

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 67

READT 003/14

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

BETWEEN **THE REAL ESTATE AGENTS
AUTHORITY (PER CAC 20004)**

Prosecutor

AND **ZHONG (SAM) LI**

First defendant

AND **JANE WANG**

Second defendant

AND **CHRISTOPHER SWANN**

Third defendant

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 10 and 11 April 2014 (with subsequent sequence of
written submissions)

DATE OF THIS DECISION 1 September 2014

COUNSEL

Mr M J Hodge for the prosecutor/Authority
Mr T D Rea for the three defendants

DECISION OF THE TRIBUNAL

Introduction

[1] Zhong Li, Jane Wang, and Christopher Swann individually face charges of misconduct laid by Complaints Assessment Committee 20004 of the Authority under the Real Estate Agents Act 2008 ("the Act").

[2] The relevant charges have been amended by consent. They are the same as the charges before us during the hearing of the evidence, except that a charge of a wilful or reckless breach of the Act and other Acts against each of Ms Wang and Mr Swann has been withdrawn to leave a charge of serious incompetence or

negligence against all the above licensees (with the usual alternative option of an unsatisfactory conduct finding), together with the other charges as now set out.

The Charges

[3] The amended charges read:

"Following a complaint by Saiyad Shiron and Shazia Ali (the complainants), Complaints Assessment Committee 20004 (CAC 20004) charges the defendants as follows:

Charge 1 – Zhong Li

CAC 20004 charges Zhong Li with misconduct under s.73(c)(i), (ii) and (iii) of the Real Estate Agents Act 2008 (Act), in that his conduct wilfully or recklessly contravened:

- i. Section 133 of the Act in that Mr Li did not provide the complainants with an approved guide before they signed a sale and purchase agreement for 64/51 Ireland Road, Panmure (the property), and did not receive a signed acknowledgement form from the complainants that they had been provided with the approved guide; and/or*
- ii. Rule 9.7(a)-(c) of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (Rules) in that Mr Li did not recommend that the complainants seek legal advice before signing a sale and purchase agreement for the property, did not ensure the complainants were aware of their ability to seek legal advice before signing a sale and purchase agreement for the property, did not ensure the complainants were aware of their ability to seek technical or other advice, and did not allow the complainants a reasonable opportunity to seek any advice; and/or*
- iii. Rules 5.1, 6.2, 9.2 and 9.8 of the Rules in that Mr Li did not properly take into account that the complainants were first home buyers, were already financially committed to a business, had obtained finance approval "a long time ago", that the property was a leaky building, and that the complainants did not fully understand the consequences of entering into an unconditional sale and purchase agreement. As a result, Mr Li did not proceed carefully or diligently when advising the complainants to sign an unconditional sale and purchase agreement and placed them under undue pressure; and/or*
- iv. Section 146 of the Unit Titles Act 2010 in that Mr Li, as the seller's agent, did not provide the complainants with a pre-contract disclosure statement before they entered into the sale and purchase agreement for the property, a unit title; and/or*
- v. Section 36(2A) of the Lawyers and Conveyancers Act 2006 in that Mr Li, having not held a licence as a salesperson under the Act for more than 6 months, prepared the sale and purchase agreement for the property and gave the complainants advice about legal rights and obligations, particularly in relation to the meaning of conditional and unconditional, which was advice that was incidental to the preparation of the sale and purchase agreement.*

Charge 2 (alternative to Charge 1) – Zhong Li

CAC 20004 charges Zhong Li with misconduct under s.73(b) of the Act, in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.

Particulars

The Committee repeats particulars (i)-(v) above but says that in the event that Mr Li's conduct was not wilful or reckless, it was done in ignorance of his legal and ethical responsibilities.

Charge 3 (further alternative to Charges 1 and 2) – Zhong Li

Unsatisfactory conduct under s.72 of the Act, repeating particular (i)-(v) set out in Charge 1 above.

Charge 4 – Jane Wang

CAC 20004 charges Jane Wang with misconduct under s.73(b) of the Act, in that her conduct constitutes seriously incompetent or seriously negligent real estate agency work.

Particulars

Ms Wang instructed Mr Li to obtain the complainant's signature on the sale and purchase agreement for the property in circumstances where the sale and purchase agreement had not been finalised and Mr Li could not legally finish preparing the sale and purchase agreement for the property, or give advice about legal rights and obligations arising from the agreement for sale and purchase.

Charge 5 (alternative to Charge 4) – Jane Wang

Unsatisfactory conduct under s.72 of the Act, repeating the particulars set out under Charge 4 above.

Charge 6 – Christopher Swann

CAC 20004 charges Christopher Swann with misconduct under s.73(b) of the Act in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.

Particulars

Mr Swann did not properly supervise Mr Li to ensure that Mr Li's agency work in relation to the property was performed competently and that the work complied with the requirements of the Act, Rules, and Lawyers and Conveyancers Act 2006.

Charge 7 (as an alternative to Charge 6) – Christopher Swann

Unsatisfactory conduct under s.72 of the Act, repeating the particulars set out under Charge 7 above."

A Summary of the Allegations for the Prosecution

[4] Mr Hodge put the prosecution case as that Mr Li dealt directly with a Mr and Mrs Shiron (the complainants) in relation to their purchase of 64/51 Ireland Road, Panmure, which they were unable to complete due to their inability to obtain finance.

[5] He put it that, except at the auction of the property (detailed below) which Mr and Mrs Shiron attended and where they bid but did not purchase the property, Mr Li dealt with Mr and Mrs Shiron exclusively as the real estate salesperson selling the property. Mr Hodge submits that Mr Li should not have been doing this, given his limited experience, and that he was wholly unequipped to do so.

[6] As a result, it is pleaded that Mr Li breached a number of important legal requirements, if not wilfully or recklessly, then because of serious incompetence. Crucially, did Mr Li deal with Mr and Mrs Shiron fairly? It is put that Mr Li signed them up to an unconditional contract without properly explaining the implications of doing so, and without any meaningful enquiry about their means and ability to obtain finance; and that this was in circumstances where Mr Li should have known that a bank could well impose strict lending requirements given the property was part of a large block of units and had recently had weathertightness problems.

[7] It is also alleged that Mr Li was dealing directly, and nearly exclusively, with Mr and Mrs Shiron because (it is pleaded) of the serious incompetence of Ms Wang. She knew that Mr Li was not lawfully permitted to deal directly with Mr and Mrs Shiron in relation to the matters that he did, and should have known that he was not competent to do so; but she let him anyway.

[8] It is also pleaded by the prosecution that Mr Swann effectively abdicated to Ms Wang his supervisory responsibilities for Mr Li. It is put that, in substance, Mr Swann treated Ms Wang as if she was a licensed agent or branch manager able to run her own team, when she is licensed only as a salesperson. The prosecution charges that Mr Swann must take responsibility for the conduct of Mr Li due to his failure as a supervisor.

The Nature of the Charges**Mr Li**

[9] The first charge against Mr Li alleges misconduct by him amounting to a number of wilful and reckless breaches of the Act, other Acts, and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, as set out in particulars (i) to (v) of that first charge. The second charge alleges that Mr Li's conduct was seriously incompetent or seriously negligent; was wilful or reckless, and in ignorance of his legal and ethical responsibilities.

[10] In addressing the said particulars (i) to (v), Mr Hodge puts it that we may consider that Mr Li did not wilfully or recklessly breach the various legal requirements referred to, but rather was seriously incompetent with the result that he breached

some or all of those requirements. In that case, we would find Charge 2 proved rather than Charge 1.

[11] Charge 3 merely refers to the alternative possibility of a finding of unsatisfactory conduct. That is open to us in any event, by virtue of s.110(4) of the Act.

Ms Wang

[12] The first charge against Ms Wang (charge 4) is to the effect that she was seriously incompetent or seriously negligent to instruct Mr Li to obtain the complainant's signature on an agreement for sale and purchase. This was in circumstances where Ms Wang knew Mr Li could not legally complete the agreement for sale and purchase or give advice about legal rights or obligations arising from the agreement, and where Mr Li had nearly all the direct dealings with Mr and Mrs Shiron.

[13] It is put that, at the least, Mr Li was placed by Ms Wang in a position where there was a risk he would need to give such advice to Mr and Mrs Shiron, which (allegedly) eventuated, in order to deal with them fairly. Also, it was Mr Li who dealt with Mr and Mrs Shiron almost exclusively.

[14] Charge 5 merely refers to the alternative possibility of a finding of unsatisfactory conduct open to us, in any event, by virtue of s.110(4).

Mr Swann

[15] Charge 6 alleges that Mr Swann was seriously incompetent or seriously negligent in his supervision of Mr Li. Mr Hodge submits this was because he effectively abdicated that responsibility to Ms Wang, which he is not permitted to do.

[16] Charge 7 merely refers to the alternative possibility of a finding of unsatisfactory conduct open to us in any event by virtue of s.110(4).

Relevant Legislation

[17] "*Misconduct*" is defined in s.73 of the Act as follows:

"73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or*
- (c) consists of a wilful or reckless contravention of—*
 - (i) this Act; or*
 - (ii) other Acts that apply to the conduct of licensees; or*
 - (iii) regulations or rules made under this Act; or*

- (d) *constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee."*

[18] *"Unsatisfactory conduct"* is defined in s.72 of the Act which reads:

"72 Unsatisfactory conduct"

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) *falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
- (b) *contravenes a provision of this Act or of any regulations or rules made under this Act; or*
- (c) *is incompetent or negligent; or*
- (d) *would reasonably be regarded by agents of good standing as being unacceptable."*

[19] We also set out s.50 of the Act which reads:

"50 Salespersons must be supervised"

- (1) *A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager.*
- (2) *In this section properly supervised and managed means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure—*
 - (a) *that the work is performed competently; and*
 - (b) *that the work complies with the requirements of this Act."*

[20] Section 36(2) of the Lawyers and Conveyancers Act 2006 reads:

"36 Exceptions to sections 32, 33 and 35 ..."

- (2) *Sections 32, 33, and 35 do not prevent any person who holds a current licence under the Real Estate Agents Act 2008 –*
 - (a) *from preparing any agreement for sale and purchase of land or any interest in land or of the goodwill of a business or of chattels; or*
 - (b) *from giving advice about legal rights and obligations that is incidental to the preparation of an agreement of the kind referred to in paragraph (a)."*
- (2)A *However, subsection (2) does not apply to a person who, under the Real Estate Agents Act 2008, holds a licence as a salesperson unless the person has had at least 6 months experience as a licensee."*

[21] Section 146 of the Unit Titles Act 2010 reads:

"146 Pre-contract disclosure to prospective buyer

- (1) *Before a buyer enters into an agreement for sale and purchase of a unit the seller must provide a disclosure statement (a pre-contract disclosure statement) to the buyer.*
- (2) *The pre-contract disclosure statement must be in the prescribed form and contain the prescribed information."*

[22] We also record that s.133 of the Real Estate Agents Act 2008 requires the agent, before a client signs an agreement for sale and purchase, to have provided that person with a copy of the approved guide and have received a signed acknowledgement of that from the recipient. An "approved guide" is a guide which relates to the sale of residential property and has been approved by the Authority for the purposes of s.133.

[23] In the course of this decision we summarise below various rules from the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 and there was also reference before us to rule 9.4 which reads: "A licensee must not mislead customers as to the price expectations of the client".

Wilful or Reckless Breaches – Section 73(c) of the Act

[24] This is relevant only to Charge 1, against Mr Li.

[25] Section 73(c) of the Act provides that conduct which consists of a wilful or reckless contravention of the Act, certain other Acts, their Rules or Regulations, amounts to misconduct.

[26] The issue of wilfulness/recklessness was considered by us in *REAA V Clark and Clark* [2013] NZREADT 62. In it we referred to the following passage from the case of *Zaitman v Law Institute of Victoria* [1994] VicSC 778 (9 December 1994) at page 52:

"It is implicit in what I have just said that, while the solicitor who does not knowingly act in contravention must be shown to have foreseen that what he was doing might amount to a relevant contravention, there is no need to go further and establish that the solicitor foresaw the contravention as "probable"; it is enough that he foresaw it as "possible" and then went ahead without checking ... [I]t will be enough if the solicitor ... is shown to have been aware of the possibility that what he was doing or failing to do might be a contravention and then to have proceeded with reckless indifference as to whether it was or not."

[27] Also, in *Zaitman* the Court had addressed the defence of ignorance advanced on behalf of the law practitioner this way (at page 43):

"In my opinion, practitioners who are granted practising certificates by the institute are bound as a matter of professional duty to keep themselves abreast of the Rules. It would be counter-productive to allow them to claim ignorance of the very rules which are put there to regulate their conduct in the public interest. It may be that in a given case, some particular detail in a given rule escapes

their attention, but I am not called upon to consider what would follow then; for that is not this case."

[28] Mr Hodge submits this reasoning is as applicable to real estate agents in New Zealand as it was to law practitioners in Victoria and that Mr Li's conduct must be assessed in line with these principles. We agree.

Serious Incompetence or Negligence – Section 73(b) of the Act

[29] All three defendants have been charged with serious incompetence or serious negligence (Mr Li in the alternative). Section 73(b) provides as follows:

"For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct –

...

(b) constitutes seriously incompetent or seriously negligent real estate agency work."

[30] We have previously applied the well-known dicta in *Pillai v Messiter* (No. 2) (1989) 16 NSWLR 197 in s.73(b) cases. This dicta is as follows:

"Departures from elementary and generally accepted standards, of which a medical practitioner could scarcely be heard to say that he or she was ignorant, could amount to such professional misconduct ... But the statutory test [misconduct in a professional respect] is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It 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 as a medical practitioner."

[31] It is accepted that this dicta applies in s.73(a) cases (disgraceful conduct), following the approach of our High Court to the interpretation and application of the analogous provision from the Lawyers and Conveyancers Act 2006 (disgraceful or dishonourable conduct) in *S v New Zealand Law Society* (Auckland Standards Committee No 2) HC Auckland CIV-2011-404-3044, 1 June 2012 per Winklemann J.

[32] Mr Hodge submits that it is duplicative to apply the very same test under s.73(b) and that doing so would unduly restrict the application of s.73(b).

[33] In *Brown v The Real Estate Agents Authority* [2013] NZHC 3309 the High Court appeared to cast doubt on the applicability of the dicta in *Pillai v Messiter* in a case involving s.73(b). More generally, the High Court observed at its para [21] that:

"... the types of misconduct specified in s.73 are qualitatively different. One would not expect an identical legal threshold to apply to all. Conduct which a reasonable member of the public would regard as disgraceful would obviously be qualitatively different from serious incompetence or wilful contravention of the Act."

[34] In any case, s.73(b) is concerned with a serious departure from acceptable standards rather than a mere departure from acceptable standards captured under s.72(c) of the Act.

[35] Limited assistance may be gained from the discussion in the recent Supreme Court decision *Graham & Ors v R* [2014] NZSC 55 dealing with different levels of culpability of company directors for Securities Act 1978 offending. In particular, the distinction drawn by the sentencing Judge, whose approach was upheld in the Supreme Court, between an error of judgment or carelessness, and gross negligence which amounts to a major departure from the standard of care to be expected when a director performs a statutory duty.

[36] Mr Hodge submits that whether the language used is of a serious departure or a major departure, the point is the same. Under the Real Estate Agents Act 2008, an error of judgment or carelessness breaching acceptable standards is captured by s.72(c). Serious negligence or incompetence, amounting to a serious departure from acceptable standards, is captured by s.73(b).

The Case Against Mr Li

Particular (iii)

[37] This alleges that Mr Li breached:

- (a) Rule 5.1 – requiring a licensee to act with skill, care, competence and diligence at all times;
- (b) Rule 6.2 – requiring a licensee to act in good faith and deal fairly with all parties engaged in a transaction;
- (c) Rule 9.2 – prohibiting a licensee from conduct that would put a customer (as Mr and Mrs Shiron allegedly were) under undue or unfair pressure;
- (d) Rule 9.8 – prohibiting a licensee from taking advantage of a customer's inability to understand relevant documents where such inability is reasonably apparent; by not properly taking into account that the complainants were first home buyers, were already financially committed to a business, had obtained finance approval "*a long time ago*", that the property was a leaky building, and that the complainants did not fully understand the consequences of entering into an unconditional sale and purchase agreement.

[38] Mr Hodge submits that, having heard the evidence of Mr and Mrs Shiron, and of Mr Li, it is open to us to conclude that all these rules were breached as a result of Mr Li's conduct. It is also submitted that this particular may best be approached with reference to rule 6.2, and that in all the circumstances pleaded under particular (iii), Mr Li did not treat Mr and Mrs Shiron fairly.

[39] Mr Hodge submits that it must have been apparent to Mr Li that Mr and Mrs Shiron were young purchasers and relatively unsophisticated; Mr Li knew they owned a business but made no enquiry of them to learn more about this; had he done so, he would quickly have realised that their business ventures do not demonstrate extensive commercial experience or expertise; furthermore, the fact they were already financially committed to a business raises potential questions about their ability to purchase an additional asset (i.e. the property); and these questions were not asked by Mr Li.

[40] Mr and Mrs Shiron gave evidence that, in 2010 when they were considering buying a house from a friend, they had received approval for finance up to \$390,000.

[41] Mr Li's evidence was that the complainants had only told him that they had received pre-approval for finance, they did not tell him that this approval was back in 2010. On Mr Li's own account, he asked no questions about when the pre-approval was obtained, whether it was for the property or for another property, or any other relevant details. Instead, Mr Li was happy to sign Mr and Mrs Shiron up to an unconditional contract based on this minimal information.

[42] More particularly, Mr Li did not point out to Mr and Mrs Shiron that, to be safe in the absence of a finance condition, they should obtain pre-approval for the specific property, given that it is part of a large block of units which had leaky building issues (in the past at least). Mrs Duncan's unchallenged expert evidence on this point is that any reasonably competent licensee knows that "*... all banks reserve the right not to lend on certain properties, namely, those with weather tightness issues and large blocks of units*".

[43] In the event, ANZ refused to lend on the property without a 35% deposit because of the previous weathertightness issues. Other banks imposed similarly stern requirements. Mrs Shiron's evidence to this effect was not challenged.

[44] Further, it is put that Mr Li did not recommend that Mr and Mrs Shiron make their offer conditional on finance, or even explain to them the risks of not doing so.

[45] In Mr Li's evidence he said he explained the meaning of "*unconditional*" on the day of the auction when he said to Mr and Mrs Shiron: "*when you bid on auction should be unconditional and you need to do everything ... so I told them gets your finance been approved and also gets building report (sic).*"

[46] When Mr Li was asked in cross-examination whether he gave advice about what "*conditional*" or "*unconditional*" meant, he said that he "*didn't expand [on] the unconditional and conditional [definitions]*". Also in cross-examination, Mr Li agreed that he would not have explained the legal definition because he was not allowed to give advice due to his inexperience. Mr Li then said that he "*probably told them if you, you bid on the auction you need to get your finances approval and also the building, building consents LIM report before you go to auction (sic)*". Mr Li later admitted that he had said "*if you make the unconditional offer, definitely that'll be more attractive to the vendor*".

[47] He also admitted that, on 29 April 2013, he did not discuss with Mr and Mrs Shiron whether they needed a finance condition, or conditions relating to a LIM and builders report. Mr Li said that he did not discuss these points with the complainants because the agreement was "*complete*" before he visited them and all that it required was a date for settlement and a signature.

[48] It is submitted by Mr Hodge that Mr Li was a wholly unreliable witness, but that, on his own account, it is clear he did not properly explain to Mr and Mrs Shiron the risks of making an unconditional offer or recommend that they include a finance condition to make sure they were protected if the bank declined to lend them finance on acceptable terms. Mrs Duncan's evidence, again unchallenged on this point, is that Mr Li did not act fairly in the information he provided to the complainants.

[49] Mr Hodge submits that, in all the circumstances, Mr Li's dealings with Mr and Mrs Shiron in signing them up to an unconditional contract, without making enquiries of them about the matters referred to above, or providing them with proper information about the risks of making an unconditional offer, fell far short of acceptable standards of fair dealing for a real estate salesperson.

Particular (ii)

[50] Mr and Mrs Shiron's evidence is that Mr Li did not recommend that they obtain legal advice.

[51] Mr Li's evidence is that because he tells everybody to get legal advice, a building report, and finance, he would have also told the complainants to do so. However, the prosecution put it that Mr Li's evidence in relation to the advice (or lack of it) which he gave to Mr and Mrs Shiron in relation to finance, shows the unreliability of this evidence based on his "*usual practice*".

[52] Mr Hodge submits that, furthermore, what occurred here was that Mr Li made an assumption that, because Mr and Mrs Shiron had bid at auction, he did not need to recommend they get legal advice. In his subsequent meetings with them, Mr Li simply sought to get Mr and Mrs Shiron to sign an unconditional offer.

Particulars (i) and (iv) of the Charges Against Mr Li

[53] It is a requirement of s.133 of the Act that purchasers be provided with a copy of the approved guide before they sign a sale and purchase agreement. Purchasers must also sign an acknowledgement that they have received this guide.

[54] Mr and Mrs Shiron should also have been provided with a copy of the Form 18, Pre-contract Disclosure Statement, pursuant to s.146 of the Unit Titles Act 2010, given the property was subject to that Act.

[55] In cross-examination, it was put to Mrs Shiron that the information was provided to her prior to signing the multi-offer. However, she did not concede this point. Mrs Shiron's evidence was that she and Mr Shiron were only given the REAA approved guide after they signed the documents on 2 May 2013 and that Mr Li never provided them with the pre-contractual disclosure information.

[56] At the hearing before us, Mr Li's position was that he had provided this information either at the open home or when he first met Mr and Mrs Shiron at the barber's shop on 29 April 2013 to sign the first sale and purchase agreement. However, in neither case could he remember handing the information to Mr and Mrs Shiron. Mr Hodge put it:

- (a) Mr Li said that as the information was available at the open home and free to be taken, Mr and Mrs Shiron probably received it there. However, he admitted, in cross-examination, that he was "*not 100% sure*" they had "*grabbed*" the material that was available at the open home. Mr Li accepted that he did not send this material through in advance of the auction, despite following up with Mr and Mrs Shiron about the auction. That would have been a logical point at which to ensure they received the material.

- (b) Mr Li then gave evidence that he had given the information to the complainants during the first meeting he had with them at their barber's shop on 29 April 2013. However, when cross examined on this point Mr Li again could not specifically remember leaving the documents with the complainants. Rather, he said that he would have left the documents with them because he only needed to take the sale and purchase agreement away with him.

[57] Mr Hodge submits that Mr and Mrs Shiron's evidence on these issues is to be preferred to that of Mr Li; that what has occurred is that Mr Li has proceeded on the basis that they had this material because it was available at the open home; and that is insufficient to meet the statutory requirements.

Particular (v) of the Charge against Mr Li

[58] Mr Hodge emphasised that the prosecution is not running a case that Mr Li has committed any of the offences under ss.32, 33 or 35 of the Lawyers and Conveyancers Act 2006, and does not need to. Rather, the prosecution alleges that Mr Li's conduct contravened s.36(2A) of that Act which prevents a real estate salesperson with less than six months experience from preparing any agreement for sale and purchase of land or any interest in land or of the goodwill of a business or of chattels; or giving advice about legal rights and obligations that is incidental to the preparing of such an agreement. That is by way of an exception to the prior statutory exception under s.36(2) which permits real estate licensees to provide conveyancing services of that kind.

[59] Mr Hodge submits that, even on Mr Li's evidence, he prepared at least part of the agreement for sale and purchase and gave deficient advice incidental to that.

[60] Mr Hodge feels that, later in his in cross-examination, Mr Li tried to change this evidence. It is submitted by Mr Hodge that Mr Li frequently changed his position when giving evidence and that his evidence was unreliable in this regard.

[61] In any event, Mr Hodge remarks that we could be forgiven for thinking that the question of the breach of s.36(2A) has ended up as something of a distraction because it is clear that Mr Li dealt almost exclusively with Mr and Mrs Shiron and that the way he dealt with them was unfair; and in these circumstances, a fine analysis of whether the conduct of Mr Li was in breach of s.36(2A) might be seen as slightly beside the point. We accept however, even on this view of the facts as they emerged at the hearing, that s.36(2A) remains relevant because it underscores that Mr Li should never have been in the position where he was the salesperson dealing with Mr and Mrs Shiron almost exclusively, including signing them up to an unconditional contract.

Mr Li's Intention

[62] Mr Li did not profess ignorance of the relevant statutory provisions. Mr Hodge submits that, if we find he did contravene some or all of them, we should find that he did so wilfully or recklessly.

[63] Mr Hodge submits that, as a new member of Ms Wang's team, Mr Li was under considerable pressure to bring about sales. We heard evidence of the success of Ms Wang and her team. We can infer that it was not Mr Li's focus or concern to advise or assist Mr and Mrs Shiron on matters required by law or fairness, for he was

there to get a signed unconditional contract; and that is why he disregarded the relevant requirements.

[64] Mr Hodge notes that, having heard Mr Li in evidence, it is open for us to conclude that Mr Li was badly out of his depth at material times. Given his limited experience, Mr Li should never have been put in the position where he was the salesperson who had almost all of the dealings with Mr and Mrs Shiron. He certainly should not have been the salesperson tasked with trying to negotiate a contract with Mr and Mrs Shiron, and obtain their signatures, which he did on not one, but two, occasions. Nevertheless, Mr Li chose to proceed as he did, and the fact that his superiors put him in the position they did, cannot excuse a wilful or reckless breach of the relevant provisions.

[65] Mr Hodge submits that we might reasonably conclude, notwithstanding Mr Li's professed knowledge in the witness box of what was required of him, that he was in reality wholly ignorant of his legal and ethical obligations, and that his conduct is more appropriately viewed as being seriously incompetent. If so, it is put that should we find the second charge, under s.73(b), proved against Mr Li.

The Case against Ms Wang

[66] It is submitted by Mr Hodge that Ms Wang instructed Mr Li to obtain Mr and Mrs Shiron's signatures on the sale and purchase agreement when important aspects of the agreement had not been finalised; and that Mr Li, with less than six months' experience, could not legally finalise the agreement or provide advice about legal rights and obligations arising from it; and that there were important matters about the agreement which needed to be covered with Mr and Mrs Shiron as a matter of fairness.

[67] This occurred in the context where Mr Li had all the dealings with Mr and Mrs Shiron, apart from Mr Swann's interaction with them at the auction. Mr Li had almost all of the important contact with them including at the open home; pre-auction contact (by telephone); post-auction follow up (by telephone); and two meetings in person (29 April 2013 and 2 May 2013), at both of which Mr Li obtained the signatures of Mr and Mrs Shiron to unconditional offers.

[68] Ms Wang has admitted that, by not attending with Mr Li, her actions breached company policy. Mr Swann described it as an error of judgment. However, Mr Hodge submits that Ms Wang's conduct was much more serious than that. He noted that the property had undergone significant repairs due to weathertightness issues. It was part of a large complex of units. Anne Duncan's evidence about lending requirements in either of these circumstances, referred to above, was not challenged. In cross-examination Ms Wang agreed with Anne Duncan's evidence on this point. Despite this, Ms Wang allowed Mr Li to have almost exclusive dealings with Mr and Mrs Shiron, and to sign them up to an unconditional contract.

[69] Ms Wang gave no advice to Mr and Mrs Shiron about the possibility of the banks imposing strict lending requirements. She did nothing to ensure that Mr Li explain this, or explain the need for finance pre-approval for the property, or discuss the need for their offer to be conditional on finance.

[70] Ms Wang's evidence was that she promotes a careful approach in dealing with purchasers as a matter of fairness. Ms Wang says that even if there is a "1% risk" the purchaser is unsure, the purchasers should put a condition in the contract.

[71] Mr Hodge submits that the dealings with Mr and Mrs Shiron fell short of that standard by a very wide margin. It is submitted that, by her own standards and the standards of reasonable agents, Ms Wang's conduct in letting Mr Li deal with Mr and Mrs Shiron by himself, and failing to take the care to ensure they were dealt with fairly in relation to whether a finance condition should have been inserted, was seriously incompetent or negligent, and her conduct in letting this happen was a serious departure from acceptable standards.

[72] Mr Hodge noted that Ms Wang and Mr Li have attempted to justify Mr Li's solo attendances by explaining that Ms Wang was available to call should Mr Li encounter any problems. Ms Wang has also explained her actions by stating she was just too busy. However, it is also submitted by Mr Hodge that being too busy, and stating that she was available on the telephone, does not excuse Ms Wang's misconduct under s.73(b) of the Act.

The Case against Mr Swann

[73] Mr Hodge submits that Mr Swann did not properly supervise Mr Li to ensure that he performed his agency work competently in relation to the property and that, in failing to do so, Mr Swann's conduct was seriously incompetent or negligent.

[74] Section 50 of the Act imposes a clear duty on branch managers or agents to properly supervise and manage salespeople. Mr Swann said in his brief of evidence that Ms Wang is accountable to him as the manager; and he had instructed both Mr Li and Ms Wang that salespersons with less than six months' experience were not permitted to conduct a negotiation of a sales and purchase agreement on their own, or prepare sale and purchase agreements on their own.

[75] Mr Hodge submitted that the reality of Mr Swann's arrangements with Ms Wang, as shown in this case at least, is that he lets her run her own team; but that goes beyond any reasonable notion of delegation of certain supervisory tasks and is an abdication of Mr Swann's supervisory obligations.

[76] Mr Swann emphasised that he sets policy, has regular meetings where the staff attend as a group, and that he has an open door policy. We agree with Mr Hodge that these things are appropriate, but they are not the same as being the person who, as a matter of day-to-day practice, is the supervising manager of the members of Ms Wang's team. The reality is that it is Ms Wang who is required to be that person.

[77] This is demonstrated by the events of this case. Ms Wang was too busy to meet Mr and Mrs Shiron with Mr Li. There is no suggestion in the evidence that Mr Li went to see if Mr Swann could help in light of Ms Wang being busy, or that this is what the licensees thought should have been done. This is because it was Ms Wang, not Mr Swann, who was, in practice, acting as Mr Li's supervising manager.

[78] Mr Hodge also submitted that the consequence of Mr Swann's failure as a supervisor was that Mr Li had almost all the dealings with Mr and Mrs Shiron and (he submits) acted unfairly as described above. The responsibility for this being allowed to occur rests with Mr Swann who was Mr Li's supervising manager; and Ms Wang was not (and is not) licensed to perform that role.

Expert Evidence

[79] Expert evidence was given for the Committee by Mrs A P Duncan as a very experienced salesperson, manager, and Principal Agent and, for the licensees, by Mr H Morley as a very experienced real estate consultant. Neither witness had their expertise impeached.

[80] Mr Hodge submits that, at a minimum, the following two important points emerge from the expert evidence:

- (a) Mrs Duncan gave expert evidence about the knowledge of reasonably competent licensees of the prospect of banks having strict lending requirements where there are weathertightness issues or where the property is in a large block of units. Both of these features applied to the property, albeit there had been repairs. This evidence was not challenged and, indeed, was agreed with by Ms Wang. As Mr Hodge says, this is an important part of the evidence demonstrating the seriousness of Mr Li's conduct in his dealings with Mr and Mrs Shiron about finance approval and whether the contract should have had a finance condition in the circumstances of this case.
- (b) Mr Morley's evidence demonstrates how unacceptable it was for Mr Li to have had almost all the dealings with Mr and Mrs Shiron in the way that he did. Mr Morley's evidence shows that the most Mr Li should have been doing at his level of experience, was delivering or picking up the contracts. Of course, Mr Li did much more. Mr Hodge also puts it that Mr Morley's evidence shows Ms Wang's serious incompetence in letting Mr Li undertake the task that he did, and Mr Swann's serious incompetence as Mr Li's supervisor in being oblivious to what was going on. We prefer to replace "*serious incompetence*" with "*serious negligence*".

[81] Accordingly, Mr Hodge for the prosecutor/Authority submits that charge 1 (or in the alternative, charge 2) is proved against Mr Li, charge 4 against Ms Wang, and charge 6 against Mr Swann.

A Summary of Salient Evidence

Evidence from Ms S Ali (aka Mrs Shiron)

[82] Ms Ali is one of the two complainants. The other being her husband Mr S Shiron. She came to New Zealand from Fiji in 2006 and is currently studying hairdressing. She owns a barbershop in an Auckland suburb and has run that business since November 2012 employing two barbers and one hairdresser.

[83] In April 2013 she and her husband were renting a unit in the same complex as the property having lived there since January 2010 and having observed that some of the other units in the complex were reclad because of weathertightness problems. One side of their unit had been reclad before they moved into it.

[84] In 2010 they had been approved by their bank for a mortgage loan on a house in Mangere but did not proceed with that purchase.

[85] On 13 April 2013 they went to an open home for the property now in issue and met Mr Li, one of the defendants. The property was to be auctioned a week or so later. Mr Li sent them several text messages to see if they were interested in making an offer on the property. They decided to attend the auction merely as observers to see how an auction works. They did not have any bank approval for finance and did not wish to make any offer on the property.

[86] At the auction on 24 April 2013 Mr Li introduced them to his manager, the defendant Mr C Swann, who sat beside them as did Mr Li. The latter suggested they make a bid but Mr Shiron said they were attending only as observers for experience.

[87] Ms Ali said that Mr Li then told them to make an offer just to get the auction started. She also told us that he had not asked them about their financial position and they did not understand what the word "*unconditional*" meant in terms of buying a property. As they trusted Mr Li, Mr Shiron bid \$300,000. Ms Ali says that Mr Li told her husband to bid at \$350,000 but he declined saying they did not have that much money. The property did not sell at that auction. After the auction both Messrs Li and Swann told the complainants that, if they were still interested in the property, the agents would speak to the vendor.

[88] At about 5.30 pm on 29 April 2013 Mr Li came to Ms Ali's hair salon and told the complainants he wished them to obtain the house and they should make an offer. Mr Shiron said they could only offer up to \$340,000. Mr Li then wrote this into a form of sale and purchase he had brought with him and said he would take it to the vendor. He asked them to write their names on the agreement and sign it. He inserted a settlement date of 17 May 2013. Ms Ali said they did not know that was a formal offer at the time. She said that he asked them if they would be needing a loan and they replied in the affirmative and told him they had arranged a loan back in 2010. He said that meant there would be no problem in arranging a loan then. He also told them that the sale and purchase agreement would be unconditional but Ms Ali and her husband said they did not know what that meant so Mr Li explained to them the meaning of "*conditional*" and "*unconditional*". She understood that, if conditions were put in the offer, the vendor might think they were not genuine buyers, but that if they made the offer unconditional he would be interested in their offer.

[89] Ms Ali says that Mr Li did not tell them that they would be in trouble if they entered into an unconditional contract and could not obtain a loan. She also says that he did not give her a copy of that agreement for anyone to read or check, nor did he tell them they should see a lawyer. She thought the form of agreement would be taken by Mr Li to the vendor and that then she and her husband could decide whether or not to negotiate to purchase the property, and that they would have time to apply for a loan. She says they did not understand that, if the vendor accepted the offer, they were legally bound to purchase the property.

[90] Mr Li later advised that the vendor was not interested in the price of their offer and he came back to the salon the next day, and waited for Mr Shiron to arrive also, and advised that the seller wanted at least \$350,000 as the purchase price. Mr Li then had the complainants sign a multi-offer form because there were two other people interested in the property.

[91] They met again on 2 May 2013 and Mr Shiron suggested that they offer \$370,000 but Mr Li advised them to offer \$375,000, and they did that rather reluctantly apparently. Ms Ali says that it was only at that point did Mr Li give them the REAA booklet which among other things advised them to consult a lawyer.

[92] Ms Ali says she then thought that, if the vendor agreed with their offer, they would have the chance to apply for a bank loan but would not be required to purchase the property if the bank declined. She insists that she did not understand the difference between "*conditional*" and "*unconditional*" and that Mr Li did not explain that to her. Earlier in her evidence she said that he had explained that.

[93] They received a text from Mr Li the next day to advise they had purchased the house so that Mr Shiron telephoned their accountant about arranging a loan and sent him a copy of their purchase agreement. They then went into a panic because the accountant told Mr Shiron that if the bank would not provide a loan they were still required to buy the property. The accountant tried on their behalf, through Mr Li, to add a finance clause into the purchase agreement but Mr Li said it was too late to do that and it could not be done.

[94] A bank soon agreed to give them a loan but required that they pay 35% of the price from their own cash. As they could only fund 5% of the purchase, they could not obtain finance. They then went to see a lawyer for advice.

[95] Ms Ali also alleges that, after she made a complaint against Mr Li to the Authority, he came to her salon and asked if she would withdraw the complaint if he could obtain an assurance from the vendor that the vendor would not sue them but they might have to pay a little money to the vendor to achieve that. She declined. They have now been sued by the vendor for \$37,500 which is the 10% deposit required under the contract.

[96] Ms Ali was thoroughly cross-examined and insisted that she honestly believed that she and her husband could "*get out of the contract if they could not obtain finance*". Curiously, Ms Ali still seems to feel that she did not need to obtain legal advice to buy a property but, with hindsight, feels she should have consulted her accountant. She insists that she told Mr Ali that her previously approval of finance was back in 2010 and not that they had preapproved finance as at April 2013.

Evidence from Mr S Shiron for the Prosecution

[97] Mr Shiron is a courier driver who moved to New Zealand from Fiji in 2008. Generally speaking, he corroborated the evidence of his wife Ms Ali. He mentioned that the loan pre-approved in 2010 by a particular bank was for \$390,000. He maintains also that when he signed the sale and purchase agreement he did not know it was binding and he did not then know what unconditional or conditional meant. He said that Mr Li had asked them if they had ever taken a loan before and they told him that they had not but had arranged finance for a proposal back in 2010. Mr Shiron said that Mr Li told them that meant a loan would not be a problem.

[98] Under careful cross-examination, it seemed that Mr Shiron's affairs are handled by the accountant who also handles many business matters for Ms Ali.

[99] Mr Shiron seemed to us to have a reasonable understanding of commerce as did Ms Ali despite their protestations to the contrary. At material times they knew a lawyer who had advised them when Ms Ali bought the hairdressing business. It seemed that lawyer also acted for the vendor of the hairdressing business to Ms Ali. Mr Shiron seemed to be saying they simply let him handle the transaction and did not need his advice because they understood the detail of the purchase of that business. In Fiji, Mr Shiron had been a student for a time at the University of Business Accounting but, due to lack of finance, did not finish his degree studies.

[100] Mr Shiron states that he and Ms Ali were novices about real estate and did not realise that bidding at an auction could lead to a binding unconditional contract to purchase the property. He said that, even when they later purchased the property, they did not know they had entered into a binding contract but thought they could walk away from it if they could not obtain finance. He put it that he and his wife had gone to the auction to observe, but that Mr Li pressed them into bidding, as did Mr Swann. He insists that he had no idea that they would have been bound if they had purchased the price at the auction nor when they later entered into the purchase agreement. He insisted that "*I was sure it would be right*" meaning that he could borrow the full \$375,000 purchase price from the bank and that, in any case, he was still merely in a negotiation stage with the vendor; and that he only realised to the contrary when he spoke to his accountant after having signed the binding contract.

Evidence for the Defence

Evidence from the first Defendant Mr Zhong Li (also known as Sam Li)

[101] In the Mr Li's in evidence to the Authority he said that, at material times, he was an associated salesperson with the defendant Ms Wang at Barfoot & Thompson in Panmure.

[102] Mr Li said that when he met the complainants at an open home for the property on 13 April 2013 they were very interested prospective purchasers. Over about half an hour, he showed them usual information including copies of the title, Council rates, auction documents, and the form 18. He said he made it clear that, because the property was being auctioned, they must bid without any conditions; and also that the complex was run by a body corporate. He said they answered that they were living in an apartment in the complex and understood things, that they owned a barbershop in a nearby suburb, and had bank approval for finance, and they knew that the property had been reclad and certified so they did not need a building report and were ready for the auction.

[103] Mr Li then referred to the complainants being the highest bidders at the auction but not meeting the reserve. After the auction, Ms Wang encouraged Mr Li to have them put in a written offer so that he kept in touch with them. He said that on 29 April 2013 Jessie Guo at the agency drafted an appropriate sale and purchase document which Ms Wang checked and prepared all other necessary documentation for, including the form 18 and the buying guide. However, Ms Wang was so busy and the complainants had been to the auction, that he went to them and had them sign an unconditional offer at \$340,000 with a settlement date of 17 May 2013 to allow time for them to give notice to their landlord. When he advised them that offer had been rejected, they told him they still wanted to buy the property.

[104] On 2 May 2013 Ms Wang told Mr Li that someone else was making an offer for the property so he advised the complainants of that. They wanted to meet with him and make another offer. Ms Wang told him he could use the previous offer document and have the complainants insert and initial their best price. Also, Ms Wang had Ms Guo add another clause acknowledging the recladding situation. Mr Li then met the complainants who changed the price to \$375,000 and also had them sign the agency's multi-offer form. He said he was never told they might have trouble arranging finance. He gave that offer to Ms Wang and late that evening she told him the vendor accepted it.

[105] Early the next day, he advised the position to the complainants and asked when he could pick up their deposit cheque. They told him they needed to see their bank first and arrange that, but the next day Mr Shiron advised that the bank required more information so he and Ms Wang met the complainants at the agency on 4 May 2013. It seems that Ms Wang arranged for them to have more time and a few days later spoke with their banker herself. The bank seemed concerned about the recladding certification but Mr Shiron advised Ms Wang that bank finance had been obtained and he was arranging with the bank for a deposit cheque. However, the complainants did not settle the purchase on 28 May 2013 as finally arranged. The agency received notice of their complaint to the Authority on 30 May 2013.

[106] Mr Li was carefully extensively cross-examined by Mr Hodge. We assessed him as a sensible and honest person. He insists that the complainants told him they had pre-approved finance and did not tell him that related to a prospective transaction back in 2010. He said, otherwise, he would have told them that such financial arrangements had lapsed long ago.

[107] Mr Li said he found the complainants to be intelligent people who knew what they were doing and knew all about the complex in which the property was sited and about the recladding there. He insists that, early on in his dealings with them, he advised them to obtain legal advice, and arrange finance and reports, such as a building inspection, so they would then be in a position to make an unconditional offer. He said they responded that they had lived in the complex for two or three years and knew all about it.

[108] Broadly, Mr Li said that in all his dealings with them Ms Wang had instructed him and expected him to ring her if any questions arose. He seemed to be maintaining that he was supervised by Ms Wang and Mr Swann. Mr Li said that all necessary advice documents were given by him to the complainants at the open home.

[109] In cross-examination, Mr Li accepted that at material times he had only been licensed for about two months. He seems to have now returned to China and does not wish to continue in the real estate industry in New Zealand. At material times he worked closely with the defendant Ms Wang and with Ms Guo at the agency who (he said), together with the defendant Mr Swann, were extremely helpful in supervisory of him, but he worked mainly with Ms Wang and Ms Guo who prepared all documents for him. The agency office was extremely busy at all material times.

[110] Inter alia, Mr Li insists that at the auction he told the complainants that their offer or bid was being made on an unconditional basis. Mr Hodge asked Mr Li if he had explained to the complainants the meaning of the words "*conditional*" and "*unconditional*", and he said no he did not, because he was not allowed to do that, but he would have said to them that to bid at the auction they needed to have their finance arranged so that they could bid without conditions.

[111] Mr Li was also cross-examined on the detail of the facts. We note that he admitted that, when the complainants signed the offer to purchase the property, he did not take them through all the terms of the contract "*because they had bid at the auction*". He said he did ask them about their finances and the state of the building, but they did not disclose their financial situation to him. He said that the agreement had been completed by Ms Wang and he only needed to obtain the complainants' signatures and did not need to give them advice. He felt sure that they knew the meaning of the word "*unconditional*". He said they made it clear they did not want to

put conditions in the contract regarding such matters as obtaining finance or getting a LIM report. He said he did say to them that if there were no conditions in the contract then their offer would be more attractive to the vendor and they would be seen as genuine.

[112] Mr Li also said that both complainants spent about 10 minutes reading the purchase contract before they signed it. Mr Li insisted that, throughout his dealings with the complainants, he kept advising them to obtain legal advice but they did not seem to want to and he particularly did that before they signed the purchase contract. Later in his cross-examination, he seemed to be saying that he assumed they had obtained legal advice when they fixed their price at \$375,500.

[113] Mr Li also seemed to say that although he knew that, if a property had had weathertight issues, banks required a bigger cash contribution from their purchaser customers, he did not tell that to the complainants. Then he added that he did not know what percentage of the purchase price they needed to borrow from their bank.

[114] Finally in cross-examination, Mr Li denied that he had ever come to Ms Ali and asked that the complainants withdraw their complaint against the defendants if he could arrange for the vendors not to sue them for the deposit.

Evidence from Ms J Wang

[115] Ms Wang says that she works closely with associate salespersons at the agency, and that includes Mr Li, but they are supervised by Mr Swann also. The latter works full time in the office and does not list or sell properties himself so that he is always available to all staff including the associate salespeople. It seems that all those people except Mr Swann speak Mandarin.

[116] Ms Wang confirmed that the complainants did receive the approved guide or precontract disclosure document prior to signing their first offer on the property and she produced their acknowledgement of receipt for that contained in Schedule 3 of the contract they had signed. She confirmed that the relevant contract was prepared by Ms Guo who normally prepares all the agreements within the relevant team. She confirmed that Mr Li was to telephone her if the complainants had any questions. Paragraph 14 of her evidence-in-chief reads as follows:

"I was aware that it was against the company policy for salespeople with under 6 months' experience to go unaccompanied to get purchasers to sign up agreements, and I was also aware that salespeople with under 6 months experience are not supposed to prepare agreements or give advice about legal rights and obligations relating to the preparing of an agreement. As I explained to the Authority's investigator when he interviewed me, I only allowed Sam to do it in this case because the agreement had already been prepared and I did not expect that he would give any advice to the purchasers as I had told him to telephone me if there were any issues. I was also very busy at the time or I would have gone with him. I will certainly be very careful in the future to be sure that something like this does not happen again."

[117] Inter alia, Ms Wang said that even after the agency had difficulty in collecting deposit from the complainants they told her that they had finance approved. She said that in her dealings with them they did not appear to her to be unsophisticated or naïve. They told her they were very happy with the contract to purchase and they

wanted to buy the property and their only issue was extending the settlement date to enable them to arrange their finance.

[118] Ms Wang observed that the agency had other interested buyers with finance and, if she had known sooner from the complainants about their difficulties with finance, she may well have been able to persuade the vendor to release them and have the vendor sell to someone else.

[119] Generally speaking, Ms Wang's evidence covered the facts as set out above.

[120] In the course of her evidence she acknowledged that she had over-delegated to Mr Li and, in doing so, had breached the policies of the agency. She said that she knew that at material times, but was then extremely busy and felt she was only requiring Mr Li to obtain signatures and that there was nothing which he needed to discuss with the complainants as prospective purchasers and, in any case she was always available on the telephone. She also understood that the complainants had the necessary finance and did not want any conditions in their offer.

[121] Ms Wang did not tell Mr Swann that she was breaching his managerial requirements. She also admitted that she did not tell Mr Li to warn the complainants that banks required a higher than usual cash contribution from purchasers where the building had been subject to weathertight problems, and she knew that the relevant complex had those issues. She was conscious that the complainants lived in the complex and knew all about its weathertight problems. She also conceded that, because the complainants had bid at auction, she simply left Mr Li to handle their financial situation. She added that she had interviewed and recruited Mr Li for the agency and assessed him as a very capable and careful person.

[122] It was put to Ms Wang that, in fact, Mr Li had handled this purchase transaction by the complainants. Ms Wang seemed to accept that. However, she insisted that she and Ms Guo prepared all necessary paperwork so that (she put it) Mr Li merely needed to obtain signatures from the complainants; although she admitted that Mr Li controlled the open home, assisted at the auction, and did all the following-up work after the auction leading to the contract to purchase by the complainants.

Evidence from the Defendant Mr C Swann

[123] Mr Swann is the branch manager at the Panmure branch of Barfoot & Thompson Ltd and has been for the past 14 years. At material times there were 18 licensed salespersons at that branch. They all spoke Mandarin but Mr Swann does not.

[124] Mr Swann said that he oversees and supervises all the licensees and he requires them to attend regular meetings and training seminars. He attends all auctions for properties listed with his branch. He emphasised that associates with less than six months experience are clearly told of the necessary compliance directives regarding them. He says that he is always available and the salespersons and sales associates know that.

[125] He works closely with Ms Wang who has a very high work rate. He also states that he regularly checks compliance matters with her and her team to ensure that sale and purchase agreements are not drafted by a salesperson of under six months experience and asserts that, in fact, Ms Guo does all that; and that the sales associates and Ms Wang are under instruction that no sales associate (under six

months) is to be involved in the negotiation of a sale and purchase agreement on his or her own. Mr Swann says that he regularly asks those inexperienced associates, whose name may be associated with an agreement in conjunction with Ms Wang, who accompanied them during the negotiations. He concluded his evidence-in-chief as follows:

"24. Allowing Sam to go out alone in this circumstance was a lapse of judgement on Jane's part and contrary to the instruction that both she and Sam had received from me. There has not been another case of unescorted negotiation, as far as I am aware."

[126] Under pressing cross-examination from Mr Hodge, Mr Swann put it that even if Ms Wang had handled the transaction herself the outcome would have been the same. He seemed to imply that the outcome was the fault of the complainants but was all rather unfortunate.

[127] Mr Hodge also put it to Mr Swann that a more experienced agent than Mr Li would have probed into the financial position of the complainants. Mr Swann's response seemed to be that Ms Wang had breached his instructions in allowing Mr Li to be so involved with them.

[128] Mr Swann agreed that he had conferred with the complainants prior to the auction, sat with them in the auction room, and that he encouraged them to bid. He emphasised that there should have been more involvement from Ms Wang in the purchase transaction entered into by the complainants. He was concerned about Mr Li's involvement in that transaction and particularly that his agency's policies were not adhered to due to what he said *"was a very unfortunate lapse of judgement by Jane Wang, but I can't change the past"*. He says that he is and was at all times well aware of the requirements of s.50 of the Act.

[129] Mr Swann would not concede that this case shows that the hands on day to day management and supervision of the agency had been left by him to Ms Wang, but maintains that he tightly controls all staff. We observe that he needs to use Ms Wang as a language conduit because the staff all speak Mandarin and he does not. He insists that he has an open door policy and encourages staff to consult him over any matter and that he is available for them 24 hours per day by telephone.

[130] He seemed to accept that Ms Wang had simply been too busy to be accompanying Mr Li when he dealt with the complainants and insisted she had a lapse in judgement in bending his office directives. He accepted that neither Ms Wang nor Mr Li had seen fit to consult him at any stage over this transaction. Mr Hodge put it that was because Ms Wang led the team rather than him, but Mr Swann asserts that view is *"completely incorrect"*.

[131] Mr Swann emphasised that in Ms Wang's team the contracts are drafted by Ms Guo, the licensee, as part of her administrative duties and that she and all sales associates and Ms Wang are under instruction that no sales associate who has had less than six months experience as a licensee is to be involved in the negotiation of a sales and purchase agreement on their own.

The Submissions for the Defendants

[132] We are appreciative of extensive typed submissions from Mr Rea but, at this point, we merely summarise them.

The Charges Against Mr Li

Alleged failure to provide approved guide

[133] Mr Rea noted that evidence was given both by Mr Li and by Ms Wang of the standard process within the group of licensees associated with Ms Wang, where a suitably experienced licensee within the group would, in all cases, prepare agreements for sale and purchase, and compile other necessary documents together in a bundle ready for presentation to prospective purchasers.

[134] He also noted that Ms Wang specifically confirmed in her evidence that she checked the contents of the bundle in this instance, as she does in every case, and the approved guide was included together with the pre-contract disclosure document.

[135] Mr Li was questioned about the bundle and its contents, and he confirmed that the approved guide was contained within the bundle left with the complainants at the time the first offer was signed. Mr Rea submits that Mr Li's evidence is also consistent with the documentary evidence, particularly, the complainants' signed acknowledgement that they had been given the approved guide.

Recommendation of legal advice/complainants' awareness of ability to obtain expert or other advice/reasonable opportunity to seek advice

[136] Mr Rea emphasised Mr Li's evidence that he did recommend that the complainants should seek legal advice, as was his invariable practice. Mr Rea puts it that the complainants would, in any event, have been well aware that it would have been open to them, if they had wished to do so, to obtain legal, expert, or other advice; and this would have been self-evident to Mr and Mrs Shiron. Mr Rea added that Mrs Shiron knew it would be sensible to consult a lawyer about the purchase of a business or lease of premises and she, in fact, had obtained expert advice from her accountant before deciding to buy her hair salon business; and there had been ample time for the complainants to have sought legal, expert, or other advice during the period over which they had pursued their interest in purchasing the property.

Alleged failure to properly take into account that the complainants were first home buyers, financially committed to a business, obtained finance "a long time ago", property was a "leaky building", complainants did not fully understand consequences of entering into an unconditional sale and purchase agreement

[137] Mr Rea puts it:

- (a) While the complainants may have been first home buyers, they were articulate, intelligent, and commercially astute, and there was nothing to put Mr Li on notice that they may not have fully understood the nature and consequences of their actions (which is denied);
- (b) There has been no evidence presented to support the allegation that the complainants were "*financially committed to a business*", nor has there been any evidence to suggest this had any relevance to their inability to obtain finance;
- (c) On Mr Shiron's own evidence, he informed Mr Li that the complainants had been approved for finance by Westpac up to the sum of \$390,000

(being \$15,000 more than the agreed purchase price), and he conceded that he probably would not have informed Mr Li that this was in 2010;

- (d) The complainants did, in fact, understand the unconditional nature of the agreement that they were signing but they assumed, incorrectly, that they would be able to obtain finance.

Alleged failure to provide pre-contract disclosure statement

[138] Mr Rea referred to Ms Wang's uncontested evidence that the pre-contract disclosure statement was among the documents contained in the bundle which she checked. He submits that would have made no sense for Mr Li to have removed this document from the bundle which had already been prepared for him.

Alleged breach of s.36(2A) lawyers and Conveyancers Act 2006

[139] Mr Rea submits that nothing Mr Li did was, in substance, "conveyancing services" within the meaning of that term.

Charge against Ms Wang

[140] The charge against Ms Wang is that she was, allegedly, seriously incompetent or seriously negligent in instructing Mr Li to obtain the complainants' signatures on the agreement for sale and purchase where the agreement had not been finalised and Mr Li could not legally finish preparing the agreement or give advice about legal rights and obligations arising from the agreement.

[141] The agreement for sale and purchase was in the standard form, approved by the Real Estate Institute of New Zealand and Auckland District Law Society, containing general terms of sale clauses 1 to 17 with two additional special conditions. On the front page of the agreement property details were identified, with the type-written property address and legal description and deletion of the legal estates which did not apply, so that the property was identified as a freehold strata title. The vendors' names were also typed on to the agreement. This was all prepared by a suitably experienced salesperson (i.e. Ms Guo apparently), not by Mr Li.

[142] Mr Rea emphasised the evidence that all terms of sale were already prepared before Mr Li took the agreement to the complainants, and that the only input by Mr Li was to make the handwritten notations on the front page of the agreement, apart from the purchasers' names which were written by Mr or Mrs Shiron.

[143] Mr Li wrote the initially offered price of \$340,000 into the form of agreement based on the instructions of the complainants. On the evidence, both Mr Li and Ms Wang knew that this was the amount of the offer that the complainants intended to make before the agreement was delivered to them. Mr Li also wrote in the settlement date of 17 May 2013. He drew a line across the area designated for any finance conditions and circled the word "no" beside references to a LIM and Building report. Clause 9 (of the general terms of sale) addresses the procedure which applies where a finance condition is included, or for a LIM or building report, and these provisions only become effective where there is a condition inserted relating to finance, or where the purchaser indicates that a LIM or building report is required. It is submitted that, therefore, the only "operative" contractual provisions in the agreement that were written by Mr Li were the purchase price (determined by the

complainants, and already known before Mr Li left the agency's office), and the final price, and the settlement date.

[144] It is submitted by Mr Rea that this limited input into the agreement does not, in substance, amount to "*conveyancing work*" as envisaged by the Lawyers and Conveyancers Act 2006, and there would be no reasonable prospect of a successful prosecution if Mr Li were pursued for an offence contrary to s.35 of that Act in relation to the preparation of the agreement. That might be so but, technically in our view, Mr Li's input was conveyancing work.

[145] It is further submitted for Ms Wang that it is entirely untenable for the prosecution to assert that a salesperson who informs prospective purchasers that an unconditional offer will be more appealing to vendors is giving those purchasers legal advice.

[146] We accept that even if we were to take the view that Mr Li gave legal advice, either by making the handwritten insertions completing final details in the agreement, or by advising the complainants how an unconditional offer would be perceived, it does not follow that Ms Wang was negligent or incompetent.

[147] Mr Rea emphasises that, at the time Mr Li went to visit the complainants, Ms Wang knew that they had previously bid for the property at an auction. She knew that the property had been remedied for weathertight issues and that a code compliance certificate had been issued, and her office had dealt with other sales of units in the same circumstances without finance being an issue. She was also expressly told by Mr Li that the complainants had specifically assured him that they had approval of finance in place.

[148] Mr Rea therefore submits that it was not at all unreasonable in those circumstances for Ms Wang to be confident that any offer that would be made would be unconditional, and that there would be no need for Mr Li to give the complainants any advice about their legal rights and obligations. The auction had been held only eight days previously, and the complainants had made an unconditional offer by entering a bid for \$340,000 at that time. It is put that it would be inferred that they had done their due diligence, obtained any necessary advice, and put in place whatever arrangements needed to be made to be able to complete the purchase. Mr Rea emphasises that, nevertheless, Ms Wang took the precaution of instructing Mr Li to telephone her if the complainants had any questions so she could deal with them directly.

[149] Ms Wang gave evidence of her dealings with the complainants after the agreement had been entered into when there were delays in collecting the deposit. Her unchallenged evidence was that the complainants told her clearly that they had finance approved and they just needed to provide a few more documents to the bank. Mr Rea observes that the clear statements by the complainants to Ms Wang about their approval of finance at that stage proved to be incorrect, and that there is every reason to believe that the complainants would have been equally clear about the matter before the agreement was signed, which Mr Li says they were to him.

The Charges against Mr Swann

[150] Mr Rea submits that, as with the charge against Ms Wang, the charge against Mr Swann has as its starting point an assumption that the prosecution's theory of the case of Mr Li exerting unfair pressure on the complainants is correct.

[151] Mr Rea also submits that the evidence demonstrates that Mr Swann is very much a "*hands on*" manager, present and available at all times, and that he takes his responsibilities seriously. Mr Swann does not undertake any selling and is solely dedicated in his role to management of the branch office and staff.

[152] Mr Rea puts it that effective delegation is an essential part of management, particularly in an office with a large number of salespeople. He noted that the prosecution's expert witness, Mrs Duncan, gave evidence of a role she herself had undertaken as a "*sales manager*" responsible for 15 other salespeople, albeit that she was not the person ultimately responsible for supervision under the applicable legislation.

[153] Mr Rea notes that Ms Wang and the salespeople associated with her are all Mandarin-speaking, and English is not their first language; and that, as Mr Swann explained under cross-examination, Ms Wang is a useful conduit for the translation of concepts regarding compliance and other aspects of real estate agency work.

[154] Mr Rea observed that there has been extensive evidence of all of the steps taken by Mr Swann to ensure appropriate supervision and training of staff, and that expert evidence has been presented by Mr Morley that the arrangements put in place by Mr Swann were reasonable and in line with accepted standards within the industry. Mr Rea noted that the prosecution's own expert, Mrs Duncan, accepted that the high volume of work undertaken by the branch and absence of other complaints indicates an overall good level of supervision.

[155] Mr Rea put it that Mr Swann had in place a policy under which salespersons with less than six months' experience were not permitted to be involved unaccompanied in the negotiation of agreements for sale and purchase, and he would regularly undertake spot checks to ensure that this policy was complied with. Mr Rea submits that this policy involves a more stringent standard than required under the Lawyers and Conveyancers Act 2006 and recognises that there is a risk that in negotiations a salesperson may stray into giving advice about legal rights and obligations incidental to an agreement; but that Mr Li and Ms Wang did not follow this policy set by Mr Swann.

[156] It is submitted that, if there was any breach by Mr Li of any duty under the Act or Rules or other legislation, then that occurred despite the arrangements put in place by Mr Swann for effective supervision, and not as a result of the actual arrangements at the agency.

Discussion

[157] Mr Rea puts it that the situation in which the complainants find themselves is regrettable but a result of their own assumptions as to their ability to obtain finance, and of their own conduct, including their failure to seek legal or other expert advice before signing up to an unconditional agreement for sale and purchase, and they clearly knew obtaining such advice was an option available to them.

[158] Alternatively, Mr Rea puts it that, even if the complainants were, in fact, as naïve as the case for the prosecution supposes, their conduct was such that none of the licensees would have had reason to expect that their approval of finance was not relevant and current but would apply to the property, which remediated and issued with a code compliance certificate for the repairs, and where other units in the same development had been sold by the agency without finance issues arising. The

relevant conduct includes bidding at an auction for the property, which (Mr Rea puts it) no reasonable licensee would expect to be done without the complainants having satisfied themselves already that they were in a position to buy the property unconditionally, and their express advice to Mr Li that they had been approved for a loan of up to \$390,000, where Mr Shiron accepted in his evidence that this was not identified as having been previously in 2010.

[159] Mr Rea provided a final helpful summary of the response of all defendants to the amended charges but we have covered that content above and, at this stage, merely add the following.

[160] Mr Li insists that he did provide the complainants with an approved guide before they signed the relevant sale and purchase agreement and they have acknowledged this. He also insists that he did recommend to them that they seek legal advice before signing that agreement and that, in any event, they were well aware of their ability to do that. He puts it that they were articulate, intelligent, and commercially astute. It is also submitted for Mr Li that there was no evidence or suggestion that the complainants might have financial problems in terms of their ability to obtain finance for the said purchase transaction. Mr Shiron gave evidence that he informed Mr Li that the complainants had finance approved at \$390,000 and "*probably*" (he put it) did not add that had been arranged in 2010. Mr Li also asserts that he provided a precontract disclosure statement (form 18) to the complainants in terms of s.146 of the Unit Titles Act 2010.

[161] Mr Rea also points out that technically the property was not a leaky building because it had been remediated and Code Compliance Certificate had been issued.

[162] Inter alia, Mr Rea points out that it is s.35 of the Lawyers and Conveyancers Act 2006 which creates the offence of an unauthorised person providing conveyancing services to any other person. There is an extensive definition of "*conveyancing*" in s.6 of that Act. Mr Rea submits that any input by Mr Li into the preparation of the agreement for sale and purchase was "*de minimis*". He also submits that the advice allegedly given by Mr Li, as to the meaning of conditional and unconditional, to the effect that an unconditional offer would be considered more favourably by a vendor, is not advice about legal rights and obligations, nor does it amount to "*conveyancing services*"; but is advice concerning a vendor's likely perception of an offer. We think that, at least technically, Mr Li did provide conveyancing services to the complainants to a small extent.

[163] With regard to Ms Wang, Mr Rea adds that she admits she permitted Mr Li to obtain the complainants' signatures on the contract but emphasises that she expressly instructed him to contact her if the complainants had any questions so as to minimise the risk that Mr Li might provide advice to them about legal rights and obligations.

[164] With regard to Mr Swann, Mr Rea adds that Mr Swann denies that he failed to properly supervise Mr Li and asserts that, in addition to exercising substantial and meaningful personal supervision of all licensees at the Panmure Branch office, he implemented regular policies and checks to ensure that his instructions were complied with. He says those instructions particularly included that no person with under six months experience was to prepare agreements for sale and purchase; in the case of sales associates working under Ms Wang, that all agreements were prepared by a designated and suitably experienced salesperson; and that no licensee with under six months experience was to be involved in any unaccompanied

negotiation of sale and purchase agreements. It is also submitted for Mr Swann that, in fact, there was no incompetent real estate agency work or any breach of any applicable statutory provision in this case.

[165] We stress that the requirements of the Act and its Regulations regarding supervision of licensees must be complied with carefully; and it is a serious matter to fail to do that. It is also most important that the said relevant sections of the Lawyers and Conveyancers Act 2006 be complied with. However, having stood back and absorbed all the evidence and argument, we now set out, fairly succinctly, our overall views in this case.

[166] We are reluctant to be particularly critical of Mr Li. At material times he was a novice real estate agent but self-assured, confident, and industrious. He obeyed his orders from his superiors at the agency. He has been candid to us and is clearly concerned at the predicament in which the complainants have landed. We do not think that his failures in this case amount to misconduct. In terms of the alternative possibility that he is guilty of unsatisfactory conduct, we think that to be so.

[167] However, we are not suggesting Mr Li is incompetent or negligent but we find that he has contravened the Act and its Rules and, in terms of his lack of real estate work experience, it is unacceptable or falling short of reasonable standards that he be so involved in a purchase transaction with, possibly, unsophisticated prospective purchasers when he knew or should have known that he was not entitled to do that without proper supervision. In terms of the evidence overall, his work on behalf of the complainants seems to have been undertaken competently. It seems he now resides in China and does not wish to pursue a career here in real estate.

[168] With regard to Ms Wang, we are of the firm view that her conduct was deficient in that she over-delegated to Mr Li in order to keep putting through a high volume of real estate work and achieve many sales in a high-powered manner. She knew of the requirements of the Act and its Regulations that she supervise Mr Li. She was well aware that, in failing to do so, she was breaching the very strict guidelines imposed by Mr Swann on behalf of her agency.

[169] We regard her failure to supervise Mr Li at material times as concerning. It may well be that the heavy financial consequences which the complainants seem to have incurred have resulted from that; although, in many ways, they seemed to know the risks they were undertaking.

[170] We consider that misconduct has been proven against Ms Wang but, quite possibly, at a relatively modest level of offending overall. We feel she was seriously negligent in her instructions to Mr Li as to the real estate work he was to undertake as covered above and she has wilfully contravened the Act and its Regulations.

[171] With regard to the charges against Mr Swann, it is to his credit that he understands his responsibility to new agents, such as Mr Li, and he seems to have implemented appropriate and firm rules of conduct at the agency. He is no doubt a very good branch manager but, in this case, he had allowed Ms Wang to take much of the control over her team of salespersons which he should have retained, especially knowing that Ms Wang is an extremely high-powered and effective salesperson. He ought to have been particularly careful about supervision in this situation where, apart from him, all employees of the agency spoke in Mandarin. It is a near run thing whether his failures amount to misconduct at a low level or to unsatisfactory conduct at a reasonably significant level. Our finding is the latter.

[172] It is surprising that between Ms Wang, Ms Guo and Mr Li, neither a finance condition nor conditions relating to a LIM and builder's report were inserted in the contract. At least there should have been full discussion by an experienced agent with the complainants about those aspects.

[173] Generally speaking, we cannot disagree with the case against Ms Wang put to us by Mr Hodge and as we have summarised it above. We also agree with much of what Mr Hodge has set out above in terms of the prosecution case against Mr Swann.

[174] Penalty needs to be separately dealt with but, probably, by a series of succinct written submissions. We direct the Registrar to arrange a telephone conference of counsel with our Chairperson for him to decide on the most appropriate process for hearing submissions on penalty in this case.

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

Judge P F Barber
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member