BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 4

READT 55/14

IN THE MATTER OF	charges laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**REAL ESTATE AGENTS AUTHORITY (per CAC 20005)**
	Prosecutor
AND	**YANYAN SARAH PENG**
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms N Dangen - Member

HEARD at AUCKLAND on 4 November 2014

DATE OF THIS DECISION 16 January 2015

COUNSEL

Ms S M Earl for prosecution
Messrs T D Rea and M X Singh for the defendant

DECISION OF THE TRIBUNAL

Introduction

[1] The defendant is charged with "misconduct" as defined in s.73 of the Real Estate Agents Act 2008. There is an alternative charge of "unsatisfactory conduct" (as defined in s.72 of that Act) if we do not find misconduct proved.

[2] Very simply put, the allegations against the defendant are that she failed to notice that the purchase price of a section as shown on an agreement for sale and purchase was $565,000 in circumstances where that price should have been $545,000; and that she wrongfully disclosed information about the transaction to the purchaser.

[3] The said sections 73 and 72 read 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."

"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."

[4] The charges read in full as follows:

Charge one [amended by consent*]*

Following a complaint made by MGM Limited (complainant) Complaints Assessment Committee 20005 (Committee) charges Sarah Peng (defendant) with misconduct under s.73(c)(iii) of the Real Estate Agents Act 2008 (the Act) in that her conduct was a wilful or reckless breach of Rules 5.1, 9.1 and 9.21 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (Rules) in failing to exercise skill, care, competence and diligence at all times and in breach of her fiduciary duties to her client.

Particulars:

(a) Failing to recognise the discrepancy between the purchaser's advised counter offer on the four lots (lots 520-523) at 300 Jeffs Road, Flat Bush, at $545,000 each, and the written counter offer by the purchaser on one of the lots (lot 522) at $565,000;

(b) Failing to adhere to the complainant's instructions not to become involved in the subsequent contractual dispute between the complainant and the purchaser, by:

(i) Forwarding a copy of text messages between the complainant and herself to the purchaser;

(ii) Forwarding a copy of the commission statement between Barfoot & Thompson Ltd and the complainant to the purchaser.

In the alternative

Charge two

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

Particulars

The particulars of charge 1 above are repeated.

In the alternative to the above charges

Charge three

The Committee seeks findings of unsatisfactory conduct pursuant to s.110(4) of the Act in the event the Tribunal finds misconduct has not been proved.

Factual background

[5] Mr Martin P O'Brien is a representative of the complainant vendor company MGM Ltd. The complainant's solicitor is Mr Mike Toepfer who made the complaint to the Authority about the conduct of the defendant as covered by us below.

[6] On 1 April 2011, the complainant signed a three-month sole agency agreement for the sale of seven vacant lots (lots 520-526) at 300 Jeffs Road, Flat Bush, Auckland. The listing agent for these properties was Johnson Chen a salesperson at Barfoot & Thompson Ltd. Each lot was listed for an asking price of $699,000. This complaint only deals with four of the lots, namely, 520-523.

[7] On 22 November 2011, the listings were withdrawn for lots 522 and 523.

[8] On 12 March 2012, the complainant signed a one month sole agency agreement with the agency for lot 522 and the listing agent was again Mr Chen.

[9] A few days later in March 2012, the complainant signed a one month sole agency agreement for lot 523. The listing agent for Lot 523 was the defendant who is a salesperson at a different Barfoot and Thompson branch from Mr Chen.

[10] The complainant states that he required a minimum of $550,000 sale price for each of the four lots and that he conveyed that to the defendant at the outset.

[11] The complainant was soon informed by the defendant that there were four separate sale and purchase agreements at the branch of Barfoot & Thompson ready for the four lots 520 to 523. At that stage none of the agreements had been signed by the prospective purchaser. As a result, the complainant completed the documents and proposed a price of $580,000 per lot. The defendant presented a counter-offer from the prospective purchaser of $530,000 for each of the four lots but the complainant counter offered at $550,000.

[12] On 17 March 2012, the defendant sent a text message to the complainant advising that the buyer had "send back the offer [for the four sections] to me. He changed the price to $545,000. If you agree I will email to your lawyer tomorrow morning."

[13] On 23 March 2012, Mr O'Brien texted her asking that she forward the agreements to "our lawyer as long as he agrees we will sign we will be in touch." Because of perceived language communication difficulties, it was the complainant's belief that it was best the vendor's lawyer look at the agreements before the vendor committed to anything

[14] When the agreements were presented to Mr O'Brien, there were three for the price of $545,000 and lot 522 was for $565,000. This resulted in an average price of $550,000 across the four properties and, as such, equated to the minimum price acceptable to the complainant who signed the agreements on 23 March 2012. However, the sale and purchase agreements check list held by the agency states a sale price of $545,000 for lot 522.

[15] Each of the agreements was conditional on the buyer undertaking and being satisfied with due diligence before 17 April 2012. On 17 April 2012, the purchaser's lawyer asked for an extension. The agreements were given a new conditional date of 20 April 2012.

[16] The agreement for lot 523 (one of the four properties) was confirmed unconditional on 20 April 2012. The purchaser sought extensions on the other three lots and that was given. On 30 April 2012, the agreement was confirmed for lot 522. A further extension was sought for the other two agreements.

[17] At that stage, Mr O'Brien visited the defendant to discuss the continuing requests for extensions and why the deposits had not yet been paid.

[18] On 3 May 2012, the complainant's solicitor (Mr M Toepfer), asked the defendant whether she had collected the deposit. She did not respond, so she was asked again on 4 May 2012. On 8 May 2012, the complainant's solicitor asked the defendant again whether the deposit had been paid.

[19] On 10 May 2012, Eric Koh (branch manager of the agency) advised that the deposit of $54,500 had been paid for lot 522. The complainant was conscious that, on the basis of a purchase price of $565,000, the 10% deposit should have been

$56,500. When Mr O'Brien spoke to the defendant about this, she said that there had been a mistake in the agreement and that the correct price for Lot 522 was $545,000.

[20] On 5 June 2012, the complainant's solicitor asked the defendant for a commission statement which he received that same day.

[21] The purchaser refused to complete settlement on 18 September 2012. The complainant served a settlement notice on the purchaser and a copy was also served on the defendant.

[22] Mr O'Brien states that on about 10 May 2012 he had told the defendant to leave the matter of the proper price for Lot 522 to be dealt with by the parties' solicitors but he alleged that, despite this warning, the defendant gave the purchaser the 23 March 2012 text messages between her and Mr O'Brien and that she also gave the purchaser copies of the commission statements from Barfoot & Thompson addressed to the complainant.

[23] On 12 December 2012, the defendant sent a letter to the complainant advising that she was assisting both the purchaser and the complainant settle their differences by releasing the text messages.

Relevant evidence adduced to us

The evidence of Mr M P O'Brien (for the complainant)

[24] Mr O'Brien's typed brief is reflected in the statement of facts set out above. In particular he referred to the Defendant having on 17 March 2012 advised him by text that the buyer had *"send back the offer to me. He changed the price to $545,000. If you agree I will email to your lawyer tomorrow morning"*. Mr O'Brien said that on 23 March 2012 he requested by text to the Defendant that she forward the agreements to the vendor company's lawyer (Mr Mike Toepfer in Wanaka) and he stated: "*As long as he agrees we will sign. We will be in touch"*.

[25] In his evidence-in-chief, Mr O'Brien makes it clear that he did not accept that the price for Lot 522 had been mistakenly inserted in the form of sale and purchase at $565,000 instead of at $545,000. When the Defendant put that to him on about 10 May 2012 he disputed it and pointed out that the price on the agreement for Lot 522 was clearly $565,000 in his view and he says that he then told the Defendant *"this was a legal issue and not to discuss it with the buyer. The company's lawyer would handle it with the buyer's lawyer*".

[26] Mr O'Brien is clearly annoyed that the Defendant subsequently, apparently shortly after 18 September 2012, gave the buyer a copy of what he refers to as "*the private text of 23 March 2012 between myself and her as the company's agent*". He categorically blames the defendant for the vendor company being "*obliged to settle at $545,000, $20,000 less than the contract price*".

[27] Mr O'Brien was, of course, cross-examined in careful detail by Mr Rea and did not resile from his evidence-in-chief. He said that from his point of view he was giving the purchaser a bulk discount for purchasing four sections (although, in fact,

that purchaser only purchased two sections eventually) and Mr O'Brien felt the vendor company should be getting $550,000 per section for that bulk discount so that, in his view, the extra $20,000 referred to above fitted his intentions. He will not accept that there had been a mistake in the price on the contract for Lot 522.

[28] He covered his various communications with the Defendant about these issues and emphasised that she became upset as she was positive that the price for any of the sections was $545,000 each and that had been clearly agreed between the parties. He said that he insisted to her that she keep out of the dispute and leave it to lawyers to handle. He is annoyed that, nevertheless, without his approval and without mentioning the matter to him or his lawyer or anyone else, she disclosed the said communications of March between him and the Defendant to the purchaser, contrary to his instructions to her. He considers that she thereby put him in a weak position with the purchaser over the issue of the price of Lot 522.

[29] Mr O'Brien made it clear that he is a fulltime property developer of great experience and, in a "*hands on"* manner, did all price negotiations.

[30] Mr Rea pressed Mr O'Brien that it did not make sense, in context, for the price of Lot 522 to be shown as $565,000; but Mr O'Brien responded that caused the vendor to obtain the average price it sought for the four sections and he would not accept that there had been a mistake.

[31] There was quite some reference to Mr O'Brien having suggested to the defendant that the higher price for Lot 522 would give her a higher commission; and that the Defendant had responded that she was not interested in obtaining more commission by cheating a purchaser. It seemed to be eventually accepted before us that Mr O'Brien simply smiled at that response.

Other evidence for the prosecution

[32] There was a helpful brief of evidence from the said lawyer, Mr M M Toepfer, and from Mr G M Gallacher, a senior investigator for the Authority. That evidence was accepted by consent without the need for cross-examination and is consistent with the background of facts set out above.

The evidence of the Defendant

[33] In her evidence-in-chief the Defendant advised that she left Barfoot & Thompson on 9 May 2014 to become a fulltime mother, but not because of anything to do with this case. She has never been the subject of any disciplinary issue and states that in her career as a real estate salesperson, she always tried "*to carry myself with integrity and professionalism*" and believed that she must be "*honest and fair in all my dealings with everyone*". She then added: *"I believe that I am in this situation now only because I tried to be honest*".

[34] The defendant then covered the facts broadly as stated above. She noted that in early March 2012 the vendor company, represented by Mr M O'Brien, was dealing with a prospective purchaser client of hers and received a counter-offer at $530,000 per lot and then the Defendant continued as follows:

6 A few days later, Mr Martin O'Brien made a further counter-offer of $550,000 per lot. Mr O'Brien did tell me that he would not go below $550,000 per lot, but I told him that $550,000 is still high and this may cause the buyer to stop bidding as he is also looking at other land. I told Mr O'Brien that I could try for $540,000, or even $545,000. I clearly remember Mr O' Brien saying "ok, just try your best!"

Offer of $545,000

7 On 17 March 2012, I spoke to my buyer to discuss the vendor's counteroffers. My buyer had asked my opinion and I said that he can try to offer $545,000 per lot if he does not want to accept the vendor's counteroffer. My buyer had wanted to make a counter-offer of 545,000 per lot for each of the four lots and said that this is the highest price he could go to. He put the new price down on the agreements. I can remember this date because it is the same date I sent Mr O'Brien the text message.

8 The text message I sent to Mr O'Brien that same date was as follows: "Good evening Mark, the buyer send back the offer to me, he changed the price to 545000, if you agree, I will email to your lawyer tomorrow morning.

9 Mr O'Brien responded five days later on 23 March 2012, with the following text message: "please forward to our lawyer (sic) as long as he agrees we will sign we will be in touch. Please email asap so we can get the deal done. Martin O'Brien." I understood Mr O'Brien to say that he would accept $545,000 per lot but wanted his lawyer to check the other details in the agreement first.

10 After receiving Mr O'Brien's text message, I sent four agreements to MGM's lawyer, Mr Mike Toepher. Three of the agreements quite clearly had $545,000 listed as the purchase price. I also thought the other agreement said $545,000 but the handwriting was not very clear and I see how it could be taken to say either $545,000 or $565,000. As stated above, it was my buyer who wrote down the price. However, all previous offers were made for all lots. This one round of offers had an unclear offer amount (could have been seen as either $565,000 or $545,000) and during my text messages with Mr O'Brien there was no mention of $565,000 for any lot, or a minimum overall price. Even if you look at the agreement for lot 523, the number is not so clear. I knew that the offer for lot 522 was $545,000 because I had discussed the offer with Mr Li.

11. With regard to the negotiations about price, I thought that this is where it ended and that both sides had agreed to a price of $545,000 for each of the four lots.

[Our emphasis]

[35] The Defendant stated that in her mind there was no reason why Lot 522 would be more expensive than Lot 523 as it is a smaller lot and on the original listing from the vendor company, all prices sought were the same. She asserted that:

> It is not true that Mr O'Brien was happy for the others to be sold at $545,000 with one at $565.000, so that these would average out to $550,000. He had previously agreed to reducing all the prices and told me to try my best to get the best price. I did, and this was $545,000 for each lot.

[36] The Defendant accepted that Mr O'Brien told her the issue was a legal one and that she should not get involved. He had also told her that she should be happy at the price being $565,000 because she would earn more commission. She said she had responded that ,while she would like to earn more money, she did not want to do that by cheating a purchaser; and that Mr O'Brien just smiled and said nothing.

[37] The Defendant said that she understood that the issue was going to be "*fought in Court*" so she sent the buyer the text that Mr O'Brien had sent to her on 23 March 2012: *"Because I felt that I could help clarify the truth in this situation. I felt that I had a duty to all the parties, not just MGM, to tell the truth …"*

[38] The Defendant was extensively and thoroughly cross-examined by Ms Earl.

[39] It seems that the price was not written into the contracts by her but by the purchaser. The Defendant said that the figures regarded as "$*565,000*" seemed to her, and still did, to represent "*$545,000"* and under cross-examination she accepted "*I feel it could be taken either way"*.

[40] She also again covered that she thought Mr O'Brien was joking with her at material times, because she felt he well knew the price agreed with the purchaser was $545,000.

[41] Also under cross-examination, the Defendant insisted that she checked the contracts including their prices and interpreted the figures for the price of Lot 522 as "*$545,000*" and not "*$565,000*". It was put to her that she should have noticed that that second figure was a "*6*" rather than a *"4"*. She responded that figure did look a little like a "*6"* but she and Mr O'Brien knew it was meant to be a "*4".* The Defendant seemed to accept that because she expected to see the figure as a *"4"* she may not have realised that it was more like a "*6*". She is adamant that she checked the figures including that one and saw them as "*$545,000*".

[42] She said that she was very surprised indeed when Mr O'Brien suggested that the price for Lot 522 was $565,000 and she made it clear to him that the price was definitely $545,000. Inter alia, she said when she discussed the issue with Mr O'Brien at her office in terms of collecting the correct amount of deposit, he did not seem to argue with her that the price was $545,000 for Lot 522. Also she said that he did not say to her that the matter was a legal one and she should not get involved. She thought he was making a joke about the whole issue because it was so obvious that the price agreed was $545,000 for each section.

[43] The Defendant admitted that she did not ask Mr O'Brien if she could provide information to the purchaser on the issue but she thought the matter would go to Court and everything would need to be disclosed to the Court. She knew that her buyer wanted to negotiate with Mr O'Brien rather than fight the issue in Court. She

said she felt she had a duty to all parties to make available all relevant information she controlled.

[44] It was put to the Defendant that she must have known this would make it more difficult for Mr O'Brien's company to obtain the higher price for Lot 522 and responded "*I did not think other than that I should tell the truth"* and she thought that Mr O'Brien always knew that the price for the lot was $545,000.

[45] It was put to her also by Ms Earl that she had an obligation to act in the vendor's best interests and the Defendant responded: "*I didn't think too much about that as I knew I had to tell the truth that the price had been agreed at $545,000."* It was then put to her that there is a rule that she should follow her client's instructions (apparently that is a reference to Rule 9.1 of Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 ("the Rules")) and she responded: *"yes, but I got the best price for the vendor and when that done I must tell the truth. I do not want to lie to anyone*". It was put to her that the information she supplied to the purchaser involved "*private letters*" and she responded: "*I thought they were arguing over price and the argument would probably go to Court and I had a duty to tell the truth. True, I didn't ask Mr O'Brien if I could give the purchasers a copy of the emails … by then I had realised this not a joke and would go to Court but I did not think too much. I thought I would have to tell the truth."*

[46] We observe that the Defendant seems to be of Chinese nationality and her English and understanding of the New Zealand idiom is such as to possibly misunderstand what someone like Mr O'Brien might have been saying to her. We assess the Defendant as a thoroughly honest witness.

The case for the prosecution

Charge one - wilful or reckless breach of the Rules

[47] It is the prosecution's submission that the following Rules have been breached in a wilful or reckless way giving rising to a charge of misconduct:

(a) Rule 5.l: "A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work."

(b) Rule 9.1: "A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law."

(c) Rule 9.21: A licensee must not disclose confidential personal information relating to a client, unless -

(a) the client consents in writing; or

(b) the licensee is required by law to disclose the information; or

(c) disclosure is necessary to answer or defend any complaint, claim, allegation, or proceedings against the licensee by the client.

[48] It is noted that in relation to Rule 9.21 the information must be confidential personal information. The prosecution submits that the text message and commission statement are personal information; and that personal information has predominantly been given a wide interpretation in cases involving the Privacy Act 1993, and what constitutes personal information is often context dependent. In the case of *CBN v McKenzie Associate,* Decision No. 48/04, 30 September 2004 the Human Rights Review Tribunal observed:

> *"[11] ... there is no "bright line" test which separates that which is obviously personal information about an identifiable individual from that which is not. Much will depend in any given case on the context in which the information is found. There may be particular factors in different settings that compel a conclusion that, although the requesting individual is not named in the information, nonetheless there is a sufficient connection between the information and the requester to justify a conclusion that the information is personal information "about" the requester."*

[49] In the decision of *Fagan v REAA and Sinclair* [2013] NZREADT 64, we have previously found that GST registration status of a vendor was not confidential personal information. Here, however, the text messages are between vendor and client and would not be publicly available without the defendant's disclosure. It is the prosecution's submission that disclosure is therefore in breach of Rule 9.21.

Wilful or reckless

[50] Section 73(c) of the Act provides that conduct which consists of a *wilful or reckless* contravention of the Act or the Rules amounts to misconduct.

[51] The issue of wilfulness / recklessness was considered by us in *REAA v Clark and Clark* [2013] NZREADT 62 at [70] to [74]. We referred to the following passage from the case of *Zaitman* v *Law Institute of Victoria* [1994] VicSC 778 (9 December 1994) at p 52:

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

Charge 2: Serious negligence / incompetence

[52] Ms Earl put it that if we do not consider that the defendant wilfully or recklessly breached the Rules, we may conclude, in the alternative, that her actions constituted

seriously negligent or seriously incompetent real estate agency work, which amounts to misconduct under s.73(b) (charge 2).

[53] We have previously applied the well known dicta in *Pillai v Messiter* No 2 (1989) 6 NSWLR 197 (CA) in s.73(b) cases. However, the question of whether the *Pillai v Messiter* dicta should be applied in serious negligence / serious incompetence under the Act was considered by the High Court in *CAC v Jhagroo* [2014] NZHC 2077 where Thomas J held that:

> *"[49] The words of s 73(b) must be given their plain meaning. Whether serious negligence or serious incompetence has occurred is a question to be assessed in the circumstances of each case ... the Tribunal is well placed to draw a line between what constitutes serious negligence or incompetence, or mere negligence or incompetence, the Tribunal having considerable expertise and being able to draw on significant experience in dealing with complaints under the Act."*

[54] Thomas J also referred to comments of the High Court in *Brown* v *REAA* [2013] NZHC 3309 at [21] where the Court had appeared to cast doubt on the applicability of *Pillai v Messiter* in s.73(b) cases. In *Brown,* the High Court had observed that:

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

[55] Ms Earl submits that, in light of *Jhagroo,* the correct approach in s.73(b) cases is simply to apply the plain words of the subsection rather than to consider the *Pillai* v *Messiter* standard. We agree. The High Court also affirmed the approach adopted by us in two previous cases involving s.73(b), namely *CAC* v Miller [2013] NZREADT 31and *CAC* v *Wallace* [2013] NZREADT 46. This was recently discussed in the case of *CAC* v *Li, Wang and Swann* [2014] NZREADT 57.

[56] The prosecution also submits that the error as to price on the sale and purchase agreement coupled with the defendant's breach of her non-disclosure obligations to her client amounts to misconduct, whether under charge one or charge two.

[57] Ms Earl put it that although the defendant has said that the sale and purchase agreement could read "$565,000" because the four is not clear, the difference between this document and the others which are drafted as $545,000 is visible. She submits that this was not ambiguous drafting but rather a drafting error; and the mistake was not inconsequential as price is fundamental to the sale and purchase agreement and the defendant should have taken greater care.

[58] However, the prosecution stresses its submission that the conduct of paramount concern is that involving disclosure of material that the defendant was explicitly instructed not to disclose. The defendant was on notice that she was not to involve herself in what was a contractual dispute between purchaser and vendor. With those instructions clearly in place she disclosed text messages and a commission statement in direct contradiction of her instructions. Also, on her own evidence, at no

point did she attempt to get instructions from her client to allow her to disclose the material or inform her client that she was going to disclose the material. In fact there seems to be no evidence that the purchaser even asked for that material. There can be no doubt the defendant did it regardless of what her vendor client had instructed.

[59] Ms Earl submits that this is a clear breach of her duty to act in accordance with her instructions and in the vendor's best interest and licensees clearly have such obligations as has been discussed in the case *Lac Minerals* v *International Corona Resource* [1989] 61 DLR (4th) 14 at 36-37:

> *"the ... facts giving rise to an obligation of confidence are also of considerable importance in the creation of a fiduciary obligation. If information is imparted in circumstances of confidence, and if the information is known to be confidential, it cannot be denied that the expectations of the parties may be affected so that one party reasonably anticipates that the other will act or refrain from acting in a certain way."*

[60] It is also submitted for the prosecution that the Lac Minerals statement is codified with obligations under Rule 9.1 and 9.21 of the Rules.

[61] Ms Earl notes that the defendant has suggested, given there is a duty of fairness, that required her to disclose the material. We have previously addressed a similar issue in *Fagan v REAA and Sinclair* [2013] NZREADT 64 where the complainant contended that the licensee's disclosure of the GST registration status of the vendors was contrary to explicit instructions given by him. The licensee contended that no such instruction was given and that, in any event, he was required to disclose the information to avoid misleading the purchaser.

[62] We found that, while the Rules require that licensees not mislead purchasers nor withhold information that should by law or fairness be provided to purchasers (Rule 6.4), licensees are also obliged to act in the best interests of a client and in accordance with the client's instructions unless to do so would be contrary to the law (Rule 9.21). We determined at para [26] that:

> *"Where a client instructs that information be withheld from a purchaser, and a licensee considers that the information should be disclosed under the Rules, a licensee should raise and discuss the issue in detail with his vendor client. If the client maintains that information must be withheld and the licensee remains of the view that it should be disclosed, the licensee must then decline to act further on that transaction."*

[63] Ms Earl submits that there was no duty to disclose the information in this case; that the information that the defendant was in possession of was not information relevant to the property itself; the information related to a contractual dispute; and this was a purely contractual matter, which would be appropriately dealt with in a civil context.

[64] Ms Earl puts it that had the purchaser requested the information from the defendant, and had the defendant obtained instructions that she was not to disclose, her simple response should have been that her client had instructed her not to

involve herself. At that point in time she had no obligation to disclose the information. Ms Earl submits that, in any event, this position was not even contemplated by the defendant as (it is put) she had failed at the first step of obtaining instructions regarding the material before disclosing it.

[65] The prosecution submits that such a clear disregard of the defendant's obligations amounts to misconduct; the defendant was clearly instructed not to disclose the information; it appears that no request was made by the purchaser for the information; so that (it is put) the defendant circumvented proper process and acted contrary to her duties and was working against her clients interests.

The stance of the Defendant

[66] We appreciate the very detailed series of typed submissions from counsel for the Defendant (and from counsel for the prosecution). Essentially, is put for the Defendant that the purchaser wrote the purchase price on the agreement and (she now acknowledges) that with regard to Lot 522 the price could be taken to mean either $545,000 or $565,000. However, in the context of her text messages with Mr O'Brien and the general context which we have set out above, she was in no doubt that the price was $545,000.

[67] Mr Rea submits that it is opportunistic for Mr O'Brien to now allege that, so long as the purchase price for all four lots averaged out at $550,000, the purchase price in each of the four individual agreements was not in issue.

[68] Mr Rea also submits that there can have been no ambiguity in the mind of Mr O'Brien, nor in that of the Defendant, so that it cannot be said that the defendant failed to exercise skill, care, competence and diligence in presenting the offers to Mr O'Brien.

[69] Mr Rea noted that the prosecution's paramount concern seems to be that the Defendant disclosed material which she was instructed not to. Mr Rea dealt with this in some detail. However, we believe the Defendant that Mr O'Brien did not instruct her to not become involved in the issue and not to disclose the material. Of course, there remains the issue of whether it was proper and professional of her to have disclosed the said texts to the purchaser. In all the circumstances, as is clear from the evidence of the Defendant, she felt her paramount duty was to tell the truth.

[70] We can understand that the Defendant felt that she had a duty to all parties to tell the truth and that follows from Rule 6.4 which reads:

> *"6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client."*

[71] Insofar as Mr Rea seems to be submitting that it would have been implicit in the Defendant's discussions with Mr O'Brien that she had concerns about his stance in terms of her duty to disclose information to the purchaser so that in effect she discussed that issue with him, we could not draw such an inference. However, we can accept from the evidence that Mr O'Brien did not maintain that the information

must be withheld by the Defendant, but simply told her that she should be happy with a greater share of commission and when she challenged him on that, he simply smiled and said nothing.

Discussion

[72] As we have indicated, it does not seem to have occurred to the Defendant at material times that she would be contravening the Act or any of its Rules and we do not think that she has done that. We find her to be a credible witness and we believe her evidence.

[73] We accept that, at all material times, the defendant thought she was required to disclose the information in question to the purchaser because felt she had a duty of truth to all parties. In context, we agree with Mr Rea that there was nothing wilful or reckless about that, nor anything incompetent or negligent.

[74] We accept that the Defendant is involved in this prosecution before us because she tried to be honest and open and to carry out her duty as she understood it. Also, we find that either there was no explicit instruction from Mr O'Brien to withhold the text messages and the commission statement from the purchaser or that the defendant did not understand what Mr O'Brien was instructing her about.

[75] We also agree with Mr Rea that, insofar as the ambiguity in the agreement for sale and purchase of Lot 522 is concerned, there was no ambiguity in the mind of the Defendant nor, we find, in the mind of Mr O'Brien. On the balance of probability, there can be no doubt from the totality of the evidence that the purchase price for Lot 522 was to be $545,000.

[76] Whether the information disclosed to the purchaser was *"confidential personal information relating to a client"*, in terms of Rule 9.21, is arguable and, probably, there has been a technical breach of Rule 9.21 by the defendant. However, the disclosure was in the context of her thinking that she was required to disclose the truth.

[77] We record that we received quite a series of written submissions subsequent to the hearing from both parties but, as it happens, we were (and remain so) unanimously of a view at the end of the hearing that the Defendant is not guilty of misconduct and should not be regarded as having transgressed in any way; so that we do not find even unsatisfactory conduct on her part.

[78] As we have said in previous cases, we much prefer to focus on the facts of the particular case before us rather than make comparisons with other decisions (unless it is helpful to do so). Accordingly, in terms of the evidence and issues we have covered above, we consider that the Defendant has not committed any offence under the Act or its Rules in the context in which she found herself.

[79] Accordingly, all the above charges are hereby dismissed.

[80] 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

_____
Mr G Denley
Member

_____
Ms N Dangen
Member