BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 25

READT 094/14

IN THE MATTER OF	charges laid under s.91 of the Real Estate Agents Act 2008
BY	**COMPLAINTS ASSESSMENT COMMITTEE (per CAC20003)**
	Prosecutor
AGAINST	**CHRISTOPER WRIGHT** of New Plymouth, Licensed Salesperson
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

HEARD at NEW PLYMOUTH on 1 April 2015

DATE OF THIS DECISION 14 April 2015

APPEARANCES

Ms J MacGibbon, counsel for the prosecution
The defendant on his own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] Complaints Assessment Committee 20003 has charged Christopher Wright with two charges of misconduct which are in brief:

(a) Disgraceful conduct under s.73(a) of the Real Estate Agents Act 2008 (the Act) in that the defendant misled landlord clients about who would be occupying their property and, in particular, he did not advise them that he was renting the garage.

(b) Disgraceful conduct under s.73(a) of the Act that the defendant produced retrospective rental statements and misled the Committee in light of statements he made regarding rental records.

[2] Those charges were laid against the defendant on 20 October 2014 and read in full as follows:

*"**Charge 1***

Complaints Assessment Committee 20003 charges Christopher Wright with misconduct under s.73(a) of the Real Estate Agents Act 2008, in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars:

1. *Christopher Wright (licensee) entered into a property management agreement with Brett and Tracey Benton (clients) in respect of a property at 407 Manutahi Road, RD3 Leperton, New Plymouth (property).*

2. *The first tenancy commenced in March 2011 and ended in March 2013.*

3. *On 20 March 2013, the licensee signed a new tenancy agreement with Yvette Dobbin (Dobbin tenancy).*

4. *Prior to Ms Dobbin moving into the property, the licensee advised the clients that the interested tenants were a couple with an adult son, paying rental of $460 per week. In fact, the tenants were two adults and three children, paying rental of $350 per week. The licensee paid the remaining rent ($110 per week), for use of the garage himself.*

5. *The licensee did not inform the clients that he was renting their garage and seek their informed consent for this to occur. Instead, he misled the clients about the nature of the Dobbin Tenancy.*

Charge 2

Complaints Assessment Committee 20003 charges Christopher Wright with misconduct under s.73(a) of the Real Estate Agents Act 2008, in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Particulars:

1. *One aspect of the complaint to the Real Estate Agents Authority (REAA) about the licensee's conduct was that rental statements ceased in September 2012. The complaint related to a tenancy that continued beyond September 2012, until March 2013.*

2. *The licensee denied this in a letter to REAA dated 3 July 2013. He stated:*

> *Not so. I will forward all these to you no later than 10 July 2013.*

3. *The statements were not provided on 10 July 2013.*

4. *On 1 November 2013, the licensee emailed the investigator for REAA, stating:*

It is looking like I need an extension till 5pm Monday 4th November. This is due to unforeseen circumstance's (sic) at my end. I currently have found my file that includes all the monthly landlord rental statements till the end of 2012. I have attached these to this email.

I am as keen as you are to get this matter sorted, and look forward to emailing you on Monday 4th November 2013, with the balance of the paperwork your require.

5. *The licensee used Palace Software to produce rental statements. The licensee made no data entries into that software between 1 December 2012 and 10 October 2013. The licensee contacted Palace Software after 10 October 2013, to enter data into the Palace Software system, for the purpose of producing rental statements.*

6. *On 4 November 2013, the licensee sent an email to the investigator, attaching rental statements for January – March 2013 and a year end summary.*

7. *The licensee did not advise the investigator that the rental statements had been produced retrospectively and thereby misled the Committee in light of the statements made by the licensee as set out in paragraphs 2 and 4 above."*

The Issues

[3] The defendant denies the charges. In respect of Charge 1, he admits not informing the client owner of the arrangement regarding the garage, but denies that this was disgraceful. With regard to Charge 2, the defendant states that the rental statements he produced, while not contemporaneous, were based on manual records made contemporaneously, and that he had no intention to mislead the Authority.

Factual background

[4] On 18 March 2011, the complainants Brett and Tracey Benton, owners of 407 Manutahi Road, RD3, Lepperton, New Plymouth (the property), engaged the defendant to manage that property. The defendant was then a salesperson with McDonald Real Estate Ltd in New Plymouth.

[5] On 24 March 2011, the defendant (through McDonald) signed a tenancy agreement (on behalf of the landlords) with Mark and Marjorie Stewart at $460 per week.

[6] In September 2011, the defendant left McDonald to operate his own agency, Wright Real Estate Ltd. He took the Benton property management contract with him and had a new property management agreement signed.

[7] On 1 March 2013, the Stewarts moved out of the property.

[8] On 20 March 2013, a new tenant moved in, namely, Ms Yvette Dobbin. Unbeknown to the Bentons she was paying only $350 per week and the defendant was covering the rest of the rent himself, i.e. paying $110 per week, so he could use

the garage, apparently for storage. The Bentons' concerns with respect to this arrangement tenancy were that:

[a] They were not told about the garage rental and no separate tenancy agreement was signed nor bond paid regarding the garage;

[b] They were told the new tenants were a business couple with a son who worked for their family business when, in fact, the tenants were two adults and their three children; and

[c] They did not receive a signed tenancy agreement from the licensee for the new tenant, Ms Dobbin.

[9] On 1 April 2013, the defendant ceased to be the property manager for the Bentons. He sold his rental roll to J & R Partnership and a Ms Jennifer Russell became the new property manager for the Bentons. A third property management agreement was signed between the Bentons and Jennifer Russell.

[10] On 19 May 2013 the Bentons made a complaint to the Authority about the Dobbin tenancy and the lack of rental statements for 2012. They then signed a fourth property management agreement with Raewyn Breman of McDonald Real Estate Ltd. Ms Breman arranged for the defendant to sign an agreement for use of the garage.

REAA's document request

[11] During the Authority's investigation, the investigator (Mr G Gallacher whose evidence is covered below) made requests to the defendant for rental statements. In response to the allegation that he had ceased providing rental payment statements from September 2012 onwards, the defendant said: *"Not so. I will forward all these to you no later than the 10th July 2013."* However, these statements were not provided to the Authority on 10 July 2013.

[12] On 1 November 2013, the defendant provided copies of the statements of accounts for September 2012 to December 2012. In his email, attaching the statements, he said:

> *"It is looking like I need an extension till 5 pm Monday 4th November. This is due to unforeseen circumstances at my end. I currently have found my file that includes all the monthly landlord rental statements till the end of 2012. I have attached these to the email.*
>
> *I am as keen as you are to get this matter sorted and look forward to emailing you on Monday 4th November 2013, with the balance of the paperwork you require."*

[13] In October 2013, in the course of enquiries with the defendant's accountancy software provider, Palace Software, the Authority was advised that the defendant's account had been disabled between 3-5 months earlier (i.e. between May and July 2013) due to unpaid invoices. Palace also told the Authority that the defendant stopped entering bank records into the system in November 2012 and that he had last contacted Palace on 14 January 2013 to access his records. Therefore, the

account statements for December 2012 could not have been created contemporaneously.

[14] On 4 November 2013, the defendant provided copies of the statements of accounts for January to March 2013. On 5 November 2013, the Authority contacted Palace and asked if they could confirm that these statements were produced through it. Palace confirmed that the defendant had called and asked for certain transactions to be entered so he could produce statements. Again, it appears that these statements were not created contemporaneously, but rather in October 2013.

[15] The statements themselves have no other dates on them other than the title "*Statement of account as at x date*" to suggest whether they were in fact produced on that date.

[16] It appears the defendant could not afford to pay the monthly subscription to the Palace software and could not access his records at the material times. He has stated that he did keep a manual record which he then could upload to the software when his account was reinstated. It appears to be accepted that the rental statements to March 2013 were not produced contemporaneously.

A summary of the evidence for the prosecution

The Evidence of the Complainant Mrs T Benton

[17] By agreement, Mrs T Benton gave evidence by telephone from Australia because she and her husband owned the said New Plymouth property at material times. She said that prior to moving to Australia in March 2011 they engaged the defendant to act as property manager for that property so that on 13 February 2011 they had signed a property management authority with McDonald Real Estate Ltd of which the defendant was the property manager.

[18] In March 2011 the defendant signed a tenancy agreement with a Mr and Mrs Stewart who had been referred to him by Mr and Mrs Benton. The Stewart's tenancy commenced on 15 April 2011 at a weekly rental of $460.

[19] On 18 October 2011 the Bentons signed a new property management agreement with the defendant himself because he had established his own agency called Wright Real Estate Ltd.

[20] At the end of January 2013, the Bentons received a phone call from the defendant informing them that the Stewart's had given notice and were vacating the property on 1 March 2013 but that the defendant had interested a couple with an adult son who seemed suitable tenants. In early February 2013 the defendant phoned the Bentons to say that those people wanted to rent the property but required a minimum 24-month tenancy and needed to give four week's notice regarding their current premises. The Bentons agreed to that. However, they heard nothing further until 19 March 2013 when the defendant emailed them to confirm that the new tenants would be moving into the property on 22 March 2013 and rent would be paid weekly in advance with a first payment in April. They did not receive a copy of the relevant tenancy agreement.

[21] On 16 April 2013 the Bentons signed a new property management agreement with R & J Russell Partnership because the defendant had advised them he was no longer undertaking property management. Quite soon Ms Russell, as the new property manager, forwarded them a copy of the tenancy agreement for the property and the Bentons realised that there were two separate rental arrangements, namely, the house was rented for $350 per week and the garage was separately rented for $110 per week. They became concerned that the tenant might be running his business from the garage which might have implications for their insurance over the property. Then they noticed that the rental agreement stated that the tenants were two adults and three children.

[22] Accordingly, they informed Ms Russell of their concerns and were shocked to be informed by her that the house tenant was a real estate consultant, with three children, paying $350 per week and the garage was rented to the defendant for $110 per week on the basis that he was to maintain the grounds of one acre of gardens and hedges, but there was no written contract for the garage nor had any bond been paid in relation to it.

[23] Mrs Benton emphasised that the defendant had never sought the Bentons consent to use part of the property himself and they became concerned because, if he were to stop using it, they would only receive $350 per week rent for the house instead of $460 per week. They felt they were exposed by the lack of a written agreement for the garage and that there was a conflict issue because the defendant had been both their tenant and their property manager until 16 April 2013.

[24] On 29 May 2013 they signed a new property management agreement with Ms R Breman of McDonald Real Estate Ltd and she arranged for the defendant to sign an agreement for his use of the garage.

[25] Mrs Benton also emphasised that, while he had been acting as their property manager, she felt the defendant had misled her and her husband on the nature of the second tenancy of their property in that, prior to signing the tenancy agreement, he had told them the tenants would be a business couple and an adult son paying $460 per week; but, in fact, he had signed up a tenancy agreement with his real estate colleague Ms Y Dobbin on the basis of her and her husband and three children, paying $350 per week. Also, the defendant did not inform the Bentons that the defendant himself was renting the garage and paying $110 per week for that; and that he had failed to seek their consent to do that. They also emphasised that when they complained about this situation to the Real Estate Agents Authority, they also advised the Authority that they had not been receiving rental statements from the defendant since September 2012.

[26] Mrs Benton was fluently cross-examined by the defendant. She stated that, until they found out about the above matters of concern to them, she and her husband were very satisfied with the conduct and efficiency of the defendant.

[27] A number of peripheral matters were covered in cross-examination such as the concern of the Bentons that Ms Dobbin ran horses on the land causing some damage to it, but that and other issues have been dealt with in another forum. However, Mrs Benton did make it clear to us that the Bentons had never agreed to their paddocks being included in the tenancy agreement to be managed by the defendant. Another matter of concern seemed to be that they required that any tenant have no more than one dog which was not permitted to enter the actual

house, but that rule was not observed and there were two dogs kept inside the house.

The evidence of Ms R Breman

[28] Ms Breman has been a property manager at McDonald's Real Estate Ltd since 2002 and has been licensed as a real estate salesperson. She referred to the defendant having left McDonald's to start up his own property management business in September 2011. He took with him the management of the Benton property but on 29 May 2013 Mr and Mrs Benton signed a residential rental management authority with McDonald's Real Estate Ltd. The then sitting tenant for the property was Ms Dobbin (regarding her tenancy for two adults and three children) and she renewed that on 5 June 2013 for one adult and two children.

[29] Ms Breman added that then the defendant was then renting the garage at the property but without any agreement to that effect so that on 11 June 2013 she prepared a separate storage lease agreement for him so as to formalise his arrangement.

[30] In the course of the defendant's cross-examination of Ms Breman, we noted that the tenancy agreement with Ms Dobbin was for a 12-month fixed term and there seemed to be an oral arrangement that the defendant would vacate the garage whenever Ms Dobbin vacated, and that happened.

[31] Ms Breman seemed to accept that the defendant had been a very good tenant and there had been a security deposit paid by him because his lease of the garage was not on a residential basis so as to need a bond. That security payment was fully refunded in due course to the defendant. Ms Breman considered that the Residential Tenancies Act 1986 does not require that the property owner be provided with a copy of the tenancy agreement by the property manager although it is the practice of McDonald's Real Estate Ltd to so provide a copy of such a tenancy agreement. Ms Breman did not know whether Mrs Benton had ever sought a copy of the tenancy agreement for the property.

[32] Ms Breman noted that the defendant had been a successful property manager who had caused no problems that she knew of. She remarked that horses should not have been on the property in terms of its management by the defendant. She did not anticipate any problem in enforcing the terms of an oral tenancy agreement.

The evidence of Mr M Abbott

[33] By consent, a brief of evidence was adduced from Mr Abbott as a director of Realbase Ltd which is a supplier of "*Palace"*, a cloud-based property management software company. Property management clients of Palace upload accounting records to an internet hosting website and that process requires either manual input from a bank statement or the export of a CSB transaction file from the bank and import into Palace. Mr Abbott also said that clients require access to their accounting records through a Palace account in order to produce statements of account from the system.

[34] Mr Abbott recorded that the defendant's company (Wright Real Estate Ltd) was a client of Palace from August 2011 but that sometime in mid-2013 its account with

Palace was disabled due to arrears in the company's contract payments to Palace. At the time of disabling the account, it had last been accessed on 14 January 2013 and the entries regarding the defendant's company into the Palace system then only went up to November 2012. Accordingly, from mid-2013 the defendant's company was unable to access the Palace account to produce statements of account for the period following November 2012.

[35] Mr Abbott also stated that, in October 2013, the defendant phoned Palace staff and requested them to enter certain specific transaction so that the defendant could produce statements from his Palace account. Accordingly, monthly statements of account for the period September 2012 to March 2013 were produced but Palace had no way of verifying whether the entries came from the defendant's bank statement.

The evidence of Mr G Gallacher

[36] In the usual way Mr Gallacher gave evidence as a senior investigator at the Real Estate Agents Authority. Very helpfully, he covered all documents relevant to the above facts and as set out in an agreed bundle of documents.

[37] Mr Gallacher, *inter alia*, confirmed that the defendant currently holds an active salesperson licence and is employed in New Plymouth with By The Lake Realty Ltd, which trades as Century 21 from offices in Palmerston North. Mr Gallacher outlined the nature of the complaints he had received from Mr and Mrs Benton and the content of his consequential interviews and communications with the defendant about those complaints. We consider it helpful to set out the following portion of Mr Gallacher's evidence-in-chief to us, and we record that the defendant did not wish to cross-examine him:

> *"**2 Investigation***
>
> *2.1 As part of their complaint, the complainants claimed Mr Wright did not provide monthly statements of account for the period from September 2012 until the end of the first tenancy of their property, being the Stewart tenancy which ran from April 2011 to March 2013.*
>
> *2.2 As part of the investigation into this aspect of the complaint, I sought an explanation from Mr Wright.*
>
> *2.3 On 3 July 2013 Mr Wright responded to the allegation he had ceased to provide the complainants with statements of account after September 2012. He denied this and stated in his letter to the Authority:*
>
> *'Not so. I will forward all these to you no later than the 10th July 2013'. …*
>
> *2.4 The statements were not provided to the Authority on 10 July 2013.*
>
> *2.5 On 1 November 2013 Mr Wright emailed the Authority and stated:*
>
> *'It is looking like I need an extension till 5pm Monday 4th November 2013. This is due to unforeseen circumstances at my end. I currently have found my file that includes all the monthly landlord rental statements till the end of 2012. I have attached these to this email.*

I am as keen as you are to get this matter sorted, and look forward to emailing you on Monday 4th November 2013, with the balance of the paperwork you require.' …

On 4 November 2013 Mr Wright sent an email to the Authority attaching copies of statements of account for January to March 2013 as well as a summary for the year ended 31 March 2013.

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

2.6 *I refer to the brief of evidence of Michael Abbott of Palace Software (this information had been given to me in the course of the investigation by Ron Abbott of Palace Software). Given that Mr Wright had not created any rental statements using the Palace software after November 2012, and that he had last accessed the software in January 2013, following which his account had been disabled, the rental statements from at least December 2012 onwards must have been produced retrospectively. When forwarding those rental statements, Mr Wright did not advise the Authority of this. Rather, his previous correspondence suggested that the creation and provision of the rental statements to the complainants had been ongoing."*

The evidence of the defendant

[38] The defendant confirmed that he is currently contracted to By The Lake Realty Ltd as a salesperson and as a property manager. Broadly, he confirmed salient evidence set out above.

[39] With regard to the complaint about the defendant's handling of the tenancy of the property he states that at no stage did he tell Mr and Mrs Benton that a tenancy was confirmed with the said couple and adult son as that couple changed their mind so that he was back to quoting the property for rent. He did not feel it necessary to advise his landlords of that position then and he had merely contacted them as to the possibility of tenanting the property for a two year term.

[40] The defendant continued that in March 2013 he entered into negotiations with Ms Dobbin who wanted to tenant the property but told him the rent was unaffordable for her. The defendant then continued his evidence to us as follows:

"5. … Because there were no other prospective tenants looking at the property and the fixed term tenancy had expired, in the interests of expediency and to ensure the landlord had continual income without any down time, I agreed to take the garage for the purposes of storage, of which I paid $110 per week and Yvette paid $350.00 per week. This arrangement worked well for approximately three months and there was a change of property management during this time to Jennifer Russell, at R & J Russell Partnership. After this time a new manager was put in place by the landlord, McDonald Real Estate. I was manager for the property for approximately 6 weeks only.

6. A copy of the agreement was not forwarded to the landlords and neither was it requested. Our in house policy at the time was that copies of tenancy agreements were only forwarded to landlords if requested."

[41] The defendant emphasised that he never intended to mislead the landlords and, in fact, had done his best to ensure that they received the rental income they sought as promptly as possible. He did not contact the landlords much because he felt there was no need with rent being paid and with him keeping up the grounds and gardens. He seemed to be saying that there was no particular advantage for him using the garage for storage and "*I just wanted to find a way to make this work for all parties. I did not continue with management and received no financial gain, apart from management fees for a short period of time*". He concluded his written evidence-in-chief as follows:

> *"9. There was a written fixed term tenancy agreement for the garage, which included the maintenance of the grounds and gardens. Subsequent to this agreement and after McDonald Real Estate took over they prepared a new agreement for the garage at which time a bond paid was requested and paid by myself.*
>
> *10. The agreement regarding the garage was honoured, it was a fixed term contract, however it was linked to Yvette Dobbins agreement in that, should she ever vacate, voluntary or otherwise, my tenancy would end as well. There was never any possibility of the landlords losing money and in any event never occurred.*
>
> *11. I am at a loss to understand what disadvantage financial or otherwise the landlord has suffered due to my actions. I did not deliberately mislead her in anyway. I had no reason to, in fact she actually was financially better off. The only reason the tenancy ended was due to issues with her subsequent managers. In three years she had received regular rental income from the properties I managed."*

[42] With regard to Charge 2, the defendant stated that in 2012 he was having financial difficulties in his business and could not afford the monthly subscription for the Palace Software so that he could not access his records. He emphasised that at all material times he was keeping "*concise manual trust records, which were reconciled monthly*". He states that he had provided all statements to Mr and Mrs Benton up to December 2012 but, because he could not access the Palace Software, he was unable to send them statements from that date until his company stopped trading in May 2013. He then stated:

> *"3. After being contacted by the REAA I contacted Palace to re-instate my account so I could provide the records for the landlord and the Authority. Please note that this was for recording purposes only, I could have produced all manual records for that time. I did not realise that wasn't necessary to use the Palace program. There was no intent to mislead the investigator as manual records were being kept during that interim period where I was unable to access the software. I now have all records on hardcopy from Palace."*

[43] The defendant was comprehensively cross-examined by Ms MacGibbon on behalf of the Prosecution. For present purposes, it is only necessary to record that the defendant seems to sincerely think that we have no jurisdiction to deal with him because he maintains that he has at all times complied with the Residential Tenancies Act 1986 as a property manager and that his conduct covered by the above charges did not involve real estate agency work.

[44] Inter alia, the defendant also asserts that he did not need the landlords' consent for any of his conduct because he was complying with the terms of the property management agreement they had signed. He did not seem to accept that a property manager has any particular need to be open and honest with the property owners but only to carry out their instructions.

[45] It also emerged quite clearly from the defendant's cross-examination that, at all material times, he had adequate manual records but did not realise that these would be acceptable to Mr Gallacher and thought that Mr Gallacher would only be satisfied with computer records from the Palace system. He also asserts that he was truthful to Mr Gallacher because he meant that he had found his file of manual statements and eventually had that information entered onto the Palace computer. The defendant puts it that, at all times, he answered all the questions put to him by Mr Gallacher.

Misconduct

[46] 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; …"*

[47] We considered the ambit of the term "*disgraceful*", as used in s.73, in *CAC v Downtown Apartments Limited* [2010] NZREADT 06 where 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 … 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).

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

[49] The test in *Pillai and Messiter* (No. 2) (1989) 16 NSWLR 197 is also of assistance when assessing whether professional misconduct has been demonstrated, namely:

> *"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 …"*

[50] The section allows for disciplinary findings to be made in respect of conduct which, while not directly involving real estate agency work, nevertheless has the capacity to bring the industry into disrepute and which, for that reason, agents of good standing would consider to be disgraceful.

The Stance of the Prosecution

[51] Ms MacGibbon submits that the conduct of the defendant was clearly disgraceful for the following reasons. In acting as a property manager for the Bentons he was to provide accurate information about the occupants of the property and rent they were paying each week. Having advised the Bentons that the occupants would be a couple and adult son he failed to inform them that the occupants would in fact be two adults and three children and, most importantly, that he himself would be renting part of the property. He therefore misled his clients.

[52] Furthermore, the defendant put himself in a situation of conflict, in that he was a property manager and a tenant at the same time. One of the property manager's roles is to take action to protect the position of the landlord if rent is not paid. If the defendant himself failed to pay his rent it is unclear how the Bentons could have relied on the defendant, as their property manager, to rectify the situation. The landlord may be content to allow the property manager to rent part of the property, but express permission should be sought.

[53] The defendant failed to disclose his occupation of the property and also misled the Bentons about who was in occupation. Ms MacGibbon submits that this is disgraceful and shows a cavalier attitude to his obligations and to the use to which his clients' property was put.

[54] Ms MacGibbon puts it that, when he produced his rental statements to the Authority, the defendant provided no clarification that some had been produced retrospectively. She also put it that he was obligated to do so given his letter of 3 July 2013 which gave the impression that the provision of rental statements was ongoing and had not been stopped. Instead, he said to the Investigator that he will forward "*all of the statements"* no later than 10 July 2013. He then sought an extension, saying he had found the file that included all of the monthly landlord rental statements until the end of 2012, which he attached to his email. However, as noted above, the December 2012 statement appears to have been produced more recently,

as information was not entered into the Palace system between November 2012 and late October 2013.

[55] Ms MacGibbon also puts it that, given that the defendant said that rental statements did not cease in September 2012 and that he would forward all of the statements within 7 days, the inference is that he continued preparing and supplying rental statements throughout the tenancy. She submits that, when he subsequently provided the rental statements for January to March 2013, he ought to have qualified his denial by acknowledging that these statements were not prepared contemporaneously but were in fact prepared in October 2013.

[56] Ms MacGibbon submits that the defendant was obliged to clarify to the Committee that this was the case, given his previous statements to the investigator; and that the only inference that can be drawn from his communication to the investigation is that he had continued to create and supply statements throughout the tenancy.

[57] It is firmly submitted for the Authority that both the above charges reflect disgraceful conduct on the part of the defendant. It is put that his failure to provide the Bentons with accurate information about the occupants of their property and, in particular, his own use of his clients' property, was misleading and in breach of his basic obligations. Also, the inference drawn from the defendant's communication to the investigator is that the statements he provided to the Authority were drafted contemporaneously, but it is obvious from the evidence of Michael Abbot that is not the case and they were drafted sometime in October 2013. It is further submitted that failure to clarify the position is misleading in the circumstances and is disgraceful conduct.

Discussion

[58] Although the defendant's conduct did not involve real estate agency work he did not seem to understand that a real estate salesperson can, nevertheless, breach s.73(a) of the Act which defines "*misconduct*" in respect of conduct which does not relate to real estate agency work, as does s.73(d).

[59] As Ms MacGibbon emphasised, in her final oral submissions, s.73(a) provides for an offence under the Act of misconduct if a real estate salesperson has engaged in conduct which would be reasonably regarded by agents of good standing, or reasonable members of the public, as disgraceful; and she submits, and we agree, that does not necessarily require that the conduct in question be real estate agency work.

[60] We now set out in full ss.72 and 73 of the Real Estate Agents Act 2008 which respectively define "*unsatisfactory conduct*" and "*misconduct*".

> *"**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.

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."

[61] Of course, both the above charges against the defendant are laid pursuant to s.73(a) and plead *"misconduct*".

[62] Ms MacGibbon submitted that a real estate salesperson must be honest and open when dealing with customers no matter what the type of work is; and that the defendant's dealings with Mr and Mrs Benton were poor in terms of open and honest communication and, in addition to that, he put himself in the conflicting position as their manager and tenant without them even knowing and, somewhat curiously as Ms MacGibbon opined, does not at this stage even see the danger in that position of conflict.

[63] She put it that the facts show that the defendant has a cavalier attitude to his duties and responsibilities as a real estate agent and, indeed, towards us (and the Authority) and that his lack of understanding in these respects is most concerning. We agree with the content of that last sentence. While we agree that the licensee put himself in a position of conflict, we do not think that was disgraceful in its context and it does not relate to real estate work.

[64] With regard to the defendant's tardiness in supplying Mr Gallacher (from the Authority) with rental records, Ms MacGibbon puts it that, again, the defendant has shown a lack of openness and attempted to mislead Mr Gallacher. She submits that is disgraceful conduct, especially coupled with the defendant's failure to provide the true letting situation to the Bentons about their property and misleading them into thinking that it was fully tenanted by two adults with an adult son when the tenancy had been split with different types of tenants as covered above.

[65] Simply put, Ms MacGibbon submits that the defendant's conduct has been misleading and therefore disgraceful.

[66] In his final oral submissions, the defendant conceded that he had erred in thinking that the Palace computer system was appropriate for him to use. He had been familiar with it from working with McDonald Real Estate, but became financially unable to access it. He also admits that he misunderstood the nature of the information sought by Mr Gallacher and thought that it needed to be on the Palace

software and did not realise he could have simply provided manual statements about rental income and property expenditure which he held at all material times.

[67] We respectfully observe that the defendant had a slightly belligerent manner towards us and, perhaps, that caused him to not quite understand what Mr Gallacher had been seeking from him and to have been somewhat uncommunicative to the Bentons as his clients at material times.

[68] Understandably, the defendant referred to all the good work he had achieved for Mr and Mrs Benton in terms of letting their property under the Residential Tenancies Act 1986, and having that Act observed and appropriate rent collected and paid to them. He asserted that under his management contract he did not need the approval of the owners for his relevant conduct as he had full letting discretions regarding the property. He put it that he had managed the property in the usual way with efficiency and with no loss of money for the owners or anyone else.

[69] We record that the relevant property management authority form, signed by the complainant landlords, gave the defendant extensive discretion to select tenants and administer the property.

[70] The defendant stresses that he was under no obligation to have a written contract regarding his use of the garage. He considered that such an arrangement did not need to be in writing and that there is no requirement that he supply copies of tenancy agreements to the property owners, even though that is commonly done as a matter of practice by property managers. Certainly, the Residential Tenancies Act 1986 only deals with tenancies of residential premises and s.13(1) of that Act requires that every residential tenancy shall be in writing and signed by both landlord (or agent) and tenant. Section 13(2) requires that before the tenancy commences, the landlord must provide the tenant with a copy of the tenancy agreement. Section 13C provides that no tenancy agreement is unenforceable because it is not in writing.

[71] The defendant emphasised that he rented the garage on the basis of his paying $110 per week and keeping in good order the garden of the property and its hedges, and he did all that.

[72] Overall, the stance of the defendant is that he maintained the property properly in terms of the Residential Tenancies Act 1986 and never intended to mislead Mr and Mrs Benton and was always honest with them. Apparently at times he dealt with Mrs Bentons' sister who resides in New Plymouth and from time to time felt maintenance work should be paid for by tenants; and that was effected accordingly says the defendant.

[73] Essentially, the issues are that the defendant did not advise Mr and Mrs Benton who was tenanting their property in New Plymouth; nor did he provide them with a copy of the tenancy agreements; he put himself in a conflict of interest situation by himself leasing the garage when he was property manager; and he failed to provide Mr Gallacher of the Authority promptly with full records regarding collection of rent and expenditure relating to the property and misled him about their existence. Also, he had failed to supply full rental statements to the landlords.

[74] We consider that it was unsatisfactory of the defendant to allow the owners to think that their property was tenanted by an adult couple with an adult child when, in

fact, the tenancy had been split into two so that an entirely different type of family rented the house and grounds and there was a separate letting of the garage. However he interpreted his management contract, the defendant's conduct seems rather high-handed in that respect, although he did not realise the impression he had given the landlords as to the type of tenants he had obtained for them.

[75] It was also unsatisfactory not to provide the owners with a copy of the tenancy agreement upon their requesting that. As we understand it, there is no particular requirement of law for a property manager to do that but it seems a basic courtesy.

[76] It is certainly concerning and unsatisfactory, at least in principle, that the defendant put himself in a conflict of interest situation as a property manager for the owners, and without their knowledge or approval, as their tenant of part of the property (i.e. the garage). We could treat that offending as amounting to misconduct, probably at a low level. Our assessment of Mrs Benton's regard for the defendant is that she would have permitted him to lease the garage in all the circumstances had she been asked.

[77] In principle, to fail to promptly provide the investigator for the Authority with basic records in terms of the complaint is most unsatisfactory, and also seemingly to try to mislead him and the owners about the existence and nature of those records, or to mislead such an investigator in any way, is conduct which could be treated by us as misconduct. However, manual records did exist and we accept that the defendant thought he was required to provide records under the Palace system. Nevertheless, he was not candid to Mr Gallacher about the state of the records and failed to promptly supply Mrs Benton with rental information for her tax purposes.

[78] Overall, it is concerning that this is another case where a real estate salesperson does not seem to understand that his (or her) activities which are not real estate work may, nevertheless, be so reprehensible (or disgraceful in terms of s.73(a)) as to amount to misconduct under the Real Estate Agents Act 2008. Perhaps a simpler way of expressing our concern is that such an agent's non-real estate work activities, whether business or private and, as in the present case, involving residential property management, may show that the agent is unfit to be a real estate agent and/or requires to be disciplined as an agent in terms of the standards set out in ss.72 and 73 of the Act and its Regulations.

[79] In the present case we are satisfied that the defendant sincerely but, perhaps stubbornly, believed that as a residential property manager he was beholden to comply with the Residential Tenancies Act 1986 and, because such work is not real estate agency work, neither the Authority nor we have any authority over him. As we have already explained that belief conflicts with s.73(a) of the Act in particular.

[80] While we broadly agree with the stance of the prosecution about failures on the part of the defendant, and that a real estate salesperson must always be open and honest, the defendant has given explanations for the context of his seeming deficiencies or failures in this case. Accordingly, we do not think that his conduct should be regarded as *"disgraceful"* in terms of s.73(a) of the Act so that misconduct is not proved on the balance of probabilities. That his conduct may be *"unsatisfactory"* is no concern of ours because the relevant conduct is not real estate work.

[81] Overall, we consider that the defendant's state of mind that he was acting in accordance with the law, and in terms of his management contract, means we do not find any misconduct by him as defined in s.73(a) of the Act, in terms of the charges. Prima facie in terms of s.110(4), having heard the charges against the defendant we would be satisfied that, although not guilty of misconduct, he has engaged in unsatisfactory conduct as we have explained. However, it seems to us that, in this particular case, we cannot apply s.110(4) because the unsatisfactory conduct does not relate to real estate work.

[82] Accordingly, we dismiss the charges but express the wish that the defendant undergo an appropriate educational course explaining the principles of ethics applying to real estate practice. If we had jurisdiction we would order that educational course, but because the defendant's concerning conduct is not real estate work, we have no jurisdiction to find, or penalise for, unsatisfactory conduct.

[83] 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

_____
Mr J Gaukrodger
Member

_____
Mr G Denley
Member