

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 51

READT 062/14

IN THE MATTER OF

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

BETWEEN

**COMPLAINTS ASSESSMENT
COMMITTEE (per CAC 306)**

Prosecutor

AND

ZHUO ZHOU

First defendant

AND

SHAOWEI SHE

Second defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson

Ms N Dangen - Member

Ms C Sandelin - Member

HEARD at AUCKLAND on 10 and 11 March 2015 with a subsequent series of typed submissions

DATE OF THIS DECISION 10 July 2015

APPEARANCES

Mr R M A McCoubrey, counsel for the prosecution

Mr H Laubscher, counsel for Mr Zhou

Mr S She on his own behalf

Mr A Deng assisted as interpreter of Mandarin

DECISION OF THE TRIBUNAL

[1] This is a prosecution against two licensees, Messrs Z Zhou and S She, in which particulars for each charge (set out below) not only cover the detailed allegations against each defendant but also the factual structure to quite some extent. At material times Mr She worked as a salesperson at the Glenfield branch of Barfoot & Thompson Ltd and Mr Zhou also worked at that branch as a sales associate to Mr She.

[2] Mr Zhou has pleaded guilty to the first three charges. There are six charges reading as follows (being an amended set of charges issued on 19 December 2014):

“Following a complaint by Barfoot & Thompson, Complaints Assessment Committee 306 (Committee) charges Zhou (Vincent) Zhou and Shaowei (Victor) She (defendants), as follows:

Charge 1 – Disgraceful conduct of Zhou Zhou

The Committee charges Zhou Zhou 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.

- i. In the period September 2013 to December 2013 Mr Zhou created 10 rental appraisal letters for 10 properties knowing that they were false. These properties were:

 - a. 87 Salamanca Road, Sunnynook, Auckland*
 - b. 134 East Coast Road, Milford, Auckland;*
 - c. 3 Julia Place, Totara Vale, Auckland;*
 - d. 2 Springsdale Place, New Lynn, Auckland;*
 - e. 3 Valley View Road, Glenfield, Auckland;*
 - f. 92 Eskdale Road; Birkdale, Auckland;*
 - g. 5 Eagleson Street, Torbay, Auckland;*
 - h. 34 Diana Drive, Glenfield, Auckland;*
 - i. 36 Diana Drive, Glenfield, Auckland; and*
 - j. 3 Edwards Avenue, Henderson, Auckland.**
- ii. Mr Zhou used the 10 rental appraisal letters, knowing they were false, by presenting them to the Bank of New Zealand.*

Charge 2 – Disgraceful conduct of Mr Zhou

The Committee further charges Mr Zhou with misconduct under s.73(a) of the Act, in that his conduct relating to the purchase of 34 Diana Drive, Glenfield, Auckland (34 Diana Drive) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Mr Zhou knowingly assisted with the use of a forged signature on a sale and purchase agreement for 34 Diana Drive.

Charge 3 – Wilful or reckless breach of the Act by Mr Zhou

The Committee charges Mr Zhou with misconduct under s.73(c)(i) in relation to his purchase of 34 Diana Drive:

- i. On 4 July 2013, Mr Zhou’s wife (Woori Jang) was the named purchaser on the sale and purchase agreement for 34 Diana Drive. Her Signature was forged by the wife of Mr She (Qizhe Wei), with Mr Zhou’s knowledge.*

- ii. Mr Zhou received a share of the commission paid by the vendor to Mr She for introducing the buyer (Woori Jang).
- iii. Mr Zhou became the registered owner of 34 Diana Drive.
- iv. Despite acting in the transaction and receiving a share of the commission paid by the vendors, Mr Zhou did not disclose to the vendors that his wife was purchasing 34 Diana Drive or that he was to be the registered owner, accordingly he was in breach of sections 134-137 of the Act.

Charge 4 – Disgraceful conduct of Mr She

The Committee charges Mr She with misconduct under s.73(a) of the Act, in that his conduct relating to the purchase of 34 Diana Drive would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful:

- i. Mr She introduced a buyer (Qizhe Wei, posing as Woori Jang) for 34 Diana Drive.
- ii. On 4 July 2013, Woori Jang was the named purchaser in the sale and purchase agreement for 34 Diana Drive.
- iii. Woori Jang was the wife of Mr She's associate Mr Zhou.
- iv. The signature of Woori Jang on the sale and purchase agreement was forged by the wife of Mr She (Qizhe Wei).
- v. Mr She knowingly assisted with the use of the forged signature on the sale and purchase agreement.
- vi. Mr She also received a share of the commission payable by the vendors, by way of a referral fee for introducing the buyer, when he knew that the buyer was the wife of his associate Mr Zhou, and that Mr Zhou was to be the registered owner of 34 Diana Drive and he did not disclose that fact to the vendors or the listing agents.
- vii. Mr She took no steps to ensure that the disclosure required by Mr Zhou under ss 134-137 of the Act was made."

Charge 5 – Disgraceful conduct of Mr She

The Committee charges Mr She with misconduct under s 73(a) of the Act, in that his conduct relating to the purchase of 27 Arran Road, Browns Bay, Auckland (**27 Arran Road**) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful:

- i. On 21 July 2013, Mr She attended the auction of 27 Arran Road with Zhaoing Dong, who was his tenant at the time.
- ii. Mr She intended to purchase 27 Arran Road as an investment property.

- iii. *In order to obtain a commission, Mr She had Mr Dong buy 27 Arran Road at auction and sign the sale and purchase agreement.*
- iv. *Mr She later paid half the purchase price and had his wife's name placed on the certificate of title (Qizhe Wei).*
- v. *Mr She received commission from the listing agents (Harcourts) for introducing Mr Dong.*
- vi. *Mr She did not disclose to the vendors or the listing agents that his wife was the ultimate purchaser and owner of 27 Arran Road, thus breaching ss 134-137 of the Act.*

Charge 6 – Wilful or reckless breach of the Act by Mr She (alternative to charge 5)

In the alternative, the Committee charges Mr She with misconduct under s 73(c)(i), (ii) and (iii) in relation to his wife's purchase of 27 Arran Road and relies on the particulars described above in charge 5."

Factual Background

[3] The following facts are not in dispute.

Purchase of 34 Diana Drive, Glenfield, Auckland

[4] Mr Zhou intended to purchase 34 Diana Drive for himself.

[5] On 12 July 2013, Mr She attended an open home for 34 Diana Drive, with a woman he represented as an interested buyer. She was in fact his wife, Amanda Wei.

[6] On 14 July 2013, Messrs She, Zhou, and Mr She's wife (Amanda Wei) attended the auction of 34 Diana Drive.

[7] Messrs She and Zhou represented to those at the auction, including the vendor, that Amanda Wei was actually Woori Jang but did not disclose that Woori Jang was Mr Zhou's wife. The real Woori Jang did not attend the auction.

[8] Amanda Wei won the auction and signed the sale and purchase agreement as Woori Jang on 14 July 2013. The price was \$888,500 and settlement was fixed for 31 October 2013 or earlier by mutual agreement.

[9] Messrs She and Zhou subsequently claimed and received a commission from the sale of 34 Diana Drive on the basis that they had introduced the purchaser "Woori Jang".

[10] On 31 October 2013, 34 Diana Drive was transferred from Woori Jang's name into Mr Zhou's name.

Purchase of 27 Arran Road, Brown's Bay, Auckland

[11] On 21 July 2013, Mr She attended the auction of 27 Arran Road with his flat mate and friend, Zhaoqing Dong. Mr Dong was successful in buying the property at that auction for \$1,050,000 and settlement was due on 2 September 2013.

[12] For introducing Mr Dong, Mr She received a commission from the sale of this property; Mr Zhou did not.

[13] Mr Dong has never become the registered owner of 27 Arran Road, rather he nominated Qizhe (Amanda) Wei as purchaser, and her name appeared on the certificate of title on 3 September 2013. Qizhe (Amanda) Wei was then and still is Mr She's wife.

[14] When initially spoken to by the investigator, Mr She explained that Mr Dong was purchasing the property for his parents back in China but, after paying the deposit, they did not have enough money to settle. Mr She has said that he offered to pay half the purchase price (\$525,000), financed by a mortgage through BNZ, if the Dong family paid the monthly mortgage instalments as the Dong family had the remaining \$525,000 available in cash. The parties agreed to this arrangement and so Mr She had the property transferred into his wife's name.

[15] Mr She admitted to the investigator that at no time did he advise the vendor that the title of property would be transferred into his wife's name.

[16] What is in dispute is Mr She's original intention with respect to 27 Arran Road. The Committee produced evidence from Mr Zhou that, contrary to Mr She's explanation, Mr She planned all along to buy the property for himself. Mr Zhou said that, in order to receive commission for introducing a buyer, Mr She arranged for Mr Dong to initially purchase the property at auction, before transferring the property to Mr She's wife. As we cover below, we do not accept that Mr She planned all along to buy that property for himself. We find that Mr and Mrs She intended, and understood, that Mr Dong would buy the property for his parents in China.

General Background

[17] The first defendant Mr Z Zhou has pleaded guilty to charges 1 to 3 so that there needs to be a penalty hearing in that respect in due course.

[18] The second defendant, Mr S She has defended charges 4, 5 and 6 before us. It is understood that, should we find any of the charges against Mr She to be proved, then he will also be heard on penalty at the same time as Mr Zhou is so heard.

[19] There were six witnesses for the prosecution but we do not need to detail such evidence. Mr She, his wife (Ms Wei), and Mr Dong gave evidence for Mr She. To a large extent it elaborated on the particulars contained in the pleadings and there were many conflicts in evidence between witnesses for the prosecution and for the defence. We consider that it is only helpful to refer to certain extracts of the evidence of some witnesses as we cover them below.

[20] The prosecution submits that, based on the evidence, findings of misconduct against Mr She are available to us on charges four and five on the balance of probabilities.

[21] The prosecution case which is supported by the evidence of Mr Zhou and (it puts) is, in any event, the obvious inference from the established facts, is that:

- [a] Messrs Zhou and She were both part of the plan whereby Mr Zhou's wife would acquire 34 Diana Drive and Mr Zhou would end up as its registered owner; and
- [b] Mr She's wife, and not Mr She's flatmate Mr Dong, was from the beginning to be the registered owner of 27 Arran Road as part of a similar scheme. However, we find that Mr Dong was the intended owner at the outset.

[22] The prosecution submits that, in both instances, Mr She's conduct was disgraceful, namely:

- [a] In the case of Diana Drive, by lending his aid to Mr Zhou in furtherance of Mr Zhou's admitted misconduct; and
- [b] In the case of Arran Road, by carrying through the scheme himself with his flatmate's and wife's assistance. It follows from this submission that the prosecution invites us to reject the evidence of Mr She, his wife, and his flatmate.

[23] There is an alternative formulation of misconduct submitted by the prosecution, discussed further below, that even if the evidence called on behalf of Mr She is accurate, he is still in breach of the disclosure provisions in the Act because he did not at any stage inform the vendor that the purchaser was going to be his wife.

Salient Evidence Adduced Before Us

Re 23 Diana Drive

[24] Mr Zhou stated that, in about June 2013, he noticed that 34 Diana Drive was for sale when visiting his parents who lived nearby. He became very interested in purchasing it and told Mr She of his interest. He says that the latter suggested that Mr Zhou buy the property in name of Mr Zhou's wife so that he and Mr She could be credited at Barfoot & Thompson with the sale and some real estate commission could be earned by both of them.

[25] Mr Zhou described his reluctance to accede to that proposed scheme but, because he was a friend of Mr She, it was difficult to refuse that suggestion. He pointed out to Mr She that his wife would not go along with that plan but Mr She simply proposed that his (Mr She's) wife attend the auction and pose as Mr Zhou's wife. That is what happened so that when Mr Zhou successfully bid at the auction, Mr She immediately led his wife into the house, introduced her as the buyer, and she signed the contract in the name of Mr Zhou's wife. Mr She collected a deposit cheque from Mr Zhou which was handed to the Harcourt agent marketing the property. Subsequently, the property was registered into Mr Zhou's name.

[26] Mr She simply puts it that he always believed that the buyer of 34 Diana Drive was a lady who attended and bid at the auction with Mr Zhou, but he subsequently found out that, in fact, Mr Zhou acquired the property. He puts it that he considers that Mr Zhou sought to shift all blame onto him, Mr She, and managed to persuade

Mr She's wife "*behind my back to attend the open home and auction I realise I have been frame up*", as Mr She put it.

[27] Mr Laubscher, as counsel for Mr Zhou, put it to Mr She that he has painted a picture of innocently attending the auction with his wife and noticing that Mr Zhou was very competitive in his bidding. Mr She responded that he was under the impression that Mr Zhou was bidding on behalf of a female client but noticed that when Mr Zhou's bid was successful that perceived client suddenly disappeared. Mr She then says that Mr Zhou came over to him and his wife and suggested that his wife pretend to be the missing client and that was done by them so that Mr She's wife signed the purchase and sale agreement in place of an unknown woman.

[28] Ms Wei (Mr She's wife) testified that she had no advance warning that she was supposed to sign an agreement for sale and purchase should Mr Zhou be successful at the auction of 34 Diana Drive. She said that she had attended the auction to see the outcome as Mr Zhou had expressed a personal interest in the property. At the auction she noted that Mr Zhou was bidding on behalf of another woman and was surprised that Mr Zhou was successful and then observed that the other woman suddenly disappeared. Ms Wei said that the next moment someone led her to the table inside the house, as if she was the purchaser, and she was shocked and thought that she would sign her own name but Mr Zhou gave her a name to write down. She acknowledged that she had made a wrong decision.

Re: 27 Arran Road

[29] With regard to 27 Arran Road, Mr Zhou's evidence is simply that Mr She told him in advance that he, Mr She, was interested in acquiring this property but that he planned to purchase it in the name of Mr Dong. Mr Zhou attended the auction on 21 July 2013 and saw that Mr Dong was successful and then simply left the auction. He said he does not know what has since transpired, and that he has not received any commission from Mr She in respect of that transaction.

[30] Mr She told us that Mr Dong had found this property at 27 Arran Road on the internet and wanted to purchase it. Mr Dong resided as a flatmate with Mr She and his wife. Mr Dong attended the auction and purchased the property. Mr She said that Mr Dong provided finance to pay for the deposit after Mr Dong was the successful bidder at the auction and Mr She paid that deposit from the joint account of him and his wife. Mr She said that Mr Dong was then advised by telephone from his father in China that the family had insufficient funds for Mr Dong to settle that purchase. Because of Mr Dong's young age and residency problems, Mr Dong's parents asked Mr She's wife to apply for a loan in her name; and Mr She testified that he was not involved further. He says that his wife acquired the property but is merely holding it on behalf of Mr Dong.

[31] Mr She's wife (the said Ms Wei) also testified with reference to 27 Arran Road and said that, a few days after the auction, Mr Dong's parents telephoned and told her that they had financial problems and could not settle the purchase. It was decided that Ms Wei borrow the money to complete the transaction. Initially, the property was to be registered in both her and Mr Dong's name but, because she borrowed the money in her name from a bank, she preferred that the property be registered in her name only. She borrowed \$525,000 from a Bank to help Mr Dong and his family to secure the property. She explained to us that she was a very close friend of Mr Dong and his parents and, as she was managing three other rental

properties for the Dong family, she is able to use the rental from those properties to service the mortgage she had arranged in her name over 27 Arran Road.

[32] Mr Dong testified that he had always intended to buy 27 Arran Road in his own name but only discovered a few days before settlement that his parents had become unable to provide the necessary funds from China. There were many conflicts of detail in the course of the evidence, but Mr Dong was adamant to us that he was either buying the property for himself or on behalf of his parents. He insisted that Ms Wei was never intended to be the purchaser, only he himself. He referred to the strong trust between Ms Wei and his parents and himself and asserted that he was to be the purchaser of the property. Even now he regards himself as the owner on the basis that Ms Wei is shown as the registered proprietor of the property but that she holds on trust for him; and the Dong family in China have let the property remain in her name to give her security for the mortgage money she borrowed on their behalf to achieve the settlement of the purchase of 27 Arran Road.

[33] Mr She accepted that, because 27 Arran Road was purchased in terms of title registration by his wife Ms Wei, he was in breach of the Rules but he said he had never intended that to happen and he got no benefit at all from that transaction. He seemed to be saying that he was then a new salesperson and did not understand the effect of ss.134 to 137 of the Act (set out below).

Our Basic Findings of Fact

[34] With regard to 23 Diana Drive, we find that Mr She aided and abetted Mr Zhou in having Ms Wei sign the purchase by auction contract for that property in the name of Ms Jang in order that Mr Zhou acquire it and so that Messrs Zhou and She obtain some real estate commission.

[35] With regard to 27 Arran Road, we find that Mr Dong intended to buy that property either for himself or his parents in China but that, in between his signing the binding contract after the auction and settlement of the purchase, he was left stranded over finance because his parents became unable to remit to him from China the necessary funds. As a very close and trusted friend of Mr Dong's family, Ms Wei resolved that problem by raising a mortgage in her own name. To do that, it was necessary that the title to 23 Diana Drive be in her name and that has happened. We accept that she holds that property on trust for Mr Dong.

Relevant Sections of the Real Estate Agents Act 2008

[36] Section 73 of the Act reads:

“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."*

[37] Sections 134-137 provide:

134 Contracts for acquisition by licensee or related person may be cancelled

- (1) *No licensee may, without the consent of the client for whom he or she carries out real estate agency work in respect of a transaction, directly or indirectly, whether by himself or herself or through any partner, sub-agent, or nominee, acquire the land or business to which the transaction relates or any legal or beneficial interest in that land or business.*
- (2) *No licensee may, without the consent of the client, carry out or continue to carry out any agency work in respect of a transaction if the licensee knows or should know that the transaction will, or is likely to, result in a person related to the licensee acquiring the land or business to which the transaction relates or any legal or beneficial interest in that land or business.*
- (3) *The client's consent is effective only if—*
 - (a) *given in the prescribed form; and*
 - (b) *the client is provided with a valuation in accordance with section 135.*
- (4) *The client may cancel any contract—*
 - (a) *made in contravention of subsection (1); or*
 - (b) *brought about by agency work carried out in contravention of subsection (2).*
- (5) *No commission is payable in respect of any contract of the kind described in subsection (4), regardless of whether the client cancels the contract.*
- (6) *The client may recover any commission paid in respect of any contract of the kind described in subsection (4) as a debt.*
- (7) *For the purposes of this section, a person who is the client of an agent in respect of a transaction is also the client of any branch manager or salesperson whose work enables the agent to carry out real estate agency work for that client.*
- (8) *This section and section 135 have effect despite any provision to the contrary in any agreement.*

135 Client to be provided with valuation

- (1) *For the purposes of section 134(3), the licensee must give the client a valuation made at the licensee's expense.*
- (2) *The valuation must have been made by—*
 - (a) *an independent registered valuer; or*
 - (b) *in the case of a business, by an independent chartered accountant.*
- (3) *The licensee must give the client the valuation either—*
 - (a) *before seeking the consent of the client; or*
 - (b) *with the agreement of the client, within 14 days after obtaining that consent.*
- (4) *Every consent given under section 134 without the valuation being supplied to the client in accordance with subsection (3) is ineffective.*
- (5) *Any contract to which the client is a party and to which the consent relates is voidable at the option of the client if—*
 - (a) *the client gives his or her consent in accordance with subsection (3)(b); and*
 - (b) *the valuation, when supplied, is greater than the valuation specified in the prescribed form of consent as the provisional valuation.*

136 Disclosure of other benefits that licensee stands to gain from transaction

- (1) *A licensee who carries out real estate agency work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee, or any person related to the licensee, may benefit financially from the transaction.*
- (2) *Subsection (1) does not apply to any matter disclosed under section 128 or 134.*
- (3) *The licensee must make the disclosure required by subsection (1) before or at the time that the licensee provides the prospective party with any contractual documents that relate to the transaction.*
- (4) *For the purposes of this section, an agent does not benefit financially from a transaction merely because of any commission payable to the agent under an agency agreement in respect of the transaction.*
- (5) *A contract entered into in contravention of this section may not be cancelled merely because of that contravention.*

137 Meaning of licensee and person related to licensee in sections 134 to 136

- (1) *In sections 134 to 136, licensee includes, in the case of an agent that is a company, every officer and shareholder of the company.*
- (2) *For the purposes of sections 134 to 136, a person is related to a licensee if the person is—*
- (a) a partner of the licensee under a partnership agreement:*
 - (b) an employee of the licensee:*
 - (c) a branch manager or salesperson engaged by the licensee:*
 - (d) the licensee’s spouse or civil union partner:*
 - (e) the licensee’s de facto partner:*
 - (f) a child, grandchild, brother, sister, nephew, or niece of the licensee or of any person referred to in paragraphs (d) or (e):*
 - (g) any other child who is being, or is to be, cared for on a continuous basis by the licensee or any person referred to in paragraph (d) or (e):*
 - (h) a grandparent, parent, uncle, or aunt of the licensee or of any person referred to in paragraph (d) or (e):*
 - (i) an entity that has an interest in the licensee or an entity in which the licensee has an interest (except where either interest is in quoted financial products within the meaning given for those terms in section 6(1) of the Financial Markets Conduct Act 2013).*

Discussion

[38] As Mr McCoubrey submits, pursuant to s.136 of the Act, a licensee may not carry out real estate agency work, or continue to carry out real estate agency work, without obtaining the client’s consent if the licensee knows, or should know, that the transaction may result in a person related to the licensee acquiring the land or business or an interest in it. A client’s consent is only valid if it is given in the prescribed form and the client has been provided with a valuation under s.135 of the Act. Mr Zhou has admitted he breached these sections and admitted the charge of disgraceful conduct in relation to 34 Diana Drive.

Charge Four: Disgraceful conduct under s.73(a) of the Act, in relation to 34 Diana Drive

[39] Charge four alleges that Mr She knew Mr Zhou was the intended ultimate purchaser of 34 Diana Drive and, as such, he knew Mr Zhou had a duty in accordance with ss.134-137 of the Act to disclose his interest and seek consent from the vendors. It is submitted for the prosecution that Mr She not only took no steps to ensure Mr Zhou made this disclosure, but he actively participated in Mr Zhou’s dishonest conduct in helping to conceal that he was the ultimate intended purchaser. We agree. We find that Mr She acted in a way that would be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

Charge Five: Disgraceful conduct under s.73(a) of the Act, in relation to 27 Arran Road

[40] Charge five alleges that prior to the auction Mr She intended to buy 27 Arran Road, but in order to obtain a full buyer's commission and to boost his sales figures he planned for his tenant Zhaozing Dong to "buy" the property. It is put that Mr She planned to then have Mr Dong nominate his (Mr She's) wife, Amanda Wei, as the purchaser. As is clear from our above findings of fact, we do not accept those allegations.

[41] The prosecution asserts that as Mr She intended his wife to ultimately own the property, he had obligations under ss.134-137 of the Act to disclose his interest to the vendors and seek their consent. However we find that it was always intended that Mr Dong acquire that property.

[42] The prosecution also submitted that by not disclosing his interest, and actively concealing his plans for his wife to become the ultimate purchaser in order to receive a commission, Mr She's conduct would be regarded by agents of good standing, or reasonable members of the public as disgraceful. As already indicated, we do not accept that situation but, in terms of Land Transfer law, Mr She's wife has acquired title to 27 Arran Road so that (rather technically) he is in breach of ss.134-137 of the Act and is in breach of s.73(c) of the Act rather than s.73(a). Accordingly, we dismiss charge 5 on the basis we cover below under our heading of "Outcome".

Charge Six: Wilful or reckless breach of the Act under s.73(c)(i), (ii) and (iii) of the Act (An alternative Charge to Charge 5).

[43] Mr She's evidence is that, contrary to Mr Zhou's evidence, he did not initially intend to have 27 Arran Road bought in his wife's name. Rather, according to Mr She, the original intention was for Mr Dong, his flatmate, to buy the property on behalf of Mr Dong's parents. Mr She stated that the only reason why Mr Dong was not the ultimate purchaser was because his (Mr Dong's) parents could not obtain finance. Therefore, Mr She's wife stepped in and arranged a bank loan to her, and in order to secure her interests became the registered proprietor of the property. We have already accepted that version of events.

[44] The prosecution submits that even if we accept Mr She's evidence, he still breached ss.134-137, either wilfully or recklessly. It is put that, at the point that Mr She became aware that his wife was going to gain an interest in the property, Mr She was under an obligation to inform the vendors of this. On Mr She's evidence, he became aware of this new development some days before the purchase was to be settled. Therefore, (it is submitted for the prosecution) he had at least a few days to make this disclosure. We agree.

[45] Counsel for the prosecution observes that as the sale and purchase agreement had already been signed and a price agreed, it might be argued that the harm ss.134-137 of the Act are directed at was avoided. However, the prosecution submits that, as consumers, the vendors still had an interest in knowing who was going to be the ultimate purchaser of their property, especially if that person was a family member of the introducing agent. Considering the ultimate purchaser was Mr She's wife, the prosecution submits that the vendors should have been afforded the chance to cancel or investigate the situation further; but they were not given such a chance; and at no stage did Mr She disclose the change in circumstances to either

the vendors or their salespersons. It is submitted that Mr She, therefore, wilfully or recklessly breached ss.134-137 of the Act. We find that there was a negligent breach of those sections by him. It seems that it became necessary for Ms Wei to acquire the property well before settlement but, in many ways, that offending can be regarded as rather technical.

[46] The prosecution also notes the case of *CAC v Adams* [2012] NZREADT 5 where the licensee pleaded guilty to a wilful or reckless breach of the Act for not disclosing to her vendor client that she had provided funds to the purchaser to assist him to complete the purchase. We considered that while neither the purchaser nor vendor were caused any harm, the charge was made out and we stated:

“... the heart of the matter is the appearance to the objective observer of what has occurred and, objectively, the transactions appear suspicious in terms of integrity.”

[47] We set out the following extract from the submissions for the prosecution and record we have taken its content into account:

“4.1 Mr She gave and called evidence (from his wife and from his flatmate). The Committee’s position is that this evidence should be rejected. In particular, the Committee points to the following factors:

- (a) Mr She gained commission from both transactions. That points to his having an interest to act as the Committee alleges.*
- (b) In general terms, Mr She’s evidence is inconsistent with that of Mr Zhou.*
- (c) Mr She’s close involvement in the dealings with the sale and purchase of 34 Diana Drive is confirmed by the following documentary evidence, and the inferences that flow from that evidence:*
 - (i) His cell phone number is on the sale and purchase agreement and transaction report.*
 - (ii) He attended the open home the day before the auction.*
 - (iii) He must, the Committee submits, have been aware who Mr Zhou’s wife was.*
- (d) Mr She’s involvement in 27 Arran Road is not in dispute, but the following evidence points to the Committee’s theory of the case, that Mr Dong was a “dummy purchaser”:*
 - (i) Mr Dong did not use his own address on documents relating to the purchase of 27 Arran Road, but rather Mr She’s parents-in-law’s address.*
 - (ii) There was a conflict of evidence within the evidence called on behalf of Mr She in relation to the financial arrangements said to be made to “assist” Mr Dong’s parents.*

- (iii) *Beyond the fact that it is inherently unlikely that Mr She's wife would simply step in and advance the Dong family \$500,000, there is either an absence or a conflict of evidence as to what arrangements were made financially and legally for that assistance.*

4.2 *In short, the Committee submits that Mr She's evidence should be rejected ...*

Outcome

[48] We detected quite some hostility between Messrs Zhou and She at this stage. It is difficult to know whom to believe although we consider that Ms Wei and Mr Dong in particular and, probably, Ms Jang are credible witnesses. We do not accept the theory that Mr Dong was a dummy buyer of 27 Arran Road for Ms Wei from the outset.

[49] As we have covered above, Mr Zhou admits charges 1 to 3 above inclusive. We find charge 4 proved against Mr She on the balance of probability but accept he was pressured into that offending by Mr Zhou in relation to 34 Diana Drive. We dismiss charge 5 and its alternative charge 6 but with regard to the particulars of those charges we find Mr She guilty of unsatisfactory conduct in that his wife is the registered purchaser of 27 Arran Road and ss.134-137 have not been complied with.

[50] We appreciate that there are mitigating and aggravating factors to be covered in dealing with penalty. We direct the Registrar to arrange a Directions Hearing between our Chairperson and the parties to timetable dealing with penalty in the usual way.

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

Judge P F Barber
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member