

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2014] NZREADT 102

READT 004/14

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

**BETWEEN** **COMPLAINTS ASSESSMENT**  
**COMMITTEE 20002**

**AND** **JOHN CHAND (a licensed**  
**salesperson)**

Defendant

**MEMBERS OF TRIBUNAL**

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

**HEARD** at AUCKLAND on 3 and 4 September 2014

**DATE OF THIS DECISION** 18 December 2014

**COUNSEL**

Ms S M Earl for prosecuting Committee  
Mr P J McDonald for defendant

**DECISION OF THE TRIBUNAL**

***Introduction***

[1] Initially, John Chand faced two charges of misconduct but, in light of the evidence filed on his behalf, the Committee has reviewed them and does not now pursue misconduct and submits that his relevant conduct amounts to unsatisfactory conduct. As explained below, in the course of the hearing before us it became clear that the defendant admits that he breached s.136 of the Act.

[2] Mr Chand was co-charged with his associate the licensee Mr H Brar. However, by consent we shall in due course issue a separate decision regarding Mr Brar and we now deal with the charges against Mr Chand which are as follows:

- (i) one charge of misconduct pursuant to s.73(c)(i) in that his conduct consists of a wilful or reckless contravention of s.136 of the Real Estate Agents Act 2008 (the Act"); in the alternative, misconduct pursuant to s.73(b) of the Act in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work (failure to make written disclosure that he may benefit financially from the transaction).

- (ii) (jointly with Mr Brar) one charge of misconduct pursuant to s.73(b) of the Act, in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work (failing to ensure full and fair disclosure of his interests to Kiwibank).

[3] More specifically the charges read:

**“Complaints Assessment Committee 20002 charges:**

1 *John Chand with:*

- (a) *Misconduct pursuant to s.73(c)(i) of the Real Estate Agents Act 2008 (Act), in that his conduct consists of a wilful or reckless contravention of s.136 of the Act.*

*Particulars*

*Carrying out real estate agency work in the bringing about of a conditional agreement for sale and purchase of 225 Puhinui Road, Papatoetoe (property), between Durang Investments Limited (Durang) as owner and Gurpreet Kaur as purchaser (agreement), without disclosing in writing to Gurpreet Kaur that as a director and shareholder of Durang he may benefit financially from the transaction.*

- (b) *In the alternative, misconduct pursuant to s.73(b) of the Act, in that his conduct constitutes seriously incompetent or seriously negligent agent. In the alternative, misconduct pursuant to s.73(b) of the Act, in that his conduct constitutes seriously incompetent or seriously negligent agency work.*

*Particulars*

*Carrying out real estate agency work in the bringing about of the agreement without disclosing in writing to Gurpreet Kaur that as a director and shareholder of Durang he may benefit financially from the transaction.*

2 *Hardev Brar with:*

- (a) *Misconduct pursuant to s.73(c)(i) of the Act, in that his conduct consists of a wilful or reckless contravention of ss.134 and 135 of the Act.*

*Particulars*

*Carrying out real estate agency work in the bringing about of the agreement without obtaining the consent of Durang in accordance with the requirements of ss.134 and 135 of the Act, in circumstances where Gurpreet Kaur was an employee of Hardev Brar.*

- (b) *In the alternative, misconduct pursuant to s.73(b) of the Act, in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.*

*Particulars*

*Carrying out real estate agency work in the bringing about of the agreement without obtaining the consent of Durang in accordance with the requirements of ss.134 and 135 of the Act, in circumstances where Gurpreet Kaur was an employee of Hardev Bar.*

- 3 *The defendants jointly with misconduct pursuant to s.73(b) of the Act, in that their conduct constitutes seriously incompetent or seriously negligent real estate agency work.*

*Particulars*

*Failing to ensure full and fair disclosure of the following matters to Kiwibank, as the prospective provider of loan finance to Gurpreet Kaur under the agreement:*

- (a) *John Chand, as one of the two licensees who brought about the agreement, is also a director and shareholder of Durang.*
- (b) *Hardev Brar, as the other of the two licensees who brought about the agreement, is an employer of Gurpreet Kaur.*
- 4 *In the alternative to the above charges, the Committee seeks findings of unsatisfactory conduct pursuant to s.110(4) of the Act in the event the Tribunal finds misconduct has not been proved."*

***Factual Background***

[4] The charges arise out of a conditional agreement for the sale and purchase of 225 Puhinui Road, Papatoetoe. Mr Chand was the listing agent for the property. The property was owned by Durang Investments Ltd of which Mr Chand was a shareholder and its sole director.

[5] Mr Brar introduced a prospective purchaser to the property, a Ms Kaur, who signed a sale and purchase agreement for the property conditional on finance.

***The Prosecution Case***

[6] In summary, the Committee's case is that Mr Chand failed to disclose in writing to Ms Kaur that he may benefit financially from the transaction as a director and shareholder of the vendor company, as required by s.136 of the Act, and that this amounts to unsatisfactory conduct.

[7] The defendant is also charged with failing to ensure that his interest was disclosed to Kiwibank, as prospective provider of loan finance under the agreement to purchase. The Committee's case is that a competent licensee would be aware that documents generated as a result of compliance with the requirements of ss.134-136 of the Act (referred to below) form part of the documentation to be passed to the lending institution where an agreement is conditional on finance; that lending institutions expect to see such documentation where licensees or those related to them have an interest in the property being purchased, because that is relevant to the lending decision; and being aware that the sale and purchase agreement was

conditional on finance, the licensee ought to have ensured that his interest was properly documented so that Kiwibank was made aware of that.

### ***The Evidence for the Prosecution***

[8] Because this prosecution turned into the issue whether the defendant had committed unsatisfactory conduct rather than misconduct and the prosecution briefs prepared for the charges of misconduct were accepted by the parties and, as Mr McDonald put it, in effect the case became a plea in mitigation.

[9] We now summarise salient portions of the evidence as adduced to us by consent. We record that Mr McDonald strongly submitted that, in all the circumstances of this particular case and even though there had been breach of the Act as we deal with below, we not enter a finding of unsatisfactory conduct.

### ***The Witness of Mr A T Eales***

[10] Mr Eales gave evidence as a Senior Investigator at the Authority. In particular, he explained the significance of the various exhibits and confirmed that, at the time of the proposed sale of the property to Ms Kaur, Mr Chand was a director and shareholder of Durang Investments Ltd the vendor of the said property.

### ***The Witness Ms B Cooze***

[11] Ms Cooze gave evidence as a credit manager at Kiwibank. She explained in some detail why her suspicions were aroused from the form of loan application (and its attachments) made to that bank by Ms Kaur on 16 February 2011. Because of her concerns, she completed a company search on the vendor of the property, Durang Investments Ltd, and identified its director as the defendant and that he was a real estate agent employed at a Harcourts branch office. She noted that she had not otherwise been provided with such information nor that Mr Brar seemed to be the employer of Ms Kaur, the applicant for a mortgage.

[12] Ms Cooze then concluded her evidence-in-chief as follows:

*“20 In this case neither real estate agent provided any disclosure to Kiwibank of their interests in the transaction as they are required to under the Real Estate Agents Act.*

*21 On this occasion I would have expected to see a registered valuation and the principal’s consent to complete the transaction.*

*22 In cases such as these we expect written disclosure of a real estate agent’s financial interests, or the vendor’s written consent and a registered valuation. This occurs in cases where the real estate agent involved in the transaction also has a personal interest in the transaction (for example, either they are selling the property or they or someone related to them is purchasing the property). We receive these documents along with the other documentation that is supplied in support of the loan application. We expect to be supplied with the written disclosure or written consent when the real estate agent acting on the transaction has an interest in the sale and purchase of the property, because it is relevant to our lending decision. We assume that agreements for sale and purchase conducted*

*by real estate agents are fair, arm's length transactions at market value. Therefore, if the agent in fact has an interest in the transaction, we need to be aware of this and we will likely require a registered valuation to ensure that we have sufficient security for the loan and the price is fair market value.*

- 23 *Once the application by Ms Kaur was assessed it was returned to the Banking Consultant who was based in Auckland. The Banking Consultant was requested to obtain further details about the application and clarify with the customer her income. I understand that a second interview was completed and that the customer was supported by Hardev Brar at this interview. The application was eventually declined. The main reason for the application being declined was unsatisfactory evidence of Ms Kaur's income and concerns with the documentation provided in support of the application – in particular Ms Kaur's evidence of income documents; and the vendor of the property being one of the salespeople involved with the transaction."*

### **The Evidence of Ms A F M Baker**

[13] Ms Baker gave evidence as an expert licensed agent and for present purposes we set out her final four paragraphs of her evidence in chief which read:

#### ***"Licensee's interests and lending institutions***

- 14 *In my opinion, reasonably competent licensees are aware that lending institutions rely on a licensee's involvement in a transaction as representing that the transaction is a fair, arms-length deal at market value. They are also aware that when the licensee or a person related to the licensee has an interest in the transaction, the lending institution may not be able to make those assumptions and may require a registered valuation to ensure that the price paid by the purchaser reflects the property's true value, as this is relevant to the lending institution's ability to recover the funds if the borrower defaults on repayments.*
- 15 *Reasonably competent licensees are aware that the written disclosure they provide when they or a person related to them may benefit financially from a transaction, will form part of the contractual documentation that is supplied by the applicant for finance to the lending institutions if the agreement is conditional on finance. Equally, the client's written consent to the licensee or a person related to the licensee acquiring the land which is the subject of the real estate agency work will also form part of the contractual documentation that is passed by the licensee or related person to a lending institution, if the agreement is conditional on finance.*
- 16 *In my view, reasonably competent licensees are therefore aware that the documentation that is generated where they have an interest in a transaction serves as disclosure of their interests to the other parties to the transaction, but also to any lending institution that may provide finance on the transaction. This is generally how lending institutions become aware of a licensee's interest in a transaction.*
- 17 *In my opinion, reasonably competent licensees therefore ensure that the appropriate documentation is generated when they, or someone related to*

*them will or may acquire the land that is the subject of a transaction in respect of which they are carrying out real estate agency work, as required by the Real Estate Agents Act. Reasonably competent licensees who are aware that an agreement for sale and purchase is subject to finance know that the lending institution expects to see such documentation and that this documentation is important to the lending decision.”*

### **The Evidence of the Defendant**

[14] Mr Chand has been a real estate salesperson since 1996 without any previous complaint being made against him. At material times to this case, he was engaged by Image Realty Ltd which is the Harcourts franchise at Papatoetoe. He and his wife incorporated Durang Investments Ltd in 2003 as equal shareholders with him as sole director, and the company owns a small number of investment properties. It purchased the said property in 2006 but in October 2010 they decided to have the company sell it. They discussed this proposal with Mr Thorstensen, the principal of Image Realty Ltd, and that led to the defendant formally listing the property with that agency on 11 October 2010 on the basis of the property proceeding to auction on 11 December 2010.

[15] The defendant emphasised that all the sales personnel in the Image Realty office knew that he and his wife owned the property and that, throughout the marketing process, he had no hesitation in disclosing that to all interested parties.

[16] At the auction on 11 December 2010 Mr Thorstensen, as auctioneer, before calling bids announced to the room that the property was owned by the defendant through a company. The property was passed in at auction.

[17] On 14 February 2011 the defendant took a telephone call from Mr Brar, whom he knew as a Harcourts salesperson at its New Lynn office. Mr Brar had a prospective purchaser for the property and viewing was arranged. This prospective purchaser was the said Ms Kaur. She made an offer to purchase the property on 15 February 2011, with the assistance of the defendant and Mr Brar, and the defendant and his wife accepted it that day.

[18] That offer was conditional on Ms Kaur obtaining sufficient funding from Kiwibank but, on 23 February 2011, the agency was advised by Ms Kaur's lawyer that the contract was cancelled because finance could not be arranged. However, that same day Mr Brar brought another prospective purchaser to the property and that prospective purchaser made an acceptable offer to the defendant and his wife on 28 February 2011 and that sale settled in due course on 25 March 2011.

[19] In his evidence-in-chief the defendant puts it that, insofar as he has been charged with failing to ensure that full and fair disclosure was made to Kiwibank, he had no dealings *“in any material sense”* with Ms Kaur and was not at all involved in any of her dealings with Kiwibank.

[20] He then observed that he is also charged with having failed to disclose in writing to Ms Kaur that he was the owner of the property through Durang Investments Ltd and said *“I have already admitted that I did not make disclosure **in writing** [his emphasis] to Ms Kaur. However I did tell Hardevs Brar that I owned the property through Durang Investments Ltd. As with my dealings with other people enquiring about the property, I had no reason to be shy about this and I was open with*

everybody about it". He added that Mr Brar knew from the outset that the defendant owned the property through a company and that, in any case, the defendant emphasised that to Mr Brar. Mr Chand concluded his evidence as follows:

*"18. At the time, that is in October 2010 when I listed the property, my understanding was that there was no requirement to disclose my involvement as a part owner of the property. I fully understood that if I was going to buy a property through the agency I worked for, I would have to disclose, get consent and provide a valuation. Those rules about buying a property had always been in place under the previous legislation. The new Act did not significantly change those rules. However I did not at all understand any requirement to disclose a salesperson's involvement as a part-owner of the property that was being sold. I openly discussed the matter with Kerry Thorstensen the manager of the office I worked for. He did not indicate a different view from my own. I was not aware of any policy or rule in the office about being involved in selling your property as a salesperson. It was a shock to me when Mr McDonald explained the way in which section 136 requires written disclosure."*

***The Witness Mr K B Thorstensen (In support of the Defendant)***

[21] In his brief of evidence Mr Thorstensen, as principal of Image Realty Ltd and a licensed real estate agent, provided further background and emphasised that from the outset, in October 2010, he knew that the vendor of the property was the defendant's company and he had no difficulty about that. He added *"there were no particular procedures within our office in connection with that kind of proposal as over the years I have had a number of staff selling off their own investment properties"*. He said that, within his Papatoetoe office, all the sales team knew that the property was owned by the defendant and his wife through their vendor company and he had made that clear before he called for bids at the auction. He concluded his evidence with the following paragraph:

*"6. At the time, I was not aware of the requirement in section 136 of the Real Estate Agents Act 2008 to disclose in writing the ownership by the salesperson of the property offered for sale, and the fact that I made the public aware that John was employed at this Branch as a salesperson and was the vendor would [not] suffice. I also believe from my discussions with my colleagues that there has not generally been an awareness of this requirement. As at October 2010, the 2008 Act had been in force for less than a year. There had been a lot of new formalities introduced by the new Act and the Code of Conduct, but I believe that the new requirement set out in section 136 was not at all widely understood."*

***Disclosure of Licensee Interests: Section 134 to 137 of the Act***

[22] Section 136 of the Act states as follows:

***"136 Disclosure of other benefits that licensee stands to gain from transaction***

*(1) A licensee who carries out real estate agency work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee, or any person related to the licensee, may benefit financially from the transaction.*

- (2) *Subsection (1) does not apply to any matter disclosed under section 128 or 134.*
- (3) *The licensee must make the disclosure required by subsection (1) before or at the time that the licensee provides the prospective party with any contractual documents that relate to the transaction.*
- (4) *For the purposes of this section, an agent does not benefit financially from a transaction merely because of any commission payable to the agent under an agency agreement in respect of the transaction.*
- (5) *A contract entered into in contravention of this section may not be cancelled merely because of that contravention.”*

[23] We emphasise the requirements of s.136(1). Section 136 was recently considered by the High Court in *Clark v Real Estate Agents Authority (CAC 20004)* [2014] NZHC 1611. The issue in that case was whether written disclosure of a possible financial benefit to the licensee was required to be made by the appellant when the contractual documents were provided by a different individual licensee within the same licensed agency. The Court (per Moore J) reviewed the legislative context and background to the Act in examining the meaning and purpose of s.136 and found as follows:

*“[46] Its purpose is plain. It is designed to protect prospective purchasers through transparency. Prospective purchasers are entitled to be aware of the identity of those they are dealing with. Are they dealing with the owner or someone related to the owner or is this a normal, commercial arm’s length transaction? Such disclosure permits the prospective purchaser to assess the weight to be given to representations made by the salesperson. It assists the prospective purchaser in making an informed decision as to the way they conduct themselves in negotiations.” [Emphasis added]*

[24] The Court agreed with us that the duty is an ongoing one which crystallises, at the latest, at the time the contractual document is provided to the prospective purchaser, and that the duty is not restricted only to those licensees who actually present contractual documents.

[25] In the case of *CAC v Whiteford* [2011] NZREADT 7 the defendant, as agent on the sale of a property, failed to disclose to the complainant that he may benefit financially from the sale of the property as the sole director and shareholder of the vendor company. We recorded that we had no hesitation in finding the charge of misconduct under s.73(c)(i) proved (as a wilful contravention of the Act) and found that the defendant did not at any stage disclose his interest to the complainant.

### **Sections 134-135**

[26] The requirements of ss.134 and 135 are more onerous than those of s.136. Where a licensee wishes to acquire an interest in a property or business of a client for whom they are carrying out real estate agency work, the licensee must first obtain the client’s consent. Also, a licensee may not carry out real estate agency work, or continue to carry out real estate agency work, without obtaining the client’s consent if the licensee knows or should know, that the transaction may result in a person related to the licensee acquiring the land or business or an interest in it. A client’s



consent is only valid if it is given in the prescribed form and the client has been provided with a valuation under s.135 of the Act, (refer s.134(3)(a)).

[27] There is an inherent tension between a licensee's own interests and his or her duties to the vendor client if the licensee is a prospective purchaser, because licensees cannot advise and protect the best interests of the client when their own agenda is to buy the property on the most favourable terms they can negotiate for themselves. Similar issues arise where the licensee has the allegiances provided for at s.137(2) which defines parties related to a licensee. There is an obvious conflict of interest and risk of unfairness or perceived unfairness where a licensee, who must act in the best interests of the vendor client, introduces a person to the property who is related to the licensee in one of the ways provided for in the Act. Accordingly, a licensee who continues to act for the vendor in that situation of the licensee being a prospective purchaser must first obtain his or her client's consent and comply with s.135.

[28] The seriousness of any breach of these requirements is clear from s.135. The client may cancel (under s.135(4) any contract made in contravention of s.135(1) or (2) and no commission is payable, regardless of whether the client cancels the contract (s.135(5)).

### ***The Importance of Written Disclosure of Interest to Third Parties***

[29] Charge three jointly charges both the defendant and Mr Brar with failing to ensure full and fair disclosure of their interests to Kiwibank, as the prospective provider of loan finance for Ms Kaur as purchaser.

[30] The said evidence of Bernadine Cooze, of Kiwibank, outlines the concerns she had with the application for finance made by Ms Kaur. Ms Cooze confirms the importance of written disclosure of licensee interests from the perspective of lending institutions. Ordinarily, where licensees are involved as the real estate agent in a transaction, the lender can assume that agreements for sale and purchase are fair arm's length commercial transactions. However, where licensees have a personal interest in the transaction, the bank expects to be supplied with the written disclosure or written consent because the fact that the licensee has a personal interest in the transaction is relevant to a bank's lending decision. However, that approach is relevant to a licensee acquiring property from a client vendor and is not required by s.136.

[31] Ms Earl put it that, while the Committee does not submit that there is an independent obligation or duty on a licensee to make direct disclosure of their interests to the finance provider, competent licensees are aware that the written disclosure (required by s.136(1)) will form part of the bundle of documents provided to the lending institution. This was confirmed in the said evidence of Ms A Baker. If a licensee does not make disclosure in written form, or obtain the relevant written consent, the lending institution may never be aware of the licensee's interest.

### ***The Stance of the Authority***

[32] Ms Earl notes that Mr Chand admits that he breached the provisions of s.136 by failing to make written disclosure of his interests (as a proprietor of the vendor) to Ms Kaur. Ms Earl submits that a finding of unsatisfactory conduct should follow, pointing out that s.72(b) provides that a licensee is guilty of unsatisfactory conduct if

the licensee carries out real estate agency work that contravenes a provision of the Act.

[33] As Ms Earl submits, the importance of disclosure for the purposes of s.136 has been confirmed in *Clark*, given the need to protect consumer interests through transparency. The rule is not technical in nature, but provides a clear requirement for there to be a written record of the fact that a licensee may benefit financially from the transaction.

[34] Ms Earl notes that the licensee relies on the fact that he made verbal disclosure of his interests but submits that this is not sufficient to avoid liability under s.72. We agree. In *Clark*, we had found as a matter of fact that there had been oral advice that one of the licensees may benefit financially from the transaction but we still made a finding of unsatisfactory conduct. On appeal, Moore J observed that it followed from the oral advice that the licensees understood the moral need to alert the purchaser of the potential benefit, even if they did not know of the specific requirements imposed on them by s.136 (the Court commenting that this lent further support to the policy imperatives implicit in the obligations created by s.136). The Court confirmed the requirement is written disclosure and observed that if there had been written disclosure, there would be no room for any lack of clarity.

[35] Ms Earl noted that in *Whiteford* we found misconduct to be established where the defendant licensee made no disclosure of his interests (as vendor) in the property in circumstances where the defendant's evidence was that he knew of his obligation but did not know that he had to disclose that interest in writing. In that case, the breach was wilful as the licensee had been aware of the obligation generally but made no disclosure of his interest.

[36] Even in circumstances where there has been no deliberate concealment of the licensee's interests, there is nonetheless a clear breach of the provisions of the Act and it will likely be appropriate that a finding of unsatisfactory conduct is made. In *Evans v REAA and Orr* [2012] NZREADT 67 we summarised the position as follows:

*"[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] A committee of the Authority has a wide discretion whether to inquire into, or inquire further into, a complaint or allegation under the Act. However if, having held a hearing on the papers under s.90, 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 a total absence of fault may be available to an agent.'*

[37] Ms Earl put it that the failure of Mr Chand to provide written disclosure of his interest had the effect that Kiwibank was initially unaware that Mr Chand, as licensee, had an interest in the vendor company; that it was only when Kiwibank made its own enquiries that this became apparent. That the fact that a licensee has a vendor interest is relevant to the lending decision, and that Mr Chand, who was aware that the agreement was conditional on finance (and indeed wrote up the agreement),

failed to ensure that there was a proper written record of his interest to be passed to Kiwibank.

[38] In respect of Mr Chand, Ms Earl submits that the charges are proved at the level of unsatisfactory conduct.

### ***The Case for the Defendant***

[39] Mr P J McDonald, as counsel for the defendant, emphasises that from the outset the defendant has admitted that he did not comply with the requirement of s.136 that disclosure of his interest (as a shareholder and director of the vendor company) be in writing; but emphasised that the defendant openly and orally disclosed his interest to all interested parties at all times throughout the marketing process.

[40] Mr McDonald submits that the defendant's failure to disclose that in writing arose from the defendant's lack of understanding of the requirements of s.136 and noted that Mr Thorstensen, as the principal of the agency, appeared to have had the same lack of understanding at material times and that there were no office rules or guidance which might have assisted. It is put that such lack of understanding of the requirements of s.136 was, at that time, quite widely shared among real estate salesperson colleagues.

[41] Mr McDonald also put it that the defendant had no association with Ms Kaur or Mr Brar and, at all times, had disclosed his interest in the property to all with whom he had contact in its marketing process, including Mr Thorstensen as the principal of his office.

[42] Mr McDonald observed that these proceedings have placed much stress and financial expense on the defendant and yet it soon became clear that there had been no misconduct on his part as had been originally charged against him.

[43] Mr McDonald submitted that the defendant's personal responsibility must be regarded as somewhat diminished because his supervising agent was unaware of the precise requirements of s.136 of the Act, which is put as being a new requirement from the previous legislation and which did not reflect any pre-existing ethical rule or understanding and came into force on 17 November 2009. The events in this case materially happened in October 2010. Mr McDonald submits that *"in the particular circumstances of this case, a moral force of the rule in s.136 has had limited space in which to operate"*. Mr McDonald also emphasised that almost all the relevant dealings with Ms Kaur were handled by Mr Brar.

[44] Mr McDonald then made submissions along the lines that various aspects of the wording in s.136 were obscure in terms of legal drafting. He also put it that the defendant had no obligation of any kind towards Kiwibank. Finally, he submitted that the defendant is entitled to some credit for having had a clear disciplinary record over 18 years as a salesperson.

[45] In his final oral submissions, Mr McDonald seemed to be submitting that non-compliance with s.136 should be sheeted against Mr Thorstensen as the defendant's *"boss"* rather than against the defendant and that, in any case, s.136 needs to be better drafted.

[46] However, Mr McDonald makes it clear that the defendant admits a breach of s.136 but submits that, although such a breach would normally be unsatisfactory conduct, in all the circumstances of this case we should not make a finding because the defendant was let down by his supervisor, was open with everybody about his interest in the property; no harm was done; s.136 is a new and confusing rule; and the defendant has a good record of conduct and been subjected to much stress and expense by this charge.

[47] Mr McDonald also responded to the various references of Ms Earl to some of our previous decisions and to the High Court's views in *Clark*.

### ***The Final Oral Submissions of Ms Earl for the Authority***

[48] Ms Earl submitted that liability is not in issue and the context of the case before us has turned to focus on penalty.

[49] Ms Earl expressed concern that it was not immediately apparent to Kiwibank, from the agreement for sale and purchase, that Mr Chand had a personal interest in the transaction which Kiwibank was being asked to fund. She submitted that the verbal disclosures do not fulfil the requirements of s.136 and are inadequate, so that there has been unsatisfactory conduct by the defendant. She also appeared to be criticising the defendant for not having made it clear to the Authority's investigator that Mr Thorstensen had been involved in the breach of s.136 and, perhaps, ought to have been charged also.

[50] Ms Earl referred to the reasoning of Moore J in *Clark* with a view to rebutting some of the moral force arguments of Mr McDonald.

[51] She also submitted that the defendant held himself out as a licensee who was marketing the property and that he assisted Mr Brar prepare an offer from Ms Kaur who would have seen him as a licensee rather than as (in effect) the vendor.

[52] Ms Earl put it that in so far as the defendant relies on the advice of Mr Thorstensen, who told the defendant he did not need to disclose his interest in writing, that does not absolve the defendant of liability and the defendant is an experienced salesperson who should be aware of the law, and especially of new legislation. She puts it that the defendant must have known he had an obligation to disclose his interest as an owner of the property but, in any case, he had a duty to be aware of legal requirements. Ms Earl also put it that whether or not the drafting of s.136 is clear, the defendant simply did not read it because he says he did not know about it.

[53] Ms Earl submitted that if we do not find unsatisfactory conduct by the defendant in all the circumstances of this case, we will be acting contrary to the reasoning in *Clark*.

[54] Inter alia, Ms Earl observed that it is important for a prospective lender bank to know if the transaction is not a standard commercial deal. She seemed to be putting it that it should have been made clear in the information provided to Kiwibank that the defendant had an interest in the sale as a vendor, but that interest was not disclosed to Kiwibank. She accepted that although it need not necessarily have been disclosed in the form of agreement for sale and purchase, it is required to be in writing somewhere in terms of s.136 of the Act.

[55] Ms Earl put it that submissions from Mr McDonald on behalf of the defendant relate to penalty or sentence rather than liability. That appeared to be virtually acknowledged by Mr McDonald.

[56] Ms Earl submits, in terms of penalty, that we should impose “*a mid range penalty*”. She puts it that *Clark* has quite some similarities to this case although she considered that there were a number of special mitigating factors available in the *Clark* case. We fined Ms Clark \$3,000 and censured her. Ms Earl submits that we might consider a fine of \$3,000 and a censure to be appropriate for the defendant’s unsatisfactory conduct.

### **Outcome**

[57] In the course of the process from the laying of the charge to the matter being heard before us, the prosecution, quite appropriately and sensibly, dropped the actual charges of misconduct under s.73 of the Act and focused on there being unsatisfactory conduct on the part of the defendant in terms of s.72, in as much as there has been a breach of s.136 of the Act. That there has been such a breach cannot be disputed from the evidence and, indeed, has been admitted on behalf of the defendant; in any case, we so find.

[58] We realise that Mr McDonald submits on behalf of the defendant that, in all the circumstances, we not enter a finding of unsatisfactory conduct and, presumably, he seeks that we find that no further action be taken.

[59] However, we find that there has been unsatisfactory conduct because s.136 has simply not been complied with. The defendant failed to disclose in writing to the prospective purchaser of the property that he and his wife might (and/or their company) benefit financially from the transaction. In terms of s.136(3) that disclosure was required before any contractual documents were provided to the prospective purchaser. The principle in s.136 is very important for the proper functioning of the real estate industry and its breach will almost always, we expect, amount to unsatisfactory conduct at least; and we have found that it does in all the circumstances of this case.

[60] It is axiomatic that ignorance of the law is no excuse. In any case, it is surprising that, one year after that requirement became the law, experienced real estate agents were seemingly unaware of it.

[61] We are, of course, conscious of the various mitigating factors put to us by Mr McDonald and we, particularly, take into account that in marketing the property the defendant was open in orally expressing his interest as shareholder with his wife and director of the vendor company; and that he has a good record; and we can accept that these proceedings have caused stress and expense; and also one would have expected his supervising agent to have impressed the need upon him to comply with s.136. We do not see it as particularly mitigating that no harm was done.

[62] We take into account that the licensee has not transgressed against Kiwibank in terms of the Act or the Rules.

[63] If either party wishes, there will be a further hearing to deal with penalty and the Registrar would, in such case, arrange a timetable conference (to fixture for a penalty hearing) with our Chairman by telephone in the usual way. However, we can indicate to the parties that our present view is that, due to our finding of unsatisfactory

conduct, we would fine Mr Chand \$1,000 (to be paid within one calendar month to the Registrar of the Authority at Wellington). If such a penalty fits with both parties there will be no need to deal further with penalty and we would simply order accordingly.

[64] 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