

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2013] NZREADT 93

READT 53/12

**IN THE MATTER OF** charges under s.91 of the Real Estate Agents Act 2008

**BETWEEN** **THE REAL ESTATE AGENTS AUTHORITY (per CAC 10073)**

Prosecutor

**AND** **KUM (KENNY) CHO** of Auckland licensed salesperson

Defendant

**MEMBERS OF TRIBUNAL**

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

**HEARD** at AUCKLAND on 12 September 2013

**DATE OF DECISION** 4 November 2013

**APPEARANCES**

Ms J F MacGibbon, counsel for the prosecution  
The defendant on his own behalf (but with Mr Geum-Hwa Lee, his interpreter)

**DECISION OF THE TRIBUNAL**

***The Charge against the Defendant***

[1] Licensed salesperson Kum (Kenny) Cho (“the defendant”) faces two charges of misconduct, under s.73(c)(ii) of the Real Estate Agents Act 2008 (“the Act”), brought by Complaints Assessment Committee 10073. The two charges allege wilful or reckless breach of ss.63 and 64 of the Real Estate Agents Act 1976 (“the 1976 Act”). The precise charges against the defendant were laid on 20 August 2012 and read:

*“1.1 Complaints Assessment Committee 10073 (Committee) charges Kum (Kenny) Cho (defendant) with misconduct under s.73(c)(ii) of the Real Estate Agents Act 2008 in that his conduct consisted of a wilful or reckless contravention of s.63 of the Real Estate Agents Act 1976.*

**Particulars:**

*At all material times the defendant was a salesperson working for Property West Ltd trading as First National Henderson.*

*Antsarah Limited (in liquidation) (vendor) listed its property at 66 Sungrove Rise, Sunnyvale (property), for sale with First National Henderson.*

*The defendant was the selling agent on the sale of the property to Hyoung Soo Kim and Mee Young Cho (purchasers) by way of agreement for sale and purchase dated 5 March 2009.*

*The defendant entered into an agreement with the purchasers by which he provided them with money to complete the purchase in return for a share of the profit when the purchasers sold the property.*

*The defendant did not obtain the consent of the vendor to this agreement.*

- 1.2 *The Committee further charges the defendant with misconduct under s.73(c)(ii) of the Real Estate Agents Act 2008 in that his conduct consisted of a wilful or reckless contravention of s.64 of the Real Estate Agents Act 1976.*

*Particulars:*

*The Committee repeats the particulars set out in relation to the charge above and says further that the defendant did not supply to the vendor a valuation of the property made by an independent registered valuer.”*

**The Facts**

[2] The essential facts are not in dispute and an agreed summary of facts reads as follows:

**“Agreed Summary of Facts**

- 1.1 *At all material times, the defendant was a licensed or approved salesperson working for Property West Ltd trading as First National Henderson.*
- 1.2 *Antsarah Ltd (in liquidation) (vendor) listed its property at 66 Sungrove Rise, Sunnyvale (property), for sale with First National Henderson.*
- 1.3 *The defendant acted as salesperson on a sale of the property from the vendor to Hyoung Soo Kim and Mee Young Cho (purchasers) by way of an agreement for sale and purchase dated 5 March 2009.*
- 1.4 *The purchasers were good friends of the defendant.*
- 1.5 *The defendant loaned funds to the purchasers to enable them to complete the purchase of the property.*
- 1.6 *The purchasers were to repay the loan to the defendant from the proceeds of sale when the property was sold.*
- 1.7 *The defendant did not disclose the matters set out at [1.5] and [1.6] above to the vendor and did not obtain the vendor’s consent.*
- 1.8 *The defendant did not provide the vendor with a valuation of the property made by an independent registered valuer.*

1.9 *The sale from the vendor to the purchasers settled and the property was transferred into the purchasers' names."*

### **Additional Evidence Heard by Us**

#### **Evidence by the Defendant**

[3] The defendant emphasised that he and the purchasers are very good friends and are all part of the Korean Community and Church. The defendant is a leader in that Community in Auckland. Indeed, he is its vice-president. He emphasises that when the purchasers contracted to buy the property, it was never intended that he become involved.

[4] However, one of the purchasers (Mr Kim) under the purchase contract of 5 March 2009 approached him a few days before settlement of the purchase and confided that he had a shortfall of funds and was not sure how to meet his settlement obligations. He asked the defendant, as his good friend, to help him by lending him the funds the purchasers needed to complete the settlement. That shortfall was \$67,500. The defendant says that, as he was in a position to do so, he lent that amount as an act of friendship to Mr Kim and his wife *"and also to relieve him of any personal and family embarrassment and financial penalties that the shortfall would bring on him and his family if the forthcoming settlement was not able to be completed accordingly"*. The defendant said he made the loan to Mr Kim *"on the condition that I would be repaid at his earliest convenience or if he was to sell the property in the future from the profit/surplus of purchase price after his mortgage was repaid to the bank"*.

[5] The defendant's attitude seems to be that it never occurred to him that he was acting in breach of the Real Estate Agents Act 1976, never sought to hide what he was doing, and now wishes to take full responsibility for breaching the law.

[6] He also emphasised that in the purchasers' initial form of offer to the vendor company they had five working days to arrange the extra funds they needed for the purchase, but the liquidators for the vendor company (and/or the vendor's mortgagee) required that the offer be unconditional so the purchasers went ahead on that basis believing they would be able to raise the necessary funds from their bank. They expected to obtain all funding from their bank. When they could not, they approached the defendant to find out the consequences if they did not settle on time.

[7] As indicated above, the defendant agreed to and did lend them the necessary money. He emphasises that he took no security for the debt. The loan did not even seem to be recorded in writing but (the defendant put it) was an agreement between friends *"and he made the loan entirely between friends in order to help them out"* and to stop the embarrassment and shame for their family and community.

[8] The defendant was carefully and thoroughly cross-examined by Ms MacGibbon for the prosecution. He said he was well known in the Korean community and felt he must lend money to the purchasers to save face for all concerned should the purchase deal collapse. He said that it is the ethos for Korean friends to lend money between themselves. He said that he expected and received interest but did not require or expect that until the property was resold or, in this particular case, the purchasers sold a property in Korea whichever happened first.

[9] The defendant said that he did not agree to lend the money until about two days before settlement and it seems that he was only approached to lend at that point. He was repaid when the property (a section only) was sold in about August 2012. It seems that the purchasers did not intend to resell the section as such but intended to build a house on it and then either reside there or sell, but later decided not to build.

[10] The defendant emphasised that he was asked to financially assist the vendors two days before their settlement and, as a good friend of theirs, felt obliged to help out. He said he had not dealt with the vendor company but only with its lawyer so that he never thought of advising the vendor or its lawyer that he was taking an interest in the purchase.

[11] The defendant also accepted that he did not obtain a valuation for the vendor (under s.64 of the 1976 Act) as required as part of the s.63 disclosure process. The sale was effectively handled by the vendor's mortgagee bank, and the vendor company went into liquidation at about the time of sale. It seems that the defendant was engaged to sell the property for the vendor and its banker for whatever reasonable price he could obtain.

[12] The defendant seems to have introduced his friends, the purchasers, to the property and had them sign an offer at \$379,000 but the vendor's lawyer thought that was insufficient. The defendant and his manager thought that a price of about \$400,000 would be appropriate and he put that sum to the purchasers but they then offered \$390,000. The vendor's lawyer sought a higher price so the purchasers offered \$391,000 which was accepted. As it happens, when the property was resold over three years later in about August 2012, the price obtained was \$440,000 or thereabouts.

[13] It was made clear by the defendant that his manager had, at the outset, thought that the vendor should ask about \$400,000 but the defendant's friends commenced the purchase process by offering \$379,000 as explained above. It seems that many of the dealings with the vendor's lawyer were by the defendant's manager because the defendant is not fluent in English.

### ***The Evidence of Mr Kim (the Husband Purchaser)***

[14] There was also evidence on behalf of the defendant from the husband purchaser Mr Kim. He confirmed that he first offered \$379,000 for the property but was told the vendor wanted more "*so I offered a little more*".

[15] He had been confident he could obtain \$391,000 by combining his funds with bank borrowings but he had not realised that banks lend a lower proportion of value on land (or a section) as compared with land and buildings. In this case his bank was not at all keen to lend to him the sum he sought merely on the security of an empty section. Mr Kim said he did not realise that he could not complete the settlement until very close to the settlement date. He said that he then asked the defendant to lend him the \$67,500 which he needed to complete the settlement. He said he had not been approached by the defendant but he, Mr Kim, had gone for help to the defendant. Mr Kim felt that the price of \$391,000 for the section "*was a good price for us*" – meaning for him and his wife as purchasers.

[16] It seems that when the loan was made, its terms, such as duration and interest rate, were rather vague and Mr Kim said that "*as friends we didn't talk about those points*". However, it was made clear that the defendant would get his money back

when the property was resold and would then receive interest at a fair rate. Mr Kim said he had intended to resell the section quite quickly but it took some time to do that because the market was not good.

[17] Mr Kim also seemed to be saying that he had considered building a house for himself and his wife on the section but that his intentions at time of purchase were not clear because the chance to purchase and the procedure to enter into the purchase “*all happened quickly*”. He said that he had many thoughts in his mind at that time as he was also trying to sell his realty in Korea. However, he could not, so he did not have proceeds from Korea to invest in New Zealand property as he had hoped. He seemed to be saying that the loan from the defendant would not have existed much longer than it did because, otherwise, he would have sold his property in Korea, presumably, by lowering the asking price. When the section now in issue was resold, the sale was not handled by the defendant but by another real estate firm.

[18] Mr Kim seemed to be saying that when he repaid the defendant in August 2012 he added interest at about 6%.

### **Relevant Law**

#### *The Real Estate Agents Act 1976*

[19] Section 63 and 64 of the 1976 Act provide:

#### **“63 Purchase or lease by agent voidable**

- (1) *No real estate agent shall, without the consent on the prescribed form of his [or her] principal, directly or indirectly and whether by himself [or herself] or by any partner or sub-agent,—*
  - (a) *Purchase or take on lease, or be in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any land or business which he [or she] is commissioned (at the instigation of the principal or otherwise) by any principal to sell or lease; or*
  - (b) *Sell or lease to his [or her] spouse, [civil union partner, de facto partner,] or child any such land or business.*
- (2) *No partner or employee of a real estate agent and no officer of a company that is a real estate agent shall, without the consent on the prescribed form of the principal of the real estate agent, directly or indirectly,—*
  - (a) *Purchase or take on lease, or be in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any land or business which the real estate agent of whom he [or she] is a partner or by whom he [or she] is employed, or of which he [or she] is an officer, is commissioned (at the instigation of the principal or otherwise) by any principal to sell or lease; or*
  - (b) *Sell or lease to his [or her] spouse[, civil union partner, de facto partner,] or child any such land or business.*
- (3) *Any contract made in contravention of this section shall be voidable at the option of the principal. No commission shall be payable in respect of any*

*such contract, whether the principal has avoided it or not; and any commission paid in respect of the contract shall be repayable by the real estate agent to his [or her] principal and shall be recoverable by the principal as a debt.”*

#### **64 Real estate agent to provide valuation**

(1) *This section shall apply to every real estate agent, partner or employee of a real estate agent, or officer of a company that is a real estate agent; but, in relation to any real estate agent (whether a company or not) that carries on other business in addition to its business as a real estate agent, shall not apply to any employee of that real estate agent whose work primarily and predominantly relates to that other business.*

(2) *Every person to whom this section applies shall either—*

(a) *Before seeking the consent of a principal for the purposes of section 63 of this Act ; or*

(b) *With the agreement of the principal, within 14 days after obtaining that consent—*

*supply, at his [[or her]] own expense to that principal, a valuation made by an independent registered valuer of the land or business in question.*

(3) *Every consent given under section 63 of this Act without the valuation being supplied to the principal in accordance with subsection (2) of this section shall be deemed not to have been given.*

(4) *Where—*

(a) *A principal gives his or her consent under section 63 of this Act before a valuation is supplied to the principal in accordance with subsection (2) of this section ; and*

(b) *The valuation, when supplied, is greater than the valuation specified in the prescribed form of consent as the provisional valuation,—*

*any contract to which the principal is a party and to which the consent relates shall be voidable at the option of the principal.”*

[20] The key issues are:

[a] Whether the defendant’s conduct breached ss.63 and/or 64 of the 1976 Act; and, if so:

[b] Whether the breach was wilful or reckless so as to amount to misconduct rather than unsatisfactory conduct.

[21] Under s.73(c) the mental element of wilfulness or recklessness is relevant to the conduct, not knowledge of the relevant section in the Act, or rule as the case may be.

[22] This is the conventional position which applies when determining liability for offending. Mens rea is linked to the conduct in issue, and ignorance of the law is no excuse.

[23] Ms MacGibbon submits that, in any event, on any assessment the defendant in this case was reckless at the very least; and that the defendant knew there was a prohibition on taking an interest in a vendor client's property and chose to take the risk of proceeding anyway, without giving his client disclosure or even checking what the correct procedure was.

### ***Conduct Prior to the Act coming into Force***

[24] The conduct alleged in this case took place prior to the 2008 Act coming into force on 17 November 2009. Section 172 of Act therefore applies.

[25] As we have held on a number of occasions, in cases where a defendant was licensed or approved under the 1976 Act 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 the following three step process (see *CAC v Dodd* [2011] NZREADT 01 at [65] to [67]):

- [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.

[26] At the time of the conduct alleged, the defendant was an approved salesperson under the 1976 Act. He has not been dealt with under the 1976 Act in respect of the conduct in issue. He could have been complained about or charged for breach of ss.63 and 64 of the 1976 Act under that legislation.

[27] Accordingly, we may consider the charges against the defendant notwithstanding that the conduct alleged occurred before 17 November 2009. As we cover below s.172 does, however, limit any penalty that might be imposed by us.

### ***The Concept of "Purchase" in the Context of s.63 of the Real Estate Agents Act 1976***

[28] An issue arose as to whether "*purchase*" in s.63 of the Real Estate Agents Act 1976 can be limited to the period until the agreement becomes unconditional (in this case when the contract was signed), or does a "*purchase*" extend until final settlement. It was put that if the purchase had taken place when the contract was unconditional, then Mr Cho could not have breached ss.63 and 64 of the 1976 Act. Ms MacGibbon submits for the prosecution that the meaning of purchase, in the context of the 1976 Act, continues until settlement and includes the entire transaction. We agree.

[29] In *MacLennan Realty Ltd v Court & Ors* [2004] 5 NZCPR 256 the High Court directly addressed the question of whether a "*purchase*" for the purpose of s.63 of the Act is deemed to be completed when the agreement for sale and purchase goes unconditional. We note for completeness that the Court there was concerned with s.63(2)(a), however, nothing turns on this due to the similarity in wording and purpose. In that case the director of the appellant company, Mr MacLennan, had acted as the real estate agent in the sale of three town houses to a trust. The trust

was the nominee of long-time friends of Mr Maclennan and after the sale had gone unconditional but before the completion of purchase, Mr Maclennan became a trustee of that trust and so became legally interested in the property.

[30] Miller J assumed that Mr Maclennan acted in good faith and that he was asked to be trustee only after the agreement had become unconditional and so *“his work for Ms Court had effectively ended”*. However, the Judge stated:

*“I consider that the prohibition on being in any way interested in the purchase of a legal interest in the property contemplates the outcome of the transaction, in the sense that it looks forward to the identity of the person who will take the legal interest. A legal estate or interest is created in the manner prescribed by statute or the common law. It must include the estate or interest acquired by the registered proprietor upon registration under the Land Transfer Act.”*

[31] This supports the finding that the entire transaction is included in the concept of a purchase. In ordinary usage, the word *“purchase”* envisages an exchange. The purchase price is the full price to be paid for the property, and that does not occur until settlement. Further, the passing of the equitable and legal estate or interest to the purchaser, and all the consequences which flow from that, are contingent on full payment of the purchase price by the purchaser. *Shaw v Foster* (1872) LR 5 HL 321; *Avondale Printers and Stationers Limited v Haggie* [1979] 2 NZLR 124 at 141-142. The vendor is not contractually obliged to convey the legal title until payment is tendered. The purchase is not complete until settlement has taken place

[32] This view is also consistent with the purpose of s.63 of the 1976 Act which used the words *“be in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any land or business”*. Parliament chose to use very broad language.

[33] A purposive and policy-orientated approach supports this interpretation. Although, in this case the contract was unconditional from its signing, the successful purchase by the vendor of the property was contingent on the money supplied by Mr Cho. At a minimum, public perception in the integrity of real estate agents required the steps in ss.63 and 64 of the 1976 Act to be followed. The vendor was entitled to know that his agent was personally interested in the purchase. The vendor was entitled to an independent valuation to satisfy him that there was no question of a purchase undervalue.

[34] The meaning of *“purchase”* for the purposes of s.63(1)(a) of the Act includes the period after the agreement for sale and purchase becomes unconditional and before the completion of the entire transaction. In short, the purchasers could not have purchased the property without the funds from the agent; so that the purchase of the property ran until settlement.

### **Discussion**

[35] In early 2009 the defendant entered into a loan agreement with purchasers of a section he was instructed to sell . The defendant loaned funds to the purchasers to put towards the purchase of the property on the basis they agreed to repay the loan to the defendant from the proceeds of sale when the property was sold by them.

[36] The defendant’s interest in the property, through that loan agreement with the purchasers, was not disclosed to his vendor client; nor was that client provided with



an independent valuation of the property as required in terms of the disclosure process.

[37] We find that the defendant's conduct was in breach of ss.63 and 64 of the Act.

[38] In lending money (at interest) to the purchasers to enable them to acquire the property on the basis that the loan would be repaid when the purchasers later sold the property, the defendant became concerned or interested, legally or beneficially, in the purchase of the property by the purchasers. This was not disclosed to his vendor client. Also, no independent valuation was provided. There is no convincing evidence that the defendant was to, or did, receive a share of profit on re-sale of the section by the purchaser; but he received interest as always intended.

[39] It is not necessary that a licensee's interest in a property be formalised by way of eventual entry on the property's title for a breach of s.63 to occur. The section is broadly drafted and refers to an agent (or employee of an agent) directly or indirectly being in any way concerned or interested, legally or beneficially, in the purchase of land sold on behalf of the principal. The words "*indirectly ... concerned or interested*" are sufficiently wide to include lending money to a purchaser on the basis that funds would be repaid from a subsequent sale in the way which was contemplated in this case.

[40] Furthermore, from a practical and policy perspective, disclosure was clearly required by the defendant. Repayment of the loan to the licensee would depend on the purchaser's good financial position, and it was contemplated that repayment would occur from funds realised on resale. In these circumstances it was in the defendant's interests that the purchasers do well from the purchase and subsequent sale of the section. At the very least, this raises a real perception of conflict with the vendor's interests and, therefore, requiring full disclosure. It is very unsatisfactory that the defendant regarded the sale as by a faceless mortgagee. The defendant was required to obtain the vendor's consent to the defendant helping fund the purchase. It was important that the vendor not be deprived of proper knowledge and control of the selling of its land.

[41] In relation to wilfulness or recklessness, the prosecution highlighted the following:

- [a] The transaction took place in March 2009. The provisions of the 1976 Act applied to the transaction and can reasonably be taken to have been well known and understood throughout the real estate industry at the time.
- [b] The defendant was an approved salesperson under the 1976 Act. In his response to the charge the defendant stated: "*I have been an Agent for 8 years and I understand the Act regarding the purchasing of property for my own benefit ...*"
- [c] That the defendant chose not to disclose his interest in the purchase to his principal is consistent with the allegation that he knew what he was doing was wrong (or at least that it might be).
- [d] The defendant's \$67,500 investment in the property was not insignificant.
- [e] In his initial response to the complaint, the defendant referred to "*[investing] some money*" with the purchasers on their purchase of the

property and “[*sharing*] the profit” when the property was sold; so that he must have seen his contribution of funds as part of the purchase.

- [f] The defendant accepts that the purchasers were “*very good friends*” of his. Again, this could point to his being directly involved as part of the purchase of the property.

[42] We find both the defendant and his friend Mr Kim to be credible witnesses. We are conscious that the defendant must have known of his obligations under ss.63 and 64 of the 1976 Act and should have realised that he was not complying with them. We assess his evidence as showing that he was careless in not clarifying and complying with his duties. However, we cannot be satisfied, even on the balance of probability, that the defendant breached s.63, or s.64, wilfully or recklessly.

[43] In terms of our powers under s.110(4) of the 2008 Act, we are satisfied that the defendant licensee engaged in unsatisfactory conduct because he should have realised that he could not financially assist the purchasers without obtaining the approval of the vendor, and that in the circumstances he was required to supply an independent valuation.

[44] It is very important that the requirements of s.63 be adhered to; but we accept that in the present case the defendant had no intention of being involved in funding the purchase until well after the unconditional contract had been completed, and close to settlement, and his friends the purchasers had found themselves in the lurch financially. Also, there was the perceived need to avoid humiliation not only to them, and to some extent to the defendant, but to the Korean community in Auckland of which the defendant was a leader. In all the circumstances, it was very deficient of the defendant to fail to provide a valuation to the vendor in terms of s.64 of the 1976 Act.

[45] Having carefully absorbed the above, we accept the stance of the defendant and dismiss the charges of misconduct but enter findings of unsatisfactory conduct on each charge.

### ***Penalty***

[46] We understand that the parties leave it to us to impose penalty, whatever our finding, on the basis that the prosecution have also made submissions on penalty. Had we found misconduct proved then, in terms of the Real Estate Agents Act 1976, we could have cancelled the defendant’s certificate of approval, or suspended it, and/or imposed a fine of no more than \$750.

[47] In terms of our finding unsatisfactory conduct, only orders which could have been made against the defendant under the 1976 Act are available by way of penalty. We have previously held that findings of unsatisfactory conduct, as distinct from findings of misconduct, are analogous to findings made by Regional Disciplinary Sub-committees under the old statutory framework – refer *CAC 10024 v Downtown Apartments Ltd* [2010] READT 06 at paras [39] to [44]. The orders which could be made by Regional Disciplinary Sub-committees (for breaches of the REINZ Rules) were a maximum fine of \$750 and censure. However, these were orders against the approved salesperson’s employing agent rather than the salesperson or branch manager personally. We have no power to make penalty orders against the defendant for unsatisfactory conduct.

[48] Accordingly, we simply record that we have found the defendant guilty of unsatisfactory conduct on each charge.

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

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Judge P F Barber  
Chairperson

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Ms N Dangen  
Member

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Ms C Sandelin  
Member