".

[12] The deponent gave quite some evidence about the distress and stress experienced by him and his said business and life partner Ms Q due to the threatening conduct of the defendant.

[13] Mr W was thoroughly cross-examined by the defendant and by Mr Clancy. It appeared that much of the defendant's ill-will towards Mr W is because the defendant considers that Mr W owes him \$30,000 which has been taxed to the defendant. The latter seemed to regard Mr W as untruthful, and as exaggerating and misunderstanding the defendant's conduct.

[14] Although the defendant kept threatening to walk out of the hearing before us on the basis that he felt he could not obtain a fair hearing, we noted that he is fluent and perceptive.

The Evidence of Ms Ms Q

[15] Ms Q is the co-shareholder of X X Ltd trading under the X banner in Wanganui. She owns her interest in that business with her life partner, the said Mr W, who was the license holder. She deals with office management. Her evidence was along the same lines as that of Mr W. She asserted that, in the course of incidents described by Mr W, the defendant acted violently. She outlined, in particular, how he had on 27 July 2011 threatened her by saying words to the effect "*I'm coming to get ya, pay me ya bastards, I'm gunna kill you both*".

Evidence from Mr Steven R Ellis

[16] Mr Ellis is the co-owner of X X Ltd, a member of the LJ Hooker Group, trading in Wanganui. He gave quite detailed evidence about working with the defendant over November 2008 to May 2011. He said that the defendant was contracted to that business as a licensed salesperson on 24 November 2008. He provided a quite detailed "*summary*" of the defendant's "*performance*", as he described it, during that period and covered various alleged incidents referred to in the charges. He said that in November 2009 he received complaints from clients who said they were being harassed by the defendant. He referred to such a complaint of 1 December 2009 being where the complainant alleged she had been intimidated by the defendant.

[17] All that caused the relationship between the witness and the defendant to deteriorate. Matters came to a head on 22 December 2009 when the defendant wanted an early payment of commission due to him and threatened to “smash” the witness. This led to Mr Ellis terminating the defendant’s employment and the defendant responded to that with profuse swearing. From the defendant’s cross-examination of Mr Ellis, there now seems little hostility between him and the defendant.

Evidence of Mr Price

[18] Mr Price was a salesperson working with the defendant as his personal assistant from about January 2010. He gave evidence of various complaints being made after a while against the defendant. He noted that the defendant’s behaviour with clients varied from being “brilliant and happy” to that of a swearing, rude and aggressive person, and he generally detailed that sort of conduct.

[19] Also, Mr Price stated that he was at his office on 27 July 2011 and observed the defendant go to the X office. He saw Ms Q answer the telephone and become hysterical and crying and say that the staff had just been threatened for their lives by the defendant who was going to kill them both, namely, Mr W and her.

[20] Mr Price was present when the Police attended. He understood that the defendant had been arrested by the Police on Friday 29 July 2011 but, the next day after that at about 1.50 pm, Mr Price received a telephone call from the defendant who sounded happy and denied that he had threatened X and X on 27 July 2011 and said he had merely rung X and asked if his (the defendant’s) girlfriend was there and hung up.

The Evidence of Susan May Ellis

[21] Mrs S M Ellis is a co-owner with her husband Steven of X X Ltd and she is a licensed salesperson. In particular, she stated that on 22 December 2009 the defendant really “let rip” again in the office and she heard a loud noise, which she recognised as the defendant’s voice, and came from her office to see what was going on. She said “he brushed past me and headed for the door with a threat of “I feel like smashing you” directed at my husband Steve. Steve asked him if that was a threat, to which Bill said he didn’t make threats that he was not prepared to carry out. ...”

[22] We noted that Mrs Ellis was rather upset at giving her evidence and she said that her husband, Mr Steven Ellis, had not wanted to be involved in this case.

The Evidence of Ms X

[23] Ms X is a licensed agent who works for X at Wanganui as the branch manager. She described how the defendant joined her in that office in June 2007. She described his character in some detail and referred to him harassing a particular vendor and being abusive of others. By July 2008 she gave the defendant a written warning about his poor behaviour. She referred to various incidents of bad behaviour and said that in early December 2008 the defendant was fired. She said that “not long after he left, William rang me on 16 December 2008 at 2.15 pm on my mobile and threatened me. He said “you’ve f...ed with me once to many. I am going to destroy you. I’m going to take you out”. The Police were informed.

[24] The witness also referred to unpleasant allegations made against her by the defendant and she described other harassment-type conduct alleged against the defendant. She said that the defendant's behaviour caused her to become so stressed that she developed certain heart problems.

The Evidence of Ms C Gerard

[25] There was also extensive evidence from Ms Charlotte Gerard as an investigator for the Authority. Ms Gerard is a former Police Officer and she adduced to us evidence of the defendant being convicted on 11 December 2012 in terms of charge 1.5(a). Ms Gerrard provided documents regarding a complaint received by the Authority from Mr W on 21 March 2011 about the defendant's conduct and about the investigation of those issues. Inter alia, she stated that on 25 September 2012 the Authority made enquiries with the registrar of the Wanganui District Court and received confirmation that on 30 April 2012 the defendant had been convicted on a charge of threatening to injure (since confirmed on appeal) and the conviction related to the events of 27 July 2011 described by Ms Q before us and covered above.

[26] All the prosecution witnesses were carefully cross-examined by the defendant.

Further Evidence for the Prosecution

[27] Then, by consent, there were other various briefs for the prosecution which generally came from persons who had dealt with the defendant as a real estate agent and found him rude, pushy, disparaging about others, a user of profane language, quick to anger, and appearing to be of a violent nature.

[28] We were provided with a statement of evidence from a Ms S Lee Gammage, of Wanganui, who worked at X X Ltd at a time when the defendant also worked there under Mr and Mrs Ellis referred to above as the owners of the business. She said that at about 8.30 am on 22 December 2009 she saw the defendant come to the office seeming to be rather disgruntled and she overheard him talking about not being paid his commission to someone in the office and becoming very agitated. Apparently he left the office and returned 10 or 15 minutes later even more angry and using profane language about his discontent. Ms Gammage then walked into the reception area and heard the defendant expressing his concerns and observed that the defendant spoke of using violence. The defendant then advised a member of the public never to deal with Mr and Mrs Ellis.

[29] There is a statement of evidence from a Mr A T Gaskin, of Wanganui, who in May 2009 had listed his Wanganui property for sale with Ms X of X, Wanganui. He recalled receiving a number of telephone calls from the defendant, who then worked with LJ Hookers, and said the defendant was very rude and made disparaging remarks about Ms X. The witness advised Ms X of this by telephone. The witness says he was horrified by the defendant's behaviour and that Ms X was doing a very good job for him during a very difficult time.

[30] There was also a short brief of evidence from a Mr M Agnew of Wanganui. In early September 2008 he and his wife had listed their then Wanganui property with X at Wanganui and were also seeking to purchase a property. That brought them into contact with the defendant who was then working at X. Mr Agnew said "*our dealings with him were most unsatisfactory and led me to write a letter to the manager at X X Xin Wanganui*". That letter was dated 10 September 2008 and seems to have been received by Ms X then the manager at X Wanganui.

The Evidence of the Defendant

[31] The defendant had not provided a written brief of evidence but gave quite full oral evidence.

[32] Simply put, the effect of the defendant's evidence is to deny that most of the allegations covered in the charge, and referred to by prosecution witnesses, did not happen or were misunderstood and misinterpreted. The defendant is scathing in his attitude to Mr W whom he regards as the cause and perpetrator of all these issues which he considers, arise over disputes between Mr W and the defendant over money. The defendant maintains that he has a Court judgment against Mr W for a substantial sum because commissions due to the defendant were not paid to him when he worked for Mr W.

[33] The defendant seemed to be saying that his threatening and abusive telephone calls did not happen or were misunderstood. He regards himself as a busy and dedicated real estate agent who did not like being fired and would only push or shove people if they tried to stop him.

[34] The defendant insists that Mr W has simply made up allegations and stories about the defendant which are all about their disputes over money.

[35] The defendant felt that even Ms Q had invented her evidence against him and said that it was ridiculous that he would have thought of threatening to kill her or anybody else and that the allegations against him, which we have covered above, are nonsense. He seemed to be saying that, at one stage, Ms Q physically tried to rip off his shirt. He asserted a number of times that Mr W has no credibility. He asserted *"there is no way I have ever threatened to kill Ms Q."*

[36] Despite the most detailed and careful cross-examination of him by Mr Clancy the defendant adhered to that theme. He simply does not accept the allegations against him i.e. he does not accept the content of the charges laid against him by the Authority.

[37] Inter alia, he put it that his various statements that Ms X had sexually harassed him were *"just a joke and a bit of fun"*. However he accepts that it was not the best of taste type of joke. The defendant said it was simply not true that clients could say that he had harassed or threatened them in any way at any time. However, a little later in his evidence when Mr Clancy put the question to him that *"the reality is that you have been subject to an ongoing string of complaints when working with LJ Hooker/X in Wanganui regarding your conduct and practices as a real estate agent"*, the defendant responded *"well, I'm learning"*. He also insisted that he had never stolen anything or bashed anyone or threatened anyone and that those who said he had were *"just whingers"*. He said all he ever sought to do as a real estate agent was to *"seek deals"*. He said he never threatened to smash Mr Ellis but was just letting him know how he (the defendant) felt. He maintained that he could be assertive, but did not raise his voice when being that way. He stated *"I give 100%. If people muck me around, I get unhappy and that's all it is"*.

[38] Inter alia, it was put to the defendant that he shows no remorse for his conduct; and he responded *"I have no remorse as I did not do it"*. He seemed to be apologising to Mr Steve Ellis for having lost his rag with him and regrets the way he spoke to Mr Ellis and to Ms X.

[39] With regard to the defendant's said conviction it was put to him that he showed no insight into the seriousness of that. He maintained that the events in question simply did not happen and that all these problems have been manipulated against him (the defendant) by Mr W.

The Evidence of Mr Hocquard

[40] Mr Hocquard gave evidence in support of the defendant who has worked for him for two and a half years without any issues. Mr Hocquard knew of all the complaints and allegations against the defendant and said he had done his best to check them out but he could only say that he found the defendant a very good salesperson and "a nice bloke". He had no issues at all with or about the defendant and he was surprised at the allegations made against the defendant. However, he acknowledged that disputes over money create issues. He understood there was a dispute by the defendant that he was still owed significant money by Mr W.

The Defendant's Walk-out from this Case

[41] We record that about an hour before the conclusion of the hearing before us on 15 July 2013, the defendant stormed out of the hearing on the basis that we were "twisting things around" – although that comment may have been directed more to Mr Clancy than to us. Accordingly, we sent the defendant a transcript of anything said at the hearing after his departure. We received some submissions from him on 28 August 2013 which combine submissions and evidence and we refer further to them below.

Issues

Charge 1

[42] In respect of charge 1, it is for the Committee to prove, on the balance of probabilities, that the various threats, the assault and the taking of property from the office of X X Ltd occurred as matters of fact.

[43] If the facts are established, the question arises whether any or all of the incidents amount to disgraceful conduct within the meaning of s.73(a) of the Act.

[44] It is settled law that misconduct under s.73(a) need not involve real estate agency work as defined by s.4 of the Act, although there will need to be a sufficient nexus between the conduct alleged and the licensee's fitness to perform real estate agency work for a finding of misconduct to be appropriate, refer *S v CAC and B* [2010] NZREADT 13 at [19].

[45] Section 73(a) of the Act provides:

“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 ...”

[46] We considered the ambit of the term “disgraceful” in *CAC v Downtown Apartments Ltd* [2010] NZREADT 06 where we held:

“[55] The word disgraceful is in no sense a term of art. In accordance with the usual rules it is 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.

[56] The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess. See Blake v The PCC [1997] 1 NZLR 71].

[57] The ‘reasonable person’ is a legal fiction of common law representing an objective standard against which individual conduct can be measured but under s.73(a) that reasonable person is qualified to be an agent of good standing or a member of the public.

[58] 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.

[59] So, in summary, the Tribunal must find on balance of probabilities that the conduct of the ... defendant represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public.”

[47] Section 73(a) therefore allows for disciplinary findings to be made in respect of conduct which, while not involving real estate agency work, would be considered disgraceful by reasonable members of the public and/or agents of good standing.

[48] In *CAC v Arthur Subritzky* [2012] NZREADT 20 we concluded that it was disgraceful conduct for two licensees to, between them, send a radically offensive text message to a process server and behave in a verbally and physically aggressive manner towards a second process server, notwithstanding that neither licensee was engaged in real estate agency work at the time of the conduct.

[49] We held as follows in the *Arthur Subritzky* case:

“[20] We find there is a sufficient nexus between the defendant’s conduct as proved [threatening a process server and later sending racially abusive text messages to the same person] and his fitness to conduct real estate agency work.

[21] The nature of real estate work is, at times, stressful involving disputes and conflict in respect of transactions which are of great importance to the parties involved. Licensees must be able to be trusted to conduct themselves in a calm and professional manner at all times if consumer interests are to be promoted and protected.

[22] The issue in the present case is whether there has been disgraceful conduct i.e. a marked or serious departure from the standards of an agent of good standing or of a reasonable member of the public.

[23] In respect of the said charges against Arthur Subritzky, it is accepted that the incident took place away from the defendant's place of business as a licensee and involved documents not directly related to real estate agency work. However, agents of good standing and reasonable members of the public would, nevertheless, consider it disgraceful for a licensee to threaten a process server in the manner alleged and, particularly, to send racially abusive text messages to a person attempting to do his job.

[24] Licensees should be expected to conduct themselves professionally in the course of business, both while performing real estate agency work and otherwise. The recourse to personal abuse by the defendant was disgraceful."

[50] Mr Clancy submits for the prosecution that the misconduct alleged against Mr Hume is markedly more serious than that in *Subritzky*; that the allegations set out in charge 1 relate to four separate threats of violence, addressed to four different people, over a period of nearly three years. On one occasion, it is alleged that Mr Hume went further, assaulting Mr W (his real estate principal at the time) by pushing or throwing him backwards; and there is also the allegation of taking property – including a deposit cheque for \$20,000 – from his principal's office without authority.

[51] Mr Clancy submitted that if we find any or all of factual allegations in charge 1 proved, a finding of misconduct under s.73(c) must follow.

Charge 2

[52] Charge 2 alleges misconduct on the grounds of seriously incompetent or seriously negligent real estate agency work, and/or wilful or reckless breach of the REINZ Rules/Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.

[53] Charge 2.1 relates to the period June 2007 to December 2008, when the defendant was employed as a salesperson with X X Ltd (X). Charge 2.2 relates to the period November 2008 to December 2009, when Mr Hume was a salesperson with X X Ltd (L J Hooker).

[54] The charges detail a series of complaints to X and L J Hooker, and disciplinary action taken by both firms. The over-arching allegation is that those complaints/instances of disciplinary action establish that the defendant was seriously incompetent or negligent in his practice as a salesperson, and/or that he wilfully or recklessly engaged in behaviour likely to bring the industry into disrepute.

[55] 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 (or a wilful/reckless breach of the Rules). Merely negligent or incompetent real estate agency work will be unsatisfactory conduct under s.72(c), not misconduct.

[56] We considered the scope of misconduct arising from serious negligence 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 ...”

[57] Mr Clancy submits that, in this case, if we find charge 2 proved as a matter of fact, a finding of serious negligence/incompetence as per *Jenner* and *Pillai* would be available. The nature of the conduct alleged against the defendant is such that, if proved, it portrays indifference and an abuse of the privileges accompanying being licensed as a real estate salesperson.

[58] In terms of the allegation that the defendant’s conduct was a wilful/reckless breach of the requirement not to bring the industry into disrepute, Mr Clancy notes that breaches of the Rules which are not committed intentionally will, nevertheless, usually amount to unsatisfactory conduct under s.72(b), subject to a defence of total absence of fault.

[59] 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.”

[60] In summary, the prosecution submits that a finding of misconduct on charge 2 would be justified on any/all of the grounds alleged, namely:

- [a] Serious negligence;
- [b] Serious incompetence;
- [c] Wilful/reckless breach of the REINZ Rules/Rules.

Application to Delete Charge 1.5(a) and add New Charge 3

[61] At the start of the hearing the prosecution applied to amend charge 1.5(a). A criminal prosecution relating to the same facts as charge 1.5(a) led to the defendant's conviction in the Wanganui District Court on 30 April 2012 on a summary charge of threatening to injure knowing that his conduct was likely to intimidate. Mr Hume brought an appeal against the conviction, but the appeal was dismissed by Dobson J in the High Court at Wanganui on 18 December 2012. The charge related to events of 27 July 2011 described above. By way of background, Dobson J stated:

"[3] Mr Hume admitted that the telephone conversation in which the threat was allegedly conveyed did take place, but denied that it contained the words complained of. It occurred on 27 July 2011 on which day he rang the office of the Wanganui real estate agents that had formerly employed him, and spoke to a co-owner, the complainant, Ms Q. She complained that Mr Hume said "I'm coming to get ya. Pay me ya bastards, I'm gonna kill ya both". However Mr Hume gave evidence that the words he used were "I'll speak to my girlfriend, thanks".

[4] Mr Hume apparently has a heavy Scottish accent. One of the subsidiary criticisms Mr Ross argued in respect of the Judge's decision was that he failed to consider the prospects of the complainant mishearing what was said. However, it could not seriously be suggested that Mr Hume's version of the utterance was misheard as the words complained of when the two versions are so fundamentally different. The issue is therefore whether the Police proved use of the words complained of.

[5] The Judge characterised the former employment relationship as dysfunctional and there appears to have been on-going and relatively bitter animosity between Mr Hume and the employers, the complainant and her partner, Mr W.

[6] The complainant gave evidence that Mr Hume made the threat in a serious tone, and that it immediately made her frightened for her life. Straight after the call, she went to another part of their office to speak to Mr W, and the Judge accepted evidence from Mr W of her relaying to him what had been said, and the extent to which she was frightened by what had been said.

[7] A third witness, Mr Price, gave evidence of observing the complainant take the call, her reaction to it, and of her going in to speak with her partner in a distressed state immediately after the call.

[8] In assessing whether the Police had proven beyond reasonable doubt that the threat complained of had been uttered, the Judge relied on the combination of the first-hand recollection of the complainant, and the observations of her at the time by her partner and Mr Price. The Judge relied particularly on Mr Price as an objective and independent witness whom the Judge characterised as reliable."

[62] Dobson J concluded his decision as follows:

“[28] ... whilst Mr Hume is fearful that the conviction may result in his being banned from working as a real estate agent, that depends on a discretionary decision that may or may not be made adverse to him and that consequence is by no means certain.

[29] On the basis of the facts as found by the Judge, this was not trifling offending. However much an accused person may have thought he or she was provoked into a threatening exchange, making a threat to kill is a serious matter. In all usual circumstances, a conviction would be necessary to reflect the seriousness of it.

[30] To make out that the adverse consequences are disproportionate would require, at the very least, the Court to be satisfied that loss of a valued vocation would be entirely and permanently lost. That is not the case here.

[31] Additionally, the Judge was troubled when considering the prospect of a discharge that Mr Hume had done nothing to acknowledge the offending and showed nothing in the nature of remorse. That is a relevant consideration in all sentencings, and has its place in assessing the appropriateness of a discharge without conviction ...”

[63] The prosecution, therefore, seeks leave to file an amended charge, substituting an allegation under s.73(d) (which relates to criminal convictions) rather than s.73(a) (disgraceful conduct). The amendment would be to delete charge 1.5(a) and add a new charge 3 in the following terms:

“Charge 3

CAC 10054 further charges the defendant with misconduct under s.73(d) of the Real Estate Agents Act 2008, in that his conduct constitutes an offence for which the defendant has been convicted, being an offence that reflects adversely on the defendant’s fitness to be a licensee.

Particulars:

Conviction for threatening to injure, contrary to s.21(1)(a) of the Summary Offences Act 1981, in the Wanganui District Court on 30 April 2012.”

[64] We allow that amendment.

Conduct Prior to the Act coming into Force

[65] The conduct alleged in this case spans a period both before and after the Act came into force on 17 November 2009. Section 172 of the Act therefore applies.

[66] As we have held on a number of occasions, in cases in which a defendant was licensed or approved under the Real Estate Agents Act 1976 at the time of the conduct alleged, and where the defendant has not been dealt with under the 1976 Act in respect of that conduct, s.172 creates a three step process (see *CAC v Dodd*):

[a] Step 1: Could the defendant have been complained about or charged under the 1976 Act in respect of the conduct?

- [b] Step 2: If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?
- [c] Step 3: If so, only orders which could have been made against the defendant under the 1976 Act in respect of the conduct may be made.

[67] The defendant was, at the time of all the conduct alleged, an approved salesperson under the 1976 Act (or a licensed salesperson under the Act). He has not been dealt with under the 1976 Act in respect of any of the conduct in issue. Given the nature of the allegations, the defendant could clearly have been complained about or charged under the 1976 Act.

[68] Accordingly, we may consider all of the charges against the defendant notwithstanding that some of the conduct alleged occurred before November 2009. Section 172 does, however, limit any penalty that might be imposed by us for conduct pre-dating the Act.

[69] Should we find misconduct proved, the issue of penalty arises. As set out above, for conduct before November 2009, only orders which could have been made against the defendant under the 1976 Act are available. For conduct after November 2009, the full range of penalty orders under the Act is available. It is our general practice, should misconduct be found proved, to consider the issue of penalty separately, after our decision on liability is available.

The Final Submissions from Mr Clancy for the Prosecution

[70] Mr Clancy put it that the first charge breaks down into three parts. First, the defendant's conversation with Ms X on 16 December 2008 and his confrontational conversation with Mr Ellis on 22 December 2009 at the LJ Hooker office. The third part relates to allegations made by Mr W and his partner relating to the 28 February 2011 physical altercation at the X office.

[71] On 17 May 2011 there was the telephone call and the threat made over that telephone. Then there was the placard incident of 27 July 2011.

[72] Mr Clancy emphasises that, with regard to the first two parts of charge 1, both the conversations were witnessed not only by the primary complainants, Ms X and Mr Ellis, but in respect of Ms X by Mrs Ellis and in respect of Mr Ellis by Mrs Ellis. We note that the defendant accepts that there were those two confrontations and that he stepped over the line and was inappropriate in the way he spoke to Ms X and Mr Ellis. We agree with Mr Clancy that both Ms X and Mr Ellis were compelling and credible witnesses, clear and calm in their evidence, and unshaken under cross-examination. Ms X said that the defendant told her that she had "*f...d with him once too many times*" and "*I'm going to destroy you, I'm going to take you out*". Similarly, Mr Ellis said that the defendant told him "*I feel like coming over there and smashing you. I don't make threats I'm not prepared to carry out*".

[73] As Mr Clancy put it, the evidence shows a theme as to the way the defendant conducts himself when he becomes angry and is challenged. He submits that the defendant's conduct was disgraceful conduct for a licensed real estate salesperson. He put it that we have previously said that the nature of real estate work can be stressful and licensees must be able to be trusted and to conduct themselves in a calm and professional manner at all times, and consumer interests must be promoted and protected. He emphasised that the defendant has made serious threats to carry

out physical violence and some of that conduct has been observed by members of the public. We agree.

[74] Mr Clancy then referred to the evidence about the issues involving Mr W and Ms Q and to the defendant's inappropriate and threatening and aggressive behaviour to them.

[75] Mr Clancy points out that the defendant did not really seem to dispute that he took a deposit cheque, an open homes register, and keys as described above; but he endeavoured to give reasons for doing that. He told Mr W that he was not going to see the cheque and the defendant physically took it with him. We agree from the evidence that the cheque, the open homes register, and the keys were property which should have been in the possession of X Wanganui, and it was not open to the defendant to unilaterally decide to take those items with him.

[76] There is Mr W's evidence that the defendant physically pushed or threw him backwards on at least two occasions, as well as making a number of verbal threats, during the particular altercation described by Mr W. As Mr Clancy says that conduct is consistent with the way the defendant acted towards Ms X and Mr Ellis. There is also the telephone call of 17 May 2011 when the defendant threatened to kill Mr W.

[77] With regard to the charge 1.5, there is no dispute about the fact that the defendant went to the offices of X with a sign stating that X stole \$30,000 from him. Mr Clancy submits that amounts to disgraceful conduct.

[78] With regard to the added charge 3, the defendant accepts that he was convicted in the District Court and that his appeal to the High Court was dismissed. The issue is whether that offence reflects adversely on the defendant's fitness to be a licensee. Mr Clancy submits that, obviously, it must as the defendant was convicted of having made a threat to kill a woman who was a previous employer of his. Also, Justice Dobson in the High Court noted that the offending was not trifling and that, no matter what the background circumstances, making a threat to kill is a serious matter. Also, the defendant showed no remorse or insight into that offending. Accordingly, Mr Clancy puts it that offending shows that the defendant is not fit to be a licensee.

[79] With regard to charge 2, there is a list at 2.1 and 2.2 of a number of complaints against the defendant made by members of the public or by employers. Also, complaints were made by both Ms X of X and, later, by Mr Ellis of LJ Hooker; and the defendant did not really seem to dispute the content of those complaints although he had a different version of events and had some explanations. Mr Clancy puts it that, in any case, the allegations in charge 2 are more about the pattern of complaints and the disciplinary action taken by two successive employers. Mr Clancy submits that the defendant acted either wilfully or recklessly in conduct likely to bring the industry into dispute, or his conduct was seriously incompetent or seriously impacted upon real estate agency work.

[80] Mr Clancy puts it that what emerges from the overall evidence in this case is a picture of a licensed salesperson who does not control his temper and reacts to issues arising in the course of business with aggression and threats. Mr Clancy submits that is unprofessional conduct.

The Final Response of the Defendant (from his post-hearing written submissions)

[81] The defendant again criticised integrity of Mr W. Also, he seemed to be asserting that the investigator, Ms Charlotte Gerard referred to above, had not adduced much relevant evidence and he continued *“I also have concerns at the disgraceful action of the investigator to bring only half the evidence they had i.e. not to mention the fact that they had interviewed the people that had written the cheque that I was accused of stealing and knew full well that I was acting on their instructions by returning their post dated cheque. As well as not presenting the evidence on my children, and that of the Child Protection Officer that also interviewed my children. Not calling witnesses that they knew would tell a different story to what Mr W and his supporters were telling ...”*

[82] He also put it that Mr and Mrs Ellis had no animosity to him and had not wished to be involved in this case. He also maintained that Ms X did not make a complaint and was unhappy at the suggestion that the defendant had caused her heart condition.

[83] He produced a number of testimonials from contented vendors and purchasers whom he had serviced.

[84] He referred to Mr W owing him much money and put it that Mr W should be paying him costs over these proceedings. He then stated as follows:

“Charge 1: Mr Ellis did not make a complaint to the REAA. He simply provided a statement of his account of a historic argument that had been long forgotten about by both parties. The REAA investigators were pointed in his direction by Mr W as it suited his cause and campaign of discrediting me. It was clear that I had phoned Steve Ellis and asked to see him at his home, so it was a private matter. The later argument took place in the very rear of the office and out of ear shot of the public. A week later Steve and I shook hands like men do and moved on.

Charge 2: A phone call to Ms X followed by another 5 minutes later to apologise. She also did not make a complaint but again the REAA were sent in her direction. This call was not responsible for her heart condition as claimed by Mr Clancy and reported in the paper. There is no medical evidence to support this and it is a well known fact that since that Anne has undergone extensive ... surgery which would have been unlikely if there was a heart condition.

Charge 3: Mr W was fully aware of both arguments as I discussed these when I started at X, but he was not concerned. Now it suits his vendetta he is only to happy to use them and the REAA.

The claim by Mr W that he was assaulted by me on the 28th February 2011 is clearly another of his attempts to smear my name and was planned as was verified by Steven Price in court. The Police did not believe him either ...

Also Mr W tried to con again by claiming he was threatened by me on the phone. My phone records clearly show no such call was made. Mr Clancy tried to claim my phone record was incorrect. I have enclosed the record for the whole month of all calls made and it clearly shows without a doubt that once again Mr W's claims are false.

As far as going to the office with placards, Mr Clancy once again attempts to mislead the court. I, in fact, went outside the building next door (which was unoccupied) to protest with my kids as I had not been paid (and I have every right to). If I was a plumber or tradesmen I would have done the same. I was owed 3 months pay and I had kids to feed, mortgage commitments and bills to pay. I was left no choice as I believe I am the victim of his FRAUD and THEFT.

Mr W has been trying to use historical stuff that has been long forgotten about to show a pattern of behaviour, but sadly is guilty of even worse behaviour by not paying for work done and using others in any way he can to divert attention from his own underhand actions.

Charge 4: Mr Clancy then tries to draw comparison with the Subritsky case and playing the race card. There is no comparison. He also claimed that I made serious threats involving violence and threats to kill. This I am sure Mr Clancy already knows is completely untrue.

Mr Clancy tries to suggest that I stole cheque, when in fact he knows very well that the REAA investigator spoke to the cheque owner and was told that she had given very clear instructions that the cheque was not to be banked. Mr W knew this because he asked me more than once and was told it was not to be banked and having experienced his wilful disregard for customers cheques and instructions and along with his obvious financial situation there was no way I was going to allow him to put my client in a precarious situation.

...

(On reflection I should have had him charged with assault on a child). A far as keys go I had signed for them and they were my responsibility and my first rule is to always to do what is best for my vendor, and leaving the keys with him would have let my vendor down. In fact the Police wrongly returned the keys to Mr W which made it very hard for my vendors to get them back and some even had to pay Mr W to get their own keys back!"

Our Conclusions

[85] We assess the evidence for the prosecution as honest and credible. Accordingly, we find the charges proven on the balance of probability except that we are not satisfied that the evidence shows seriously negligent or incompetent real estate agency work on the part of the defendant. Otherwise, we find all the charges and their ingredients proved; so that misconduct has been proved.

[86] We are very conscious of the evidence of Mr Hocquard covered above that the defendant has worked for him as a licensee over the last two and a half years or so without any issues. That could indicate that revocation of the defendant's licence might not be appropriate. There are testimonials of support for the defendant. On the other hand, the defendant's threatening and aggressive conduct described above indicates that he is a thoroughly unsuitable character to deal with the public. Should a man of his volatile temperament be trusted in the home of a vendor?

[87] However, in the usual way, penalty needs to be now addressed. We direct the Registrar to arrange a directions hearing by telephone of the parties with the chairman to facilitate a timetable towards a hearing on penalty; unless penalty can be

dealt with “*on the papers*”. It may be that penalty orders should focus on the defendant’s health and on educational and supervisory aspects.

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

Judge P F Barber
Chairperson

Mr G Denley
Member

Ms N Dangen
Member