IN THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZ READT 8
READT 29/13

In the matter	of charges laid under s 91 of the Real Estate Agents Act 2008
BETWEEN	THE REAL ESTATE AGENTS AUTHORITY (per COMPLAINTS ASSESSMENT COMMITTEE 20003) Prosecutor
AND	VIRENDRA JHAGROO Defendant

Members of the Tribunal: Judge P F Barber – Chairperson
Mr J Gaukrodger – Member
Ms N Dangen – Member

Heard at: Auckland on 4 December 2013

Appearances: Mr L J Clancy for the prosecution
The defendant on his own behalf

Date of this decision: 3 February 2014

DECISION OF THE TRIBUNAL

Introduction

[1] On 25 January 2011, a Complaints Assessment Committee of the Authority determined to take no further action on a complaint against Mr Jhagroo (“the licensee”) from Sylvester and Tafadzwa Kamhara (“the complainants”) as prospective property purchasers. However, the latter appealed successfully to us against that decision to take no action and we directed that a charge should be laid by the Authority; refer *Kamhara v REAA* [2012] NZREADT 9.

[2] Mr Jhagroo now faces two charges of misconduct under ss 73(a) and 73(b) of the Real Estate Agents Act 2008 (“the Act”). On 14 June 2013 he filed a response in which he denied the charges.

The Specific Charges

[3] The charges read as follows:

Charge 1

Following a complaint by Tafadzwa and Sylvester Kamhara (complainants), Complaints Assessment Committee 20003 (Committee) charges Virendra Jhagroo (defendant) with misconduct under s 73(a) of the Real Estate Agents Act 2008 (Act) in that his conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful.

Particulars

(i) Under an agency agreement the defendant agreed to sell a property at 19 Janway Avenue, Dannemora (property) on behalf of Vitale and Alice Siavafu (vendors).

(ii) The property was subject to a number of interests registered on the certificate of title:

(A) Mortgage from Westpac.

(B) Caveat by Southland Finance Limited.

(C) Caveat by No Deposit Home Finance Limited.

(iii) A sale and purchase agreement for the sale of the property by the vendors to the complainants for $505,000 was entered into on 18 July 2007 (agreement). A deposit of $25,000 was payable on the agreement becoming unconditional.

(iv) The agreement was declared unconditional on 27 July 2007. The defendant advised the complainants that they had to pay the deposit or may lose the property. The complainants paid the deposit on 27 July 2007 by bank cheque into the trust account of the defendant's agency.

(v) A fax was sent from the solicitor for the vendors to the defendant on 1 August 2007 notifying the defendant that the agreement was unlikely to settle.

(vi) The solicitor for the complainants notified the defendant on 2 August 2007 that the deposit should not be released as the agreement was unlikely to settle.

(vii) The solicitor for the complainants sent a notice of cancellation of the agreement on 2 October 2007 on the basis that the vendors could not settle.

(viii) The solicitor for the vendors notified the defendant on 8 October 2007 that the deposit (minus occupation rent owed) was to be returned to the complainants.

(ix) On 9 October 2007 the solicitor for the complainants sent a letter that the deposit (minus occupation rent owed) was to be refunded to their client.

(x) Despite the facts referred to above the defendant disbursed the deposit on 7 December 2007 as follows:

(A) $20,925 retained by him as payment of commission.

(B) $3514.30 retained by him for marketing costs.

(C) $560.70 to the vendors' solicitor.

(xi) In all the circumstances, it was disgraceful for the defendant to take the sum of $24,439.30 from the deposit paid by the complainants instead of paying it back to the complainants.

Charge 2

The Committee further charges the defendant with misconduct under s 73(b) of the Act in that his conduct constituted seriously incompetent or seriously negligent real estate agency work.

Particulars

(i) Advising the complainants that $500,000 would be a sufficient purchase price to allow the vendors to repay their debts secured by the property when that advice was incorrect.

Or, in the alternative

(ii) Failing to properly check the certificate of title for the property, which showed a mortgage to Westpac and two caveats registered by finance companies, and failing to make appropriate enquiries of the vendors to ascertain the purchase price necessary to repay their debts secured by the property, in order to try to ensure that any purchase price agreed for the property would be sufficient to allow clear title to be provided to a purchaser of the property.

Factual background

[4] At all relevant times, the licensee was the principal officer of CT Realty Ltd, trading as Re/Max Point East Realty. By way of a listing agreement dated 7 June 2007, CT Realty Ltd was instructed as agent in respect of a property at 19 Janway Avenue, Dannemora by the vendors Alice and Vitale Siavalua.

[5] On 3 July 2007, Westpac New Zealand Ltd, the mortgagee of the property, obtained a valuation from registered valuers Seagar & Partners. This appraised the property at the value of $540,000 if sold on the open market and at $486,000 if sold by mortgagee auction.

[6] Under a sale and purchase agreement dated 18 July 2007, the vendors agreed to sell the property to the complainants for $505,000, with a deposit of $25,000 to be paid to the CT Realty Ltd trust account on the agreement becoming unconditional.

[7] The complainants state that the licensee took them to view the property before they entered into the sale and purchase agreement. After viewing the property, the licensee invited them back to his office and showed them the Seagar & Partners valuation, the certificate of title for the property, and various finance company documents. The certificate of title showed that there were three interests registered against the property, namely, a mortgage to Westpac New Zealand Ltd, and a caveat by Southland Finance Ltd, and caveat by No Deposit Home Finance Ltd.

[8] The complainants state that the licensee told them that, even though there were additional caveats on the property from finance companies, they need not worry as an offer of $500,000 would cover the mortgage debt to Westpac and that was sufficient. He said that the

second and third lenders were not the concern of the complainants. He also told the complainants that the information was confidential and he was only advising them as a favour as they were from the same continent.

[9] The said 18 July 2007 sale and purchase agreement was conditional on the complainants obtaining finance and a satisfactory builder's report within 10 working days. As noted above, a $25,000 deposit was payable on the agreement becoming unconditional. Settlement was to take place on 31 July 2007 but this was subsequently altered to 3 August 2007.

[10] Mr Les Divers, principal of the law firm Churton Hart and Divers acted as solicitor for the vendors. Prior to the agreement being signed, Mr Divers had advised the vendors that in any sale and purchase agreement they should include a clause making any sale conditional on the vendors reaching agreement with their mortgagees as to sale. This was because there were concerns that the amount owed to the three lenders was likely to exceed the amount that could be expected from a sale. Such a clause was not included in the agreement as the vendors did not consult Mr Divers before signing. Mr Divers gave evidence before us and we refer to that evidence below.

[11] On 27 July 2007, the agreement was declared unconditional by Khan and Associates (solicitors for the complainants). However, that same day, the complainants say they received a phone call from the licensee who told them there was a real risk that they would lose the property if they did not pay the deposit straight away. As a result, they paid the deposit that afternoon. Still later that afternoon, Mr Divers telephoned Khan and Associates and advised that the transaction was unlikely to settle given the stance taken by the second mortgagee, Southland Finance Ltd.

[12] On 1 August 2007, Mr Divers sent a fax to the licensee enclosing a copy of a letter that he had sent to Minter Ellison Rudd Watts, solicitors for Westpac, advising that the transaction was unlikely to settle.

[13] A letter was faxed from Khan and Associates (solicitors for the complainant purchasers) to the licensee on 2 August 2007 stating that, as settlement may not proceed due to caveats from two finance companies, the deposit should not be released until authority had been given by the complainants. On the same day, Khan and Associates wrote to the complainants advising them that the transaction may not settle. They also wrote to Mr Divers.

[14] On 7 August 2007, the complainants moved into the property having sold their own home, and started paying rent to the vendors; but they stopped paying rent on 3 September 2007 when the transaction failed to settle .

[15] On 12 September 2007, the solicitors for the complainants issued a settlement notice against the vendors. The settlement notice was not complied with and the agreement was cancelled on 2 October 2007 when the solicitors for the complainants sent a letter to the licensee seeking written confirmation that his company was still holding the $25,000 deposit in its trust account.

[16] On 8 October 2007, Mr Divers sent a letter to the complainants' new solicitors, Wood Ruck (for the attention of Mr Owen Vaughan), stating that the vendors had instructed that the deposit should be returned to the complainants (as intended purchasers) minus four weeks' unpaid rent. A copy of the letter was also sent to the licensee. The letter states: *"We are sending a copy of this letter to Remax and request it to be treated as authorisation for the deposit less one month's rental to be released to you"*

[17] On 9 October 2007, Wood Ruck wrote to CT Realty Ltd stipulating that the funds for the rent due to the vendors could be disbursed to them and the remaining balance of the deposit, namely $23,400, should be re-paid to the complainants.

[18] A further letter was sent from Wood Ruck to REINZ on 12 October 2007 stating that any commission due on the transaction should be paid to CT Realty Ltd by the vendors and not by the complainants, noting that the licensee appeared unwilling to return the deposit to the complainants voluntarily, and seeking REINZ's assistance in recovering the deposit for the complainant intended purchasers.

[19] On 15 October 2007, Wood Ruck Manukau sent another fax requesting the return of the deposit. The complainants state that, about then, they went to the licensee's office to confirm that he had the deposit and the licensee responded that he did not have to know where the deposit money was.

[20] It was put that, on 7 December 2007, the licensee disbursed the deposit in the following way:

(a) $20,925 was taken by the licensee (presumably by his company CT Realty Ltd) in commission;

(b) $3,514.30 taken by the licensee for marketing costs; and

(c) $560.70 was sent to the vendors' solicitor, Mr Divers, who confirms that he has not cashed the $560.70 cheque returned to him and it still held at his office.

[21] In February 2008, the complainants vacated the property. The vendors were adjudicated bankrupt in 2009.

[22] The complainants made a complaint to the Law Society against their previous lawyers, Khan and Associates, for not advising them of the risk that the transaction might not settle due to the mortgage and caveats. They also sued Khan and Associates and received an out-of-court settlement of $15,000. They say that, as a result of legal fees of $8,000, they were left with $7,000 from that settlement.

Summary of Salient Evidence To Us

The Evidence for the Prosecution

[23] There were four witnesses for the prosecution, namely, Mr Leslie Divers, the solicitor for the vendors; Ms C E Hope, an investigator for the prosecutor; and Mr and Mrs Kamhara the would-be purchasers, although Mr Kamhara's written brief was adduced by consent and Mrs Kamhara confirmed and expanded her brief by phone from Australia by consent.

The Evidence of Mr Divers

[24] Mr Divers first met the vendor, Mrs Siavalua, on 27 February 2007 when she and her husband were contemplating selling the property. It seems that they felt under financial pressure and that the amount owed to mortgagees and caveators was likely to exceed any sale proceeds. Registered on their title to the property was one mortgage to Westpac (a first mortgage) and separate caveats relating to advances from Southland Finance Ltd and No Deposit Home Finance Ltd.

[25] On 18 July 2007 Mr and Mrs Siavalua (as vendors) entered into an agreement for sale and purchase of the property as referred to above with Mr and Mrs Kamhara (as purchasers) without having consulted Mr Divers further. On 27 July 2007 Mr Divers' office received a fax from the solicitors for the Kamharas, Messrs Khan & Associates, that the agreement was unconditional. However, on that same day he received a letter on behalf of the second mortgagee caveator, Southland Finance Ltd, that it was not prepared to release its caveat due to there being a shortfall from the sale. Accordingly, on that day Mr Divers called Mr Khan and advised him it was likely the sale transaction would not settle. On 1 August 2007 he faxed that information to the defendant licensee. On 2 August 2007 he confirmed to Mr Khan that the vendors could not satisfy the holders of the mortgage and the two caveats and so would not be able to complete settlement. On 2 October 2007 he received a cancellation-of-purchase notice from Khan & Associates.

[26] On 8 October 2007 Mr Divers wrote to the new solicitor for the Kamharas (Mr Owen Vaughan of Wood Ruck) acknowledging cancellation of the sale and purchase agreement and advising that the deposit was to be released back to the Kamharas subject only to the deduction of four weeks rent (because the Kamharas had been renting the property in the meantime). A copy of that letter was also sent to Remax.

[27] Mr Divers understands that the deposit was disbursed by the licensee in December 2007. His legal firm received a cheque for $560.70 which is not cashed and has simply been held. Remax (CT Realty Ltd) retained $20,925 as payment of its commission and $3,514.30 for additional marketing costs which it had incurred on handling the sale.

[28] Mr Divers noted that the Kamharas had moved to Australia by December 2007 and he has not been in touch with them since 2008.

[29] It was covered in cross-examination of Mr Divers that entitlement to commission was for Remax rather than the defendant as the salesperson. There seemed to be no dispute about Mr Diver's evidence that, because the sale was cancelled due to the default of the vendors, the deposit paid by the purchasers still belonged to them and not to the vendors nor, of course, to their real estate agent. Mr Divers confirmed that the Remax agency in this case was CT Realty Ltd of which the defendant is shown as the "broker / owner". At material times the defendant was the licensed agent for that licensed real estate agency.

The Evidence of Ms Hope

[30] Ms Hope then gave evidence as a senior investigator for the prosecution and, very helpfully, covered the documents comprising the agreed bundle of documents. She stated that the Kamharas made an original complaint against the defendant to REINZ by letter of 12 October 2007 (from their solicitor, Mr Vaughan) but an investigation was not completed because the defendant could not then be located. However, the complaint was reactivated by REINZ when the defendant applied for a salesperson certificate in November 2009. Under the current Act from 17 November 2009 the Real Estate Agents Authority became responsible for handling complaints about the conduct of licensees. The REINZ file was forwarded to the Authority on 23 April 2010.

[31] Proper procedures were then followed leading to this prosecution before us. On 25 January 2011 a Committee of the Authority decided to take no further action against the defendant, but Mr and Mrs Kamhara appealed that decision and on 29 March 2012 we directed the Authority to lay charges against the defendant.

The Evidence of Mrs Kamhara

[32] Mrs Kamhara gave detailed evidence for the prosecution by way of a written brief and (by consent) by telephone from Australia. She covered the above background and there is no real dispute about the basic facts.

[33] She and her husband visited the property with the defendant in July 2007 and on 13th of that month put in an offer for $500,000 on the property. They increased it to $505,000 on 18 July 2007 and that offer was accepted. She said that the defendant advised them that there was a mortgage and two additional finance caveats registered against the title of the property but this was not an issue, he allegedly told them, because the first mortgagee, Westpac, would be covered by the price offered by them. She said "*he led us to believe that it did not matter about the second and third mortgagees and that what we were offering was sufficient*". She said that he gave them a copy of a valuation report prepared by valuers for Westpac. She said he also told them that the second and third lenders were not the prospective purchasers' problem but the vendors' responsibility to sort out; and that the vendors owed about $579,000 on the property and so were desperate to sell because they felt they would get less at a mortgagee auction. The Westpac valuation was for $540,000.

[34] Mrs Kamhara then covered the timeline set out above. The conditions in the agreement for sale and purchase were fulfilled by the purchasers on Friday 27 July 2007 so that the contract then became unconditional. She said that on that day the defendant contacted her and instructed her to pay the deposit because the agreement was now

unconditional saying (she alleges) that if they did not pay the deposit they would lose the property. She says that, as a result, she ran down to the Westpac Bank in Queen Street, Auckland, and banked $25,000 into the trust account of CT Realty Ltd. Later that afternoon the vendors' solicitor phoned the purchasers' solicitor and said the transaction was unlikely to settle due to the stance taken by the second mortgagee. On 2 August 2007 Khan & Associates faxed Remax advising that because settlement of property was doubtful, Remax was not to release the deposit under any circumstances.

[35] By that point the Kamharas had sold their home in Pukekohe with settlement at that time so they had nowhere to go. They negotiated with the vendors that they move into the property with a tenancy agreement and bond payment. As indicated above, they cancelled their purchase contract on 2 October 2007.

[36] Mrs Kamhara stresses that at no point did the defendant tell her or her husband that the vendors' financial position could jeopardise the sale of the property to them.

[37] On 2 October 2007 Mr and Mrs Kamhara sent a letter to the defendant asking him to confirm that he still held the deposit in his trust account. By 8 October 2007 they had changed to a new solicitor, Mr Owen Vaughan, and Mr Divers (solicitor for the vendors) faxed him confirming that the deposit may be released back to them subject only to the small deduction for rent referred to above. Accordingly, on 9 October 2007 Mr Vaughan wrote to Remax requesting the return of the Kamharas' deposit less the rent.

[38] On 12 October 2007 Mr Vaughan wrote to REINZ about the fact that the Kamharas had not recovered their deposit from the defendant. She confirmed that neither she nor her husband have ever received a refund of that deposit. She also covered that they could not locate the defendant at that time and found that his office was vacant. They made a civil claim against Khan & Associates, solicitors, and obtained an out-of-Court settlement of $15,000. Their legal fees had totalled $8,000 so they only received $7,000 of that settlement money in respect of losing their $25,000 deposit. She understands that the vendors were declared bankrupt on 20 March 2009 and have left New Zealand. In 2010 she found that the defendant was working in New Zealand again as a real estate agent so that she renewed her complaint

[39] In her evidence by phone, Mrs Kamhara added more detail to her written evidence-in-chief but in a consistent manner. She said that when the defendant advised them of the financial problems of the vendors, he asked them not to mention to anyone that he had disclosed such financial detail. He insisted that they would be able to buy the property because the vendors only needed to repay the first mortgagee. Mrs Kamhara agreed with Mr Clancy that when she was provided by the defendant with the valuation of the property referred to above, he also gave her a copy of the certificate of title to the property. He had told her that she and her husband could use the valuation to borrow money for the purchase.

[40] Mrs Kamhara was extensively, and sensibly, cross-examined by the defendant who appeared to be denying much of what Mrs Kamhara stated he had said to her. He put it to her that, perhaps, she was confusing him with the vendor's lawyer, Mr Khan. Mrs Kamhara would not accept any of that.

[41] Inter alia, the defendant maintained that he had not telephoned Mrs Kamhara and told her to pay the deposit urgently as she had stated. Mrs Kamhara also said that the defendant had told her at material times that a number of other people were interested in purchasing the property but he was favouring Mr and Mrs Kamhara. Before us, the defendant agreed with that but emphasised that the Kamharas were extremely keen to purchase and get possession of the property although they say that the defendant kept pressing them to move quickly.

The Evidence of Mr Kamhara

[42] Mr Kamhara provided a written brief, admitted by consent, confirming his wife's said evidence. He also covered that, to achieve the purchase, they increased their offer to $505,000 as encouraged by the defendant. He added that the defendant had been very friendly to Mr and Mrs Kamhara until they had paid the deposit, but then became thoroughly uncooperative from their point of view and, when they sought back their deposit moneys, he accused them of harassing him.

The Evidence of the Defendant

[43] On the day of the hearing the defendant provided a type-written brief and was thoroughly cross-examined by Mr Clancy.

[44] The defendant covered the above facts in quite some detail. He emphasised that, upon seeing the property, Mr and Mrs Kamhara became eager to acquire it because they were soon to settle the sale of their previous property. They did not wish to lose the purchase of this property.

[45] The defendant asserts that he put no pressure whatsoever on Mr and Mrs Kamhara to sign an agreement for sale and purchase of the property. There were other interested purchasers and Mr and Mrs Kamhara were advised of this and also signed a multiple offer presentation form. The vendors decided to accept Mr and Mrs Kamharas' offer on 18 July 2007. A variation of it was signed on 24 July 2007 as Mr and Mrs Kamhara had sold their previous property and requested possession for their purchase to be changed to 3 August 2007. The defendant said that Mr and Mrs Kamhara appeared "*anxious, stressed and distraught*" at the time and pleaded with the defendant to approach the vendors for them to move into the property. He did and the vendors reluctantly agreed after communicating with their solicitor Mr Divers. Accordingly, Mr and Mrs Kamhara took possession of the property pursuant to a tenancy agreement on 3 August 2007.

[46] It seems there were maintenance problems at the property, such as a leak in the kitchen sink, which led to many communications from Mr and Mrs Kamhara to the defendant, and from him to the vendors, and he felt Mrs Kamhara was upset with him about various maintenance issues at the house. The defendant said he decided not to entertain calls from Mr and Mrs Kamhara after a while as (he said) they were aggressive and hostile towards him. He alleges that resulted in them leaving rude and threatening messages on his home answer phone. By 17 October 2007 he contacted his solicitor for advice about the attitude of Mr and Mrs Kamhara towards him.

[47] On 4 September 2007 his lawyer, Mr Twigley, of Eastland Legal, responded to him about the commission situation. On 16 October 2007 the solicitor for REINZ confirmed to Mr and Mrs Kamharas' solicitor that the defendant's company would be entitled to commission "*subject to its obligations as stakeholder contained in the agreement for sale and purchase*". The defendant covered the many communications between the parties and their lawyers over this commission issue and over the so-called harassment by Mr and Mrs Kamhara of the defendant.

[48] The defendant stated that the lease of his office premises at Chapel Road expired at the end of March 2008 so that he then closed that office.

[49] The defendant asserts that he did not discuss any issues about the second or third mortgagees with Mr and Mrs Kamhara at any time. Indeed, he asserts that he had no idea what the vendors owed to those mortgagees who had caveated their title. He also asserts that he did not phone Mrs Kamhara and instruct her to pay the deposit nor did he tell her that if she did not pay the deposit she would lose the property. He says he had no idea of and was not made aware of the financial position of the vendors. The defendant also asserts that he did not tell Mr and Mrs Kamhara they could get the property cheaply and he says he did not encourage them to put in an offer, but did tell them there were other interested parties who were keen to do that. He said he never communicated with the second and third mortgagee finance companies.

[50] Among the detail put to us by the defendant was that Mr and Mrs Kamhara increased their offer to $505,000 because they were aware that there were other interested keen purchasers and he, the defendant, advised them to put up their best offer in writing for him to present to the vendors.

[51] A general theme of the defendant was that at all times he did his utmost to assist Mr and Mrs Kamhara and he advised them to seek legal advice, particularly prior to their signing the agreement for sale and purchase "*and also during the transaction and also before paying the deposit*". He insists that at no time did he misrepresent any fact or hide anything from them. Late in his evidence in chief he states:

> On the 4th September 2007 I requested advice from my solicitor, Christopher Twigley (Eastland Legal) with regards to the deposit paid. I was made aware that the issue was one of legal interpretation and the contractual obligation between the parties. **AT ALL times I relied on express legal advice from my solicitor with regards to the deposit for 19 Janway Avenue and acted upon my solicitor's advice in writing before I dispersed the deposit**. [The defendant's emphasis]

[52] The defendant was extensively and thoroughly cross-examined by Mr Clancy and generally repeated much of his evidence in chief. Inter alia, it was put to the defendant that he told Mrs Kamhara that the vendor owed $580,000 on the property. The defendant asserted that he never did as he did not know that and even today does not know the precise amounts owed at material times by the vendors. It was put to the defendant that he wanted to sell the property to the Kamharas because, if it was sold by mortgagee sale, the defendant would get less commission. He denied that and that he would ever have said that. He also denied that he told Mrs Kamhara that if she did not pay the deposit immediately, she would lose the property. He said that, on the contrary, she had called him, in a very excited state, to say that

she had arranged finance so that she would go and get the deposit immediately in terms of her solicitor's advice to her.

[53] The defendant said he did not know that the transaction might not proceed until 1 August 2007. He denied ever speaking to Mr Khan, the then solicitor for Mr and Mrs Kamhara.

[54] The defendant said that, as at 15 October 2007, the deposit was still in his agency's trust account and when he later transferred most of those funds to himself, he did that on Mr Twigley's advice. He was conscious that, because the vendors had cancelled the transaction, the purchasers were entitled to the refund of their $25,000. He mentioned that the vendors were both bankrupted in 2009 but he maintained that, at material times, he did not know they were experiencing financial difficulties so that it was unlikely they would pay him commission. He stated that he had a listing agreement signed by the vendors which entitled him to deduct his commission from the deposit.

[55] Inter alia, Mr Clancy firmly put it to the defendant that, in October 2007 the parties' stance was that the contract had been cancelled so that he was to return the deposit to the intended purchasers Mr and Mrs Kamhara, and that the deposit was no longer money due to the vendors but due to Mr and Mrs Kamhara. The defendant responded: "*No I don't accept that*". The defendant strongly insisted that he was entitled to take his commission from the deposit paid by Mr and Mrs Kamhara even though the transaction had been cancelled and that was the legal advice he had received; and he did not accept that he had no legal entitlement to do what he did. He said that he also received that advice from his manager in the Remax Group. It was put to the defendant by Mr Clancy that, if he had such views throughout material times, why did he wait until December 2007 to actually take his commission and advertising expenses from the deposit. The defendant responded: "*At all times I was taking legal advice from Mr Twigley*".

[56] Mr Clancy pressed the defendant that he had made a calculated decision to take his commission and expenses from the purchasers' deposit and let them sue the vendors for recovery of that. The defendant denied this and stated that, at all times, he simply relied on his legal advice.

[57] The overall stance of the defendant is that he believes he has done nothing wrong and simply relied on his lawyer's advice over material times. He expresses sympathy to Mr and Mrs Kamhara that they have been involved in a commission dispute but considers he was entitled to deduct his commission fee and advertising expenses from the sum which they paid as a deposit on this failed transaction. He also stated: *"At all stages before taking moneys from the deposit, I consulted my solicitors and they said in writing that I was entitled to take those moneys. I submit that I have done nothing wrong and I had express legal advice to disburse these moneys as I did"*.

Pre-Act Conduct:

[58] The conduct alleged in this case occurred before the Act came into force on 17 November 2009. Section 172 of the Act therefore applies.

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

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

(b) Step 2: If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?

(c) Step 3: If so, only orders which could have been made against the defendant under the 1976 Act in respect of conduct may be made.

[60] The licensee was, at the time of the conduct alleged, licensed or approved under the 1976 Act. He has not been *dealt* with under the 1976 Act in respect of the conduct in issue.

[61] The licensee could have been complained about or charged under the 1976 Act. In *CAC v XU* [2013] NZRERADT 16 at [18], we confirmed that “complained about” and “charged” are alternatives. Under rule 16.2 of the Rules of the Real Estate Institute of New Zealand Inc, made under s 70 of the 1976 Act, any person could complain to REINZ about, among other things, breach of the REINZ Rules by an agent, branch manager or salesperson. The REINZ Rules include broad duties including that members conduct themselves in a manner “which reflects well on the Institute ... and the real estate profession. Following investigation of a complaint, REINZ could take one of a number of steps, including referring the matter to the Real Estate Agents Licensing Board.

[62] Accordingly, we may consider the charges against the licensee under the current Act. Section 172 of that Act does, however, limit any penalty we might impose.

Discussion

Charge one - disgraceful conduct

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

> **73 Misconduct**
> For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct-
> (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; ...

[64] We considered the ambit of the term *disgraceful,* as used in s 73, in *CAC v Downtown Apartments* Limited [2010] NZREADT 06 and we held:

> [55] The word “disgraceful” is in no sense a term of art, In accordance with the usual rules it is given its natural and popular meaning in the ordinary sense of the word. But s 73(a)

qualifies the ordinary meaning by reference to the reasonable regard of agents of good standing or reasonable members of the public.

[56] The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the *test* of disgraceful conduct is an objective one for this Tribunal to assess. See *Blake v The PCC* [1997 1 NZLR 71].
[57] The 'reasonable person' is a legal fiction of common law representing an objective standard against which individual conduct can be measured but under s 73(a) that reasonable person is qualified to be an agent of good standing or a member of the public.

[58] So while the reasonable person is a mythical ideal person, the Tribunal can consider, inter alia, the standards that an agent of good standing should aspire to *including any special knowledge, skill, training or experience such person may have* when assessing the conduct of the ...defendant.

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

(Emphasis added).

[65] Section s 73(a) allows us to assess whether conduct is disgraceful both by reference to reasonable members of the public and agents of good standing.

[66] The licensee's entitlement to commission on the transaction, if it existed, was based on his contractual relationship with the vendors through the agency or listing agreement. The licensee was aware, from at least 8 October 2007, that the agreement was not going to settle and, importantly, that the vendors had instructed that the deposit should be returned to the complainants as unsatisfied purchasers. The licensee's obligation, in those circumstances, was to return the deposit to the complainants, who were lawfully entitled to it, and pursue the vendors for any commission owed to his agency.

[67] While real estate agents commonly deduct commission owed to them from deposit funds paid by a purchaser, this should occur only when the vendor, who carries the obligation of paying commission, becomes entitled to the deposit funds which is usually as an agreement becomes unconditional. While the agreement in this case did become unconditional, it was soon cancelled and the vendors expressly disclaimed entitlement to retain the deposit and instructed that it be returned to the complainants. The licensee knew this. In those circumstances, he was not entitled to take his commission from the funds to be returned to the complainants who, of course, had no obligation to pay his commission.

[68] Before the commission was deducted in December 2007, there were letters from both parties' lawyers to the licensee acknowledging that the complainants were entitled to the return of their deposit. Such letters were sent on: 1 August 2007; 2 August 2007; 2 October 2007; 8 October 2007; 9 October 2007; 12 October 2007; and 15 October 2007.

[69] It is submitted for the prosecution that agents of good standing, and members of the public, would consider it disgraceful for a licensee, in the circumstances described above, to simply take his (or his company's) commission (and marketing costs) from funds he had been instructed to return to the purchasers. Mr Clancy submits also that, given the special

knowledge, skill, and training to be expected of licensees, so deducting the commission and marketing fees was a marked and serious departure from accepted standards.

[70] Mr Clancy feels that this is highlighted by the acknowledgment of the vendors' solicitor, Les Divers, that he has not cashed the cheque sent to him by the licensee given the said circumstances surrounding this sale.

[71] In his final oral submissions, Mr Clancy emphasised that, with regard to the first charge, there is no real dispute about the facts. He put the issue as a legal question whether, in all the circumstances, it was disgraceful for the defendant to have taken his commission and advertising costs from the deposit paid by the intended purchasers rather than, upon the collapse of the transaction, passing the deposit back to the purchasers as instructed by the vendors' lawyer Mr Divers. Mr Clancy submits that that conduct was disgraceful but that if we do not so find, it must be unsatisfactory conduct in terms of s 72 of the Act.

[72] Mr Clancy noted that the defendant had left the deposit moneys in his trust account until December 2007 when the sale and purchase transaction had collapsed in August 2007, and that he says he did this based on legal advice to him. Mr Clancy stressed that it was back in September / October 2007 that the solicitor for the vendors had advised that the sale could not proceed and directed the defendant to pay the deposit back to the purchaser; yet in that situation the defendant kept the deposit moneys in his trust account until December 2007. He then took virtually all the funds for his commission and advertising costs.

[73] Mr Clancy puts it that the defendant made a hard-headed business decision that the only way for him to obtain payment of his commission and expenses from the vendors was to take it from the purchasers' deposit and let them have recourse against the vendors, whom he knew were unlikely to be able to pay back Mr and Mrs Kamhara. Mr Clancy emphasised that the purchasers were entitled to their deposit back and should have had it repaid to them immediately the transaction collapsed and that was the direction that the vendors' solicitors gave to the defendant, but he did not comply. Mr Clancy submits that the defendant's lawyer, Mr Twigley, did not say that the defendant was entitled to reimburse himself from the intended deposit moneys but the defendant, who seems an intelligent businessman, thought the purchasers would regard it as uneconomic to sue him (or his company) for recovery through the Courts.

[74] Mr Clancy submits that is disgraceful conduct on the part of the defendant.

Charge two -Seriously incompetent/negligent real estate agency work

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

> "Professional misconduct does not arise where there is mere professional incompetence nor deficiencies in the practice of the profession by a practitioner, more is required. Such misconduct includes a deliberate departure from accepted standards or such serious

> negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration ..."

[76] Since *Jenner,* we have confirmed that serious negligence / incompetence does not necessarily need to involve dishonesty or deliberate bad faith on the part of a licensee, and serious errors of judgment may suffice.

[77] In *CAC v Miller* [2013] NZREADT 31 a complaint was made that a licensee had failed to disclose a school development plan relating to land neighbouring a property he was selling as vendor, The plan potentially impacted the view from the property being sold. There was a further allegation that the licensee had positively advised the purchasers that nothing would be built on the neighbouring land. We stated:

> [85] We cannot be sure whether the defendant had any dishonest intentions to avoid proper disclosure to [the purchasers]. He had placed himself in a delicate position of trust by being both vendor and listing agent. In any case, we consider that his failure to disclose the development plan to the complainants, in all the circumstances of this case, was very negligent and a disturbing breach of trust. His assessment of the plan must have been coloured by self interest in that he did not want it to show a possible interference of the view from the property. He should have known that it was vital that the development plan be disclosed to [the purchasers] before they purchased the property. We can only regard the defendant's failure as such a bad error of judgement as to be very negligent, if not deliberate.

[78] We found misconduct proved, both on the basis of disgraceful conduct and seriously negligent real estate agency work.

[79] In *CAC v Wallace* [2013] NZREADT 46*,* we found that a licensee had made a positive representation to a purchaser that a property was "not a leaky home" when he knew, or should have known, that it was at risk of weathertightness issues due to its age and construction materials. We did not find that the licensee had necessarily intended to mislead the purchaser, but nevertheless found that his conduct was seriously negligent / incompetent.

[80] The present defendant/licensee is charged under s 73(b) of the Act that it was seriously incompetent or negligent of him to tell the complainants that the property would only need to achieve a sale price of $500,000 to settle, when this was not the case. This second charge has been drafted in the alternative, alleging that the licensee's failure to check the title and seek his clients' instructions as to their level of indebtedness also could be considered misconduct under that s 73(b).

[81] The complainants assert that they were informed by the licensee that their offer only needed to clear the mortgage to Westpac. We accept that evidence. This advice was clearly incorrect and the complainants' reliance on it placed them in a position where a sale and purchase agreement was signed (and a deposit paid) when the transaction was highly unlikely to settle.

[82] The licensee had a copy of the title (which he provided to the complainants). Even a cursory check of the title should have put him on notice that his clients may be heavily indebted because interests were registered by three separate lenders. The licensee should have taken specific instructions on this from his vendor clients. Their indebtedness was well

known to their lawyer, Mr Divers, who was aware of the implications of this for any agreement to sell the property.

[83] As a result of the licensee's statements to the complainants and / or his failure to clarify the vendors' position, the complainants were placed in a position where they lost their deposit through no fault of their own.

[84] With regard to charge 2, that the defendant advised Mr and Mrs Kamhara that $500,000 would be a sufficient purchase price to allow the vendors to repay their debts secured over the property. Mr Clancy referred to Mrs Kamhara's clear and firm evidence to that effect and submits it had the ring of truth and that the defendant must have known that the vendors could not complete a sale transaction to Mr and Mrs Kamhara at that price. We agree.

[85] The alternative to charge 2 is that the defendant failed to check the title to the property and make appropriate inquiries about the funds needed to repay the debts secured over the title in order to achieve an appropriate purchase price. Mr Clancy referred to the property being heavily mortgaged and that it had to be inferred that the licensee take care that the price would cover indebtedness so that a sale could proceed on the part of the vendors, and that he had a valuation showing the property to be worth much more than $500,000. Mr Clancy submits that the defendant was seriously negligent over these aspects. It was negligent.

Our Conclusions

[86] We found Mrs Kamhara positive and convincing but we are conscious that we only heard her evidence by telephone from Australia. The defendant cross-examined her as best he could be phone. He was without the assistance of his own counsel who withdrew some months before the hearing, presumably, because the defendant could no longer afford counsel.

[87] In terms of the first charge we have reservations as to whether it was disgraceful for the defendant to take the sum of $24,439.30 from the $25,000 deposit paid by the complainants, Mr and Mrs Kamhara, instead of paying it back to them as he had been directed on behalf of the vendors. He felt he had achieved an unconditional contract for sale and was entitled to have the vendor pay him $24,439.30 commission in the usual way and he had a listing agreement entitling him to take that from the deposit paid by the purchasers. Also, we accept that the defendant honestly understood Mr Twigley's advice to be that he was on sound legal ground to do that. In fact, the point seems arguable at law, but that legal point has not been put to us with appropriate submissions . On the other hand, the defendant has made a shrewd business decision, perhaps in some ways a little callous towards Mr and Mrs Kamhara, to take ownership of available funds and let people sue him for recovery if they think they can succeed on an economic basis through the civil courts. Although that conduct of the defendant is concerning to us, in all the particular circumstances we cannot be satisfied that it meets the level of disgraceful conduct so as to be misconduct under s 73 of the Act.

[88] With regard to charge 2, we find that the defendant must have known or should have known, on the evidence available to him, that a sale of the property at $505,000 could not

take place because mortgagees would not permit that to happen. Accordingly, he has steered Mr and Mrs Kamhara into an unrealistic situation which has cost them significant money. We think that the advice and conduct of the defendant in those respects is incompetent and negligent but we have doubts as to whether it can be termed "*seriously incompetent or seriously negligent real estate agency work*" in terms of s 73(b) of the Act. Accordingly, with regard to the basic charge 2, we find the defendant guilty of unsatisfactory conduct (as defined in s 72 of the Act) at a high level.

[89] With regard to the alternative charge for charge 2, which we find fairly closely linked to the basic particulars of charge 2, we consider that it should have been obvious to the defendant from reading the title to the property, which he did or certainly should have done in the circumstances of having it and passing it on to the prospective purchasers, that it was obvious that further inquiries needed to be made of the vendors, his principals, to ascertain the price needed to achieve a sale transaction. His failure to do that is also incompetence and negligence but we hesitate about branding it as "seriously" so. Accordingly, in respect of the alternative particulars for charge 2 we find the defendant guilty of unsatisfactory conduct at a high level.

[90] Simply put then, with some reluctance we dismiss charge 1 but, in terms of charge 2, we exercise our discretion (in terms of s 110(4) of the Act) to find the defendant guilty of unsatisfactory conduct at a concerningly high level.

[91] Accordingly, we invite the Registrar to arrange a directions hearing by telephone between our Chairperson, and Mr Clancy and the defendant, as to a timetable for submissions towards a penalty fixture.

[92] 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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Mr J Gaukrodger
Member

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Ms N Dangen
Member