

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2015] NZREADT 10

READT 045/14

**IN THE MATTER OF**

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

**BETWEEN**

**REAL ESTATE AGENTS  
AUTHORITY (per CAC 20004)**

Prosecutor

**AND**

**ALLAN ROSS VESSEY**  
of Waikanae, licensed  
salesperson

Defendant

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Mr G Denley - Member  
Ms C Sandelin - Member

**HEARD** at WELLINGTON on 2 December 2014

**DATE OF THIS DECISION** 28 January 2015

**COUNSEL**

Ms S M Earl for the prosecution  
Mr J Waymouth for the defendant

**DECISION OF THE TRIBUNAL**

***Introduction***

[1] This is a case of a resigning salesperson altering the database of his former employer company. Accordingly, Allan Ross Vessey (“the defendant”) faces one charge of misconduct laid by Complaints Assessment Committee 20004 as follows:

*“Following a complaint by Paul Berryman and Rachael Steinmetz, Complaints Assessment Committee 20004 charges Allan Ross Vessey (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:*

*The defendant falsified property and contact details contained on the database maintained by Steinmetz Berryman Real Estate Ltd (agency)*

*when he left the agency, with the effect that agency's database contained inaccurate information."*

[2] The defendant faces an alternative charge of unsatisfactory conduct.

### ***Factual Background***

[3] The defendant was employed as a licensed salesperson with Steinmetz Berryman Real Estate Limited (SBRE Ltd) trading as Ray White. He was employed with SBRE Ltd in around mid-2010 working in its new Waikanae office. SBRE Ltd had an existing office based in Paraparaumu and is now based here.

[4] It seems that on 27 January 2011 the company changed its name to Steinmetz Berryman Real Estate (Waikanae) Ltd and reconstructed its directorate and shareholdings. Mr Vessey became a director of that company along with Rachael Steinmetz and Paul Berryman. He was also a shareholder of the company with them and continued to be employed as a licensed salesperson by it.

[5] On 17 October 2012, as a result of a breakdown in the defendant's relationship with the other directors, they (Mr Berryman and Ms Steinmetz) signed an agreement with the defendant to buy back his shares in the company. The agreement was signed by the defendant on 20 October 2012. On 23 October 2012 the defendant resigned as a director of that company.

[6] Ms Steinmetz's evidence is that the intention then was that the defendant would continue to work in the business as a salesperson. However, on 11 November 2012 at 4:30pm, the defendant also resigned from that position.

### *Changes to database - past listings and prospective clients*

[7] Ray White operates a database which is used daily by administrators and individual salespeople, called "My Desk Top". Each buyer, vendor, prospective and past client is loaded into the system. All staff can view the property and vendor information. However, staff can only view the buyers and customers whom they have entered into the system themselves. Staff can edit listings or vendors that they have entered into the system (i.e. their "own" listings) but they cannot edit another person's listings or vendors. Administration and management staff also have access to their information.

[8] It is alleged that just prior to the defendant's resignation from his employment with SBRE Ltd, he made a number of changes to the company's computer database of property. He now admits that the following changes were made:

#### *i. 42 Awanui Drive, Waikanae*

[9] On 31 October 2012 at 3:37pm, the defendant changed details on an entry from 42 Awanui Drive, Waikanae to 34 Awanui Drive, Waikanae and changes were made to the phone number from 293 8895 to 293 8855. The owners of this property were loaded into the database as having had a past appraisal.

*ii. 61a Kotare Street, Waikanae*

[10] On 11 November 2012 at 7:01am, the defendant changed details on an entry relating to a property at 61a Kotare Street, Waikanae. The physical address had been changed to 2 Kotare Street, Waikanae. A change had also been made to the owners' surnames from Diamond to Ruddings and Ryniker. This entry related to a past sale of a property that sold on 14 November 2011.

*iii. 59 Kotare Street, Waikanae*

[11] On 11 November 2012 at 7:19am, the defendant changed details of a past withdrawn listing for 59 Kotare Street, Waikanae. The address had been changed to 45 Kotare Street, Waikanae. The owners' surnames had again been changed from Diamond to Ruddings and Ryniker. This was a withdrawn listing that would have been identified for follow-up as potential future business.

*iv. 76 The Esplanade, Raumati South*

[12] On 11 November 2012 at 7:24am, the defendant changed details on an entry from the address of 76 The Esplanade, Raumati South to 34 The Esplanade, Raumati South. This property had been on the market with SBRE Ltd but was withdrawn from the market on 21 May 2012.

*v. 163 Milne Drive, Paraparaumu*

[13] On 11 November 2012 at 7:28am, the defendant changed details on an entry relating to a property 163 Milne Drive, Paraparaumu, to 181 Milne Drive, Paraparaumu, and changes were also made to the owners' surname from "Enoka" to "Ennie". This was a property which had been sold through the agency.

*Changes to database - current listings*

[14] Ms Steinmetz states that changes were also made to current listings but such changes are not admitted by the defendant.

[15] Ms Steinmetz refers to two particular current (then) listings that were affected, as follows:

*i. 100 Waerenga Rd, Otaki*

[16] Ms Steinmetz's evidence is that the email address for this property record had been changed with the result that she could not contact the vendors. She said that she sent these clients an email on 12 November 2012, which bounced back. She located the correct email address on the original listing agreement and corrected the database.

[17] The defendant denies he made this change. He states that he has emails after the "*alleged event*" (presumably, he means after his resignation) showing there was no interference by him as alleged. It is unclear how those emails could answer this

aspect of the allegations. Ms Steinmetz states that she believes this change was made as the defendant intended to move these owner clients with him to his new agency. She asserts that the emails referred to by the defendant confirm that he did seek to take those clients with him to his new agency.

*ii. 84 School Road, Te Horo*

[18] Ms Steinmetz's evidence is that changes were made to these clients' email address and their phone number. Again, the first email she sent to these clients bounced back. She was able to find the correct email address by referring to the original listing agreement.

***A summary of the evidence adduced to us***

*The evidence of the complainant Ms R Steinmetz*

[19] The complainant Ms Steinmetz is a licensed agent and owner of Steinmetz Real Estate Ltd trading as Ray White Paraparaumu. Previously, that company was known as the said Steinmetz Berryman Real Estate Ltd having been incorporated on 9 June 2009. Mr Berryman, also a licensed salesperson, was a shareholder and director of it previously.

[20] The defendant was employed by that company from about mid-2010 working in a new office established in Waikanae. On 27 January 2011 Steinmetz Berryman Real Estate (Waikanae) Ltd was established and the defendant became a shareholder in that company together with Ms Steinmetz and Mr Berryman (the complainants in this case) and continued to be an employee licensed salesperson for that company.

[21] However the relationship between those three persons began to break down from a business perspective. To-ing and fro-ing over negotiations took place from about mid-2012 until an agreement was reached for the complainants to buy back the licensee's shares in the company on 17 October 2012. Even then, it was intended that the defendant continue working in the business as a salesperson under an agreement containing a restraint of trade clause should he decide to resign. He resigned as a director of the company on 23 October 2012. He seems to have resigned as an employee on 11 November 2012. He now works for an opposition agency out of Waikanae and Paraparaumu.

[22] Ms Steinmetz explained the nature of the database which is used daily by administrators and individual salespeople in the said Ray White agency. Essentially, the system has details of all property listings as a national data base of Ray White and contact details for every vendor; but there seem to be quite some restrictions on access to the system. In any case following the defendant's said resignation, alterations were found to some of the entries on the database which made it very difficult or impossible for the complainants to contact or ascertain some of their current clients. Also, emails to such clients were bouncing back to the sender. It took several weeks for the complainants to realise the full extent of this situation.

[23] On looking into the issue, they felt they had discovered that in all instances the changes of concern to them had been made to client records by the defendant just prior to his resignation from the company. The complainants could ascertain that by checking the note logs on the database which record when information is updated and, in most cases, the changes were made by the defendant on the morning of 11 November 2012.

[24] With regard to the changes, Ms Steinmetz said that the following changes were found:

***“42 Awanui Drive, Waikanae***

*The database shows that on 31 October 2012 at 3:37pm, Mr Vessey changed details on an entry from 42 Awanui Drive, Waikanae to 34 Awanui Drive, Waikanae and changes were made to the phone number, from 2938895 to 293 8855.*

*The owners of this property were loaded into our database as having had a past appraisal. Any changes made to the contact address and telephone number would make it impossible for us to follow up with them and thus we would miss business.*

*I refer to the bundle of documents at Tab 7.*

***61A Kotare Street, Waikanae***

*The database shows that on 11 November 2012 at 7:01am, Ross Vessey changed details on an entry relating to a property at 61a Kotare Street, Waikanae. The physical address had been changed to 2 Kotare Street, Waikanae. A change had also been made to the owners' surnames from Diamond to Ruddings and Ryniker. This entry related to a past sale of a property that sold on 14 November 2011.*

*Ray White does a follow up for 'Clients for Life' and these changes meant that we would have had incorrect data. This would have been an embarrassment for us as Ray White has never been involved with the property at number 2 Kotare Street.*

*I refer to the bundle of documents at Tab 8.*

***59 Kotare Street, Waikanae***

*The database shows that on 11 November 2012 at 7:19am, Mr Vessey changed details of a past withdrawn listing for 59 Kotare Street, Waikanae. The address had been changed to 45 Kotare Street, Waikanae. The owners' surnames had again been changed from Diamond to Ruddings and Ryniker,*

*Upon Mr Vessel's departure his contacts would have been delegated to another salesperson. We get agents to go through their database approximately every six months and this address would have come up as a "withdrawn listing" and a potential for prospecting.*

*By changing the address, we would have had the wrong information when enquiries were made and would have looked exceptionally unprofessional when referring to number 45 Kotare 5t which has never been on the market with us.*

*I refer to the bundle of documents at Tab 9.*

### **76 The Esplanade, Raumati South**

*The database shows that on 11 November 2012 at 7:24am, Ross Vessey changed details on an entry from the actual physical address of 76 The Esplanade, Raumati South to 34 The Esplanade, Raumati South.*

*This property was a high-end property that was on the market with us and was withdrawn from the market on 21 May 2012.*

*A couple of weeks after Mr Vessey left employment with us, I instructed one of my agents (Paulane Mclean) to call the owner of this property as we had buyers who I knew would like this property. A search was made of the database under "past vendors and withdrawn properties" but we could not find them. Then Paulane found a property shown at number 34 but I knew we had never had number 34 on our books and I realised the address had been altered from 76 to 34.*

*The change to this entry was the one that triggered the alarm bells for me that something was not right after Mr Vessey left and that changes had clearly been made to his entries in the database. This then prompted a very time-consuming search of every piece of data in all entries that had been associated with Mr Vessey.*

*I refer to the bundle of documents at Tab 10.*

### **163 Milne Drive, Paraparaumu**

*The database shows that on 11 November 2012 at 7:28am, Ross Vessey changed details on an entry relating to a previous sale at 163 Milne Drive, Paraparaumu to 181 Milne Drive, Paraparaumu and changes were also made to the owners' surname from "Enoka" to "Ennie",*

*We would have looked extremely unprofessional doing follow up to number 181 Milne Drive when we have never had any dealings with them.*

*I refer to the bundle of documents at Tab 11.*

### **Changes to current listings**

*Changes were also made to current listings, in particular 100 Waerenga Rd, Otaki. The email address had been changed, which meant that I could not get hold of the vendors. I only have limited records relating to this property as they all went when Paul Berryman left and we closed the office.*

*I believe that Mr Vessey made this change as he intended to move them over to the Professionals. When Mr Vessey resigned he told me that the vendors were friends of his and that he had told them he was leaving to go to the Professionals. He said that he would contact them and told me not to bother contacting them. I sent them an email very early on Monday 12 November 2012, which bounced back. However I managed to track down the correct email through the original listing agreement and corrected it. The vendors requested that they be released from the contract however after several emails they agreed to keep their listing agreement with us.*

*Another current listing that was affected was 84 School Road, Te Horo. Changes had been made to the email address and their phone number. My first email bounced back but I managed to find it through the original listing agreement.*

*100 Waerenga Road Otaki and 84 School Road Te Horo were both Mr Vessey's listings.*

*I no longer have access to the My Desk Top records for these properties and did not print out the time logs for these listings at the time that I discovered those changes had been made.*

### ***Impact on the business***

*The impact on our business was extremely significant. It took our head administration officer at least two weeks to go through the entire database to check everything was correct and to amend what information Ross Vessey had changed. This also meant she was two weeks behind doing any other work.*

*We lost a huge amount of time in our business, which of course means "money". I believe that it gave our company a tarnished name as I have worked very hard to ensure we comply with everything in the real estate world and work very hard at giving our clients a great experience."*

[25] Ms Steinmetz was thoroughly cross-examined by Mr Waymouth over the detail of her evidence. We note that at that time there was no back-up to their computer records. The witness emphasised that the company regarded previous or prospective vendors as clients for life and made a point of keeping in touch with them at least by way of a Christmas card. She emphasised that the defendant's changes to the company's computer system caused much embarrassment and created an impression of inefficiency by the agency.

[26] It seemed that the company would not have minded the defendant taking his own client data with him, but alleges that he tampered with the company's data. The witness seemed to be saying that most changes were made on 11 November 2012 but more were made at about 7.00am on the actual day the defendant ceased his employment, namely, 14 November 2012.

[27] The changes made seem to comprise changing the surnames of people on the database and the street number of their homes.

***The evidence of Ms L J Voullaire***

[28] Ms Voullaire is the administrator of the real estate agency company and responsible for processing all listings and contracts, and for training and administration tasks of agents and at the agency.

[29] She explained the Ray White computer system and it seems to have been Ms Voullaire who first noted that the contact details for clients of the business had been changed as covered above.

[30] She was able to follow an audit trail which showed that the changes in question had been made by the defendant, mainly, on the day of his resignation as an employee of the company. She then checked out the records of the agency and found more changes over a number of days and she set to and corrected them. She said there were more than 10 contacts who had had their contact details changed and that the affected records included records of potential clients as well as records of properties listed including some for which offers had been received.

[31] The changes were to client phone numbers, client email addresses, and the client address and property addresses. It took her a considerable amount of time to remedy matters.

***The evidence of Ms C Gerrard***

[32] Ms Gerrard is a director of a corporate investigation services company in Auckland. She was contracted by the Authority to be the investigator of the complaint in this case. She took us through a number of relevant documents in the agreed bundle of documents and this was done in her typed evidence in chief and she was not required for cross-examination.

***The evidence of the defendant***

[33] In his evidence in chief the defendant admitted the factual situations and making the alleged changes to the database for the properties at 42 Awanui Drive, Waikanae, 61 Kotare Street, Waikanae, 59 Kotarae Street, Waikanae, and 76 The Esplanade, Raumati South and 136 Milne Drive, Paraparaumu. He rejects that he made any changes to the databases of the properties located at 84 School Road, Te Horo, or 100 Wairenga Road, Otaki.

[34] Also, in his evidence in chief, the defendant seemed to be saying that he recorded details from the Ray White database with a view to transferring information concerning his own potential buyers to his personal database on the basis they were his records to take with him and were not existing persons or potential buyers or sellers, or even listings, of the company. He said he did not deal with entries involving any vendor who had an existing sole or general agency with the company at the time of his resignation.

[35] He covered the detail of his commercial dispute with the complainants.

[36] He insisted that any alteration of entries in the Ray White database was not done from his home computer. He stated: *“21. I never did what has been admitted by me or alleged to prejudice any members of the public. I was simply upset and to some extent bitter at a commercial arrangement that had soured.”* He added that, at his time of resigning from the company, he felt aggrieved over commercial issues between him and Ms Steinmetz and Mr Berryman who he felt had taken advantage of him financially, had treated him dishonourably, and, he maintains, deprived him of shares worth \$11,225.

[37] The defendant covered the said commercial dispute aspect in some detail and then said that he changed records fairly much as alleged *“out of frustration and disappointment”* with the complainants. He seemed to say that he did not wish *“to make it easy for them after all the hard work he had put into the business and that they had mistreated him”*. He was also distressed at having lost money (the said \$11,225) which had belonged to his wife.

[38] In the course of his detailed cross-examination by Ms Earl, the defendant commented on most of the entries in issue and seemed to be admitting changing them but unable to remember precisely why he focused on that particular person or property.

[39] For a time the defendant seemed to be suggesting that some of the changes were innocent errors on his part but, in general, he did not seem to be disputing most of the allegations and seemed to be saying that the items he had changed were *“chosen at random by him as he departed the business out of frustration”*.

[40] The defendant admitted that he had falsified data on the computer system of his former employer company to create problems for the complainants by way of retribution from him for his perceived unfair treatment from them. He then seemed to admit that those actions of his were *“vindictive”* but the result of bad judgement on his part at the time.

[41] Ms Earl put it to him that he could have admitted these activities at the outset of the complaint, but the defendant responded that the stance he adopted arose from legal advice he took at the time.

[42] The defendant seemed unable to give reasons why he had focused on some clients in particular in changing the details of their records in the computer system. As covered above, he still denies two of the changes alleged to have been made. He firmly denied having ever threatened to the complainants to ruin their business.

### **Misconduct**

[43] Section 73(a) of the Real Estate Agents Act 2008 provides:

#### **“73 Misconduct**

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

- (a) *would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or ...*”

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

*“[55] The word disgraceful is in no sense a term of art. In accordance with the usual rules it is to be 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 Preliminary Proceedings Committee of the Medical Council of New Zealand, 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).

[45] The prosecution submits that the defendant's conduct was disgraceful in terms of s.73(a) because the licensee falsified records on SBRE Ltd's database just prior to his departure from that office; and the only reasonable inference available in the circumstances is that he did so in order to create difficulty for the agency in contacting those clients and prospective clients.

[46] It is put that while he may have done so in order to obtain an advantage for himself (i.e. to enable him to make contact with those clients at his new agency), this case is not about whether the licensee was entitled to use the information that he became aware of during the course of his employment or to make contact with those clients.

[47] We agree that the focus of this case is on the defendant's conduct in altering the agency's records so that they contained inaccurate information, thereby affecting SBRE Ltd's ability to rely on its database. Those records were clearly the property of SBRE Ltd. Records of that nature are of critical importance to an agency's business.

Not only are the records important for contacting current clients (as Ms Steinmetz's evidence demonstrates when she was initially unable to email existing clients), the records are important for following up potential business. Indeed, it was when Ms Steinmetz sought to follow up a previous withdrawn listing for potential purchasers that the changes to previous or withdrawn listings were discovered.

[48] It is put that the defendant could only have made the changes which he did with the intent of disrupting the normal course of business for the complainants. Indeed, the defendant says that, at the time he left the agency, he was feeling aggrieved over the handling of the sale of his shares in the company, and states that he was upset and bitter at the souring of the said commercial relationship. There seems to have been a clear intent on the part of the defendant to cause significant inconvenience to his previous employer and business partners, if not detrimentally affect their business.

[49] The defendant states that he did not make the alterations which he has admitted to prejudice any members of the public. That is not a defence to the charge. It is submitted for the prosecution, regarding the defendant's intent, that any real estate agent of good standing or reasonable member of the public would regard that conduct as disgraceful. However, it would be wrong to say that there is no possible impact on consumers, particularly if we accept that changes were also made to existing listings.

[50] Clients appoint licensees as their real estate agents to act on what is a significant transaction. To create difficulties in communication between licensees and their clients, particularly where a property is currently listed for sale, clearly has the potential to negatively affect the client. It is submitted that any reasonable licensee would appreciate that fact when altering records to current listings. We agree.

[51] The defendant faces an alternative charge of unsatisfactory conduct. It appears that this is accepted by the defendant, in respect of the alterations to the five property records referred to at paragraph [8] above. The prosecution has proceeded on the basis that the conduct involved is real estate agency work, in light of *Miller v REAA and Robinson* [2013] NZREADT 14.

### ***The Stance of the Defendant***

[52] Mr Waymouth's focus was on mitigation of the defendant's said conduct with a view to asking us to find the guilt of the defendant to be at the level of unsatisfactory conduct and not the higher level of misconduct. He took us through the commercial dealings between the complainants and the defendant, as we have broadly covered them above, to explain why there was a feeling of resentment on the part of the defendant. Mr Waymouth then took us through quite a number of our previous decisions by way of comparison of penalties for what could be argued as relatively similar conduct. We take those cases into account but have often said that we prefer to focus on the precise conduct in the case before us.

[53] In paragraph 25 of his typed submissions, Mr Waymouth stated as follows:

*“25. This necessity for a "marked" or "serious" departure necessitates the seriousness of the conduct. It is submitted that the conduct undertaken by my client, whilst not being condoned:*

*a. Was limited to one isolated incident one evening when changes to four databases were made.*

*b. Was made at a time of intense emotion as a result of a breakdown of a commercial relationship.*

*c. It is submitted that the prior experience of my client through his career in real estate is a probative factor in deciding that the uniqueness of the breakdown in the commercial relationship was the driving determinant for that behaviour, and that his behaviour would not be repeated against members of the public.*

*d. That the changes to the databases in the four instances did not affect any current members of the public.*

*e. That the changes were no more than a one-off isolated incident.*

*f. The changes were not done in order to obtain advantage for himself or his new employer.*

*g. There were no consumer complaints about the relevant conduct of my client.*

*h. This was not a series or part of a pattern by my client to undertake disruptive actions, it was a one-off incident only, which would never be repeated.”*

[54] Mr Waymouth concluded his submissions as follows:

***Summary***

*37. In summary, a Tribunal must find on the 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.*

*38. My client's conduct is contrary to a standard of professional ethical and commercial conduct, but not sufficiently so serious as to warrant Misconduct.*

*39. The explanation provided by Mr Vessey is on its face credible, and his actions have not met the high standards required of Misconduct and accordingly the charge under sect. 73(a) should be dismissed.*

***Penalty***

*40. If the Tribunal was minded to make such determination at hearing then Counsel would seek to discuss Penalty in order to finally resolve what has been a long drawn out matter for my client ( REAA Complaint action letter was dated April 8th 2013 ) and to bring final certainty to my*

*client after in effect 20 months of having this matter “hang over his head”.*”

[55] We invited counsel to address penalty, which they did, and we deal with that issue below.

### **Discussion**

[56] Ms Earl submitted that the conduct of the defendant as covered above is disgraceful even to the extent admitted by the defendant. She put it that his alterations to the records of his former employer were done to cause inconvenience to that agency. She added that the evidence of his alterations is clear and is only disputed with regard to the Awanui Drive property, that there could not have been any innocent errors involved, and that the conduct arose out of the breakdown of a commercial relationship between the complainants and the defendant as covered above.

[57] Ms Earl submits that there has been a significant departure from professional standards and that the definition of misconduct under s.73 of the Act is easily met. It reads 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.”*

[58] We also set out the definition of “unsatisfactory conduct” derived from 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.

[59] As Ms Earl also puts it, employer company records have been interfered with, the integrity of business data corrupted, and the activity was done by the defendant with a type of malicious intent and could be described as some type of vandalism. We also accept that the records in question are valuable to a business and that is important for a real estate agency to maintain such records if only for communication purposes with prospective clients. The records were of quite some value to the real estate agency business of the complainants.

[60] Ms Earl also puts it that the defendant cannot be correct in putting that his selection of alterations was at random. She submits that the said conduct of the defendant shows bad character and he did not try to remedy matters or admit to the situation at an early stage of the complaint. She puts it to be disgraceful conduct to so interfere with the integrity of business data and cause such inconvenience with intention to do so to the complainants and their business.

[61] Mr Waymouth stressed, inter alia, that while the conduct is now admitted by the defendant, he is not sure why he so acted. Mr Waymouth puts it that the defendant did not so act for personal gain and that it would be stretching matters to assume it was done out of malice. Mr Waymouth also submits that no real loss was caused to the complainants and that in terms of the definition of "*client*" in s.4 of the Act, the people concerned were not clients and data in relation to current transactions was not interfered with. Mr Waymouth put it that the conduct in question arose out of an unhappy working environment which caused the defendant to become frustrated and upset with the complainants. He conceded that the activities in issue do amount at law to "*real estate agency work*".

[62] Essentially, Mr Waymouth submits that the conduct as charged is unacceptable but not disgraceful; and that while it must be regarded as unsatisfactory conduct, it does not cross the threshold to become "*misconduct*". However, Mr Waymouth seemed to accept that the conduct might be at the higher end of "*unsatisfactory conduct*". He put it to us that if we view the concerning conduct in context as covered above, it can be understood.

### ***Our view***

[63] The offending may have been mainly limited to one isolated incident but it was not rectified by the defendant, nor admitted to until these proceedings. It is an explanation but no real excuse that the offending was triggered by the emotion of a business dispute. There was at least the potential to adversely affect the public and, certainly, the complainants and their company. It could be inferred that the

defendant's conduct was intended to give him a commercial advantage as a competing salesperson in the area of Paraparaumu and Waikanae.

[64] Overall, the defendant's conduct represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public and therefore is a breach of s.73(a) and amounts to "*misconduct*". It is possible to regard the offending at the lower end of the scale of misconduct.

[65] Simply put, we accept the general submissions of Ms Earl for the prosecution and indeed we add that the conduct of the defendant amounts to a type of commercial sabotage. In our view there can be no doubt that the conduct as charged has taken place. Obviously, it is very wrong and disturbing for a salesperson to tamper with the business records of his or her employer. We are conscious that the complainants needed to spend much time and effort in rectification of their company's database.

[66] If the parties wish, we shall direct the Registrar to arrange a directions hearing by telephone to fix a procedure for submissions on penalty, whether by way of a formal hearing or on the papers. Our current view is that a fair penalty in all the circumstances might be a package of a \$3,000 fine, a contribution to the costs of the Authority of \$1,000 and to this Tribunal of a further \$1,000, and a compensation payment to the complainants of \$2,000.

[67] 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 G Denley  
Member

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Ms C Sandelin  
Member