

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2015] NZREADT 63

READT 078/14

**IN THE MATTER OF**

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

**BETWEEN**

**COMPLAINTS ASSESSMENT  
COMMITTEE (CAC 301)**

Prosecution

**AND**

**JAMES DAVID MAIRS**

Defendant

**MEMBERS OF TRIBUNAL**

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

**HEARD** at AUCKLAND on 30 July 2015

**DATE OF THIS DECISION** 4 September 2015

**COUNSEL**

Mr M J Hodge for the prosecution  
Mr T D Rea for the defendant

**DECISION OF THE TRIBUNAL**

***Introduction***

[1] A real estate salesperson effected the sale of an Auckland apartment by auction for a forestry truck-driver owner living in Tokoroa (as proprietor of his vendor company) on the instructions of that owner's Hamilton accountant and with the involvement of that owner's Putaruru solicitor, but without a written authority from the owner.

[2] Accordingly, that defendant salesperson is charged with misconduct by Complaints Assessment Committee 301 pursuant to s 73(b) of the Real Estate Agents Act 2008, and with a charge of unsatisfactory conduct in the alternative. Charge 1 alleges that the defendant's conduct constituted seriously incompetent or seriously negligent real estate agency work and, in the alternative, (Charge 2) the Committee alleges that the defendant's actions amount to unsatisfactory conduct.

[3] The broad issue is whether, in the circumstances, the conduct of the defendant in marketing the apartment for the owner without that owner's written agreement was serious negligence or, merely, negligence.

## **The Charge**

[4] The detailed charges against the defendant read as follows:

*“Following a complaint by LongLong Tian (complainant), Complaints Assessment Committee 301 (CAC 301) charges the defendant as follows:*

### **Charge 1**

*CAC 301 charges the defendant with misconduct under s 73(b) of the Real Estate Agents Act 2008 (Act), in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.*

#### Particulars:

- i. The defendant marketed the property at 110/85 Wakefield Street, Auckland (property) on the authority of a listing agreement that had not been signed by or on behalf of the registered proprietor. It had been signed by the registered proprietor’s accountant, David Waine, who did not have authority to do so. The defendant failed to make any attempt to ascertain whether the listing agreement had been signed by the registered proprietor, and if not, whether the person signing it had lawful authority to sign it on the registered proprietor’s behalf; and/or*
- ii. The defendant arranged for the sale of the property by auction without having authority from the registered proprietor or from a person lawfully authorised by the registered proprietor to sell the property by auction. The defendant failed to obtain such authority from the registered proprietor or from a person who was able to demonstrate lawful authority to sell the property by auction on the registered proprietor’s behalf.*
- iii. A consequence of the defendant’s serious incompetence or negligence as set out above was that the complainant reasonably understood he had purchased the property at auction, having won the auction with the reserve price having been met, and having signed an agreement to purchase the property which was signed by the auctioneer on behalf of the registered proprietor, when in fact the defendant had not obtained the registered proprietor’s authority to sell the property by auction, or otherwise, and the sale did not proceed.*

### **Charge 2 (alternative to Charge 1)**

*Unsatisfactory conduct under s 72 of the Act, repeating particulars (i)-(iii) set out in charge 1 above.”*

## **Factual Background**

[5] At all relevant times the defendant was employed by City Realty Limited, trading as Ray White in Auckland CBD, as a licensed salesperson.

[6] The property in question is apartment 110/85 Wakefield Street, Auckland. At the relevant time the owner of the apartment was T Rees Ltd. The sole director and shareholder of T Rees Ltd was Trevor Rees of Tokoroa, truck driver. Mr Rees’ solicitor was Kevin Hooks of Putaruru and his accountant was David Waine of Hamilton.

[7] Shortly before February 2013, Mr Rees contacted Mr Waine and left a voice message asking him to find out what the apartment was worth. Mr Rees did not then ask Mr Waine to sell the apartment and at no time gave Mr Waine any written authority to do so on his behalf.

[8] In early March 2013, Mr Waine contacted the defendant, who had previous knowledge of the apartment and Mr Rees, having been the listing agent when the property was unsuccessfully listed for sale in 2010. Mr Waine instructed the defendant to sell the property.

[9] On 28 February 2013, the defendant emailed Mr Waine to advise that he would be *"happy to assist"*. He asked: *"can I send the paperwork through to you? Would he like auction or asking price?"* Mr Waine responded on 4 March 2013, stating: *"Tony would like to get the best price, so an auction with a reserve works"*.

[10] The defendant sent a listing agreement to Mr Waine, who signed it on 6 March 2013 and returned it by email to the defendant. Mr Waine signed the sole agency agreement, the schedule relating to rebates, discounts and commissions, and the Code of Conduct for the sale of real estate by auction. The same day, Mr Waine sent the defendant an email which said: *"Signed T Rees"* including an attachment which Mr Waine believes were the documents that he had purported to sign on behalf of T Rees Ltd.

[11] Thereafter the defendant listed and marketed the apartment. An auction was scheduled for 28 March 2013.

[12] Before the auction, the defendant contacted Mr Waine to establish what the reserve price should be. He forwarded the pre-auction notices to Mr Hooks (the vendor's solicitor), and endeavoured to contact Mr Rees to find out what the auction reserve should be set at. Mr Waine was unable contact Mr Rees, so set the reserve himself. Mr Waine did not realise that Mr Rees was not receiving his messages.

[13] On receiving the auction documents from Mr Waine, Mr Hooks attempted to contact Mr Rees as well, but he too was unsuccessful. Accordingly, he took no action with the auction documents and did not respond to Mr Waine.

[14] On 27 March 2013, LongLong Tian viewed the apartment. The next day he attended the auction and successfully bid \$195,000 for it. Under the consequent sale and purchase agreement, the settlement date was to be 19 April 2013.

[15] On 28 March 2013, Mr Rees left a voice message for Mr Waine following up to find out whether Mr Waine had found out what the apartment was worth. Mr Waine left a response voice message on Mr Rees' telephone advising that the apartment had been sold. This was the first that Mr Rees knew about the sale of the apartment. It was also the first time that Mr Waine appreciated that he did not have authority to sell the apartment, only authority to investigate a prospective sale.

[16] Having received that voice message from Mr Waine that the apartment had been sold by auction, Mr Rees telephoned Mr Hooks and asked him to sort it out because he did not want to sell the apartment.

[17] On 11 April 2013, Mr Hooks wrote to Mr Ben Liu, solicitor for Mr Tian, advising him the property was not for sale and that Mr Tian would need to look to Mr Waine

for any claim he may wish to pursue. Mr Tian's solicitors received the letter and advised him the same day.

[18] On 29 April 2013, Mr Hooks received a settlement notice from Mr Tian's solicitor demanding settlement of the agreement. Settlement did not occur. On 15 May 2013, Mr Tian's solicitors cancelled the agreement for sale and purchase of the apartment.

[19] Subsequently Mr Tian made a complaint to the Real Estate Agents Authority about the defendant's conduct in listing and selling the apartment without the owner's authority.

### ***Evidence Adduced to Us***

[20] We had the benefit of detailed evidence from the said chartered accountant for the owner who is Mr David Waine, an experienced accountant from Hamilton. Similarly, we heard in detail from Mr K J Hooks, solicitor, Putaruru, who is the said solicitor for the owner. They each provided briefs, detailed further evidence, and were carefully cross-examined.

[21] However, the owner of the vendor company, Mr T W Rees, did not attend the hearing before us despite having been subpoenaed as a witness for the prosecution.

[22] By consent we also received helpful background briefs from the complainant Mr L Tian, who had been the successful bidder at auction for the apartment. We also received a brief from Mr A T Eales as a senior investigator for the prosecuting Authority. A brief was filed as from the said Mr T W Rees who (as mentioned above) did not appear at the hearing and did not co-operate with the prosecution.

[23] Despite the thoroughness of the evidence we received, in particular from the said Messrs Waine and Hooks, and the very detailed evidence and cross-examination of them and of Mr J D Mairs, the defendant, we need go no further than the factual background put to us by counsel set out above as there is no real issue of fact. However we set out some salient evidence from both Mr D Waine, the accountant, and from the defendant himself.

### ***Evidence from Mr Waine***

[24] Having referred to the efforts to sell the apartment in early 2010, Mr Waine said that in early March 2013 he received verbal instructions from Mr Rees who told him he was looking to get rid of the apartment. Mr Waine took this to mean that Mr Rees wanted it sold so he contacted the defendant and instructed him to sell the property. He said "*I did not receive a written instruction from Mr Rees and I acted on his verbal instruction only*".

[25] Inter alia, Mr Waine referred to receiving the listing agreement by mail from the defendant and on 6 March 2013 signing it and related papers and returning them to the defendant by email. Mr Waine said that most of his communications with the defendant were by email or telephone. He said that on 6 March 2013 he sent an email to the defendant which stated: "*signed T Rees*", in the context of indicating to the defendant that he had signed the agency agreement documents on Mr Rees' behalf. It seems that although the listing agreement was not signed by Mr Rees but signed by Mr Waine on his behalf, in the covering email the listing agreement was marked "*signed T Rees*" in the body of the email. Certainly, the agency agreement

exhibited to us is dated 4 March 2013, the owner's name is put as "*T Rees Investment Ltd*" and the owner's signature is that of Mr Waine.

[26] Mr Waine said that, prior to the auction of 28 March 2013, he received pre-auction notices from the defendant which he forwarded to Mr Hooks and he also rang Mr Rees to ask him what the reserve would be and left a message saying he needed to know by 5.00 pm that day. He knew that Mr Hooks was also trying to contact Mr Rees. Because the latter could not be contacted Mr Waine set the reserve. It did not occur to him that Mr Rees was not receiving his telephone messages.

[27] When he advised Mr Rees on 28 March 2013 that the marketing had been successful, Mr Rees responded that he had only asked Mr Waine to investigate the sale of the apartment and not to sell it. However, Mr Waine asserted to us that, at all stages, he believed he was acting under authority from Mr Rees. Mr Waine observed that he felt Mr Rees had become greedy after the sale and thought he could get more money from auctioning the property again so that he took the point that he had given no written authority to sell it. In hindsight, Mr Waine blames himself that he took the statement of Mr Rees to him made in late 2012 "*just get rid of it, I just want it gone*" as an instruction to organise the sale of the apartment.

[28] Mr Waine was carefully and thoroughly cross examined by Mr Rea. Inter alia, he stated that as at 6 March 2013 he was trying to resolve Mr Rees' predicament that the latter was under pressure from the body corporate of the property to pay his outstanding levies.

[29] It seems that over 2012 and early 2013 there was quite frequent contact between Messrs Rees, Waine, Hook, and the defendant as to what was the value of the apartment and when would be a good time to sell it, and the defendant was anxious to be instructed to proceed should Mr Rees wish to sell. Most of those communications were by telephone and email but Mr Waine had several face to face meetings with Mr Rees who made it very clear to him on 6 March 2013 that Mr Rees wanted Mr Waine to organise the sale of the property by auction forthwith. Mr Waine is convinced that, at all material times, Mr Rees intended that Mr Waine proceed to do that and otherwise he would certainly not have done so.

### ***Evidence from the Defendant***

[30] The defendant made it clear that in 2010 he had been working with City Sales Ltd in Auckland when he first had dealings with Mr Rees of Tokoroa. Currently he works for City Realty Ltd, trading as Ray White, as he was at material times to this prosecution. He said that early in their communications Mr Rees explained to him that, as a truck-driver, he was often on the road and difficult to contact. The defendant said that virtually all of his instructions regarding the first auction in 2010, when Mr Rees had signed an agency authority, came from Mr Rees' solicitor Mr Hooks. At that time the highest bid for the property was about \$130,000 so that it was passed in. The auction sale in issue as at 28 March 2013 achieved a price of \$195,000 when Mr Waine had fixed the reserve at \$180,000.

[31] Over 2012, if not earlier, the defendant had telephoned Mr Rees about every six weeks for a routine follow up on his wishes for the apartment but often the defendant would not be successful in reaching him and Mr Rees did not usually return messages. Mr Waine had not been involved with the first auction but, some months after that, Mr Rees gave the defendant Mr Waine's telephone number and told the

defendant to deal with Mr Waine, but to continue dealing with Mr Hooks, and that Mr Waine as the main point of contact. That is what happened.

[32] Inter alia the defendant said that, in early March 2013, Mr Waine told him that he was authorised to sign the listing agreement for the impending auction on 28 March 2013 but that he, Mr Waine, would go and visit Mr Rees and discuss that with him. On 6 March 2013 Mr Waine returned the agency agreement which included the words "*signed T Rees*" so that the defendant assessed that as meaning that Mr Rees had approved the signing of the listing agreement by Mr Waine on behalf of Mr Rees. Nevertheless, the defendant continued endeavouring to contact Mr Rees directly in order to give him updates on marketing process and left a number of telephone messages for him but without response.

[33] The defendant noted that the apartment was subsequently sold in February 2014 for \$190,500 which is \$4,500 less than the complainant bid for it.

[34] Inter alia, the defendant said that he was in regular communication with Mr Hooks who knew the property was being marketed for sale in 2013.

[35] Of course the defendant was carefully cross-examined by Mr Hodge. The defendant emphasised that, over 2012 into 2013, he spoke to Messrs Rees, Waine and Hooks frequently as to the state of the market for selling the apartment and its likely value. He made it clear that he sought instructions to sell it should Mr Rees wish that to be done. Apparently, Mr Waine seemed to become the main spokesman for Mr Rees on the matter at about mid 2012. In particular, the defendant kept them advised on sales of similar apartments in the relevant block.

[36] The defendant emphasised that he knew that Mr Waine had spoken with Mr Rees on 6 March 2013 and understood that Mr Rees wanted the apartment sold forthwith by auction and that was why Mr Waine gave firm instructions to the defendant to progress that. In fact, the defendant had been told earlier than that by Mr Waine to endeavour to sell the apartment.

[37] The defendant emphasised that, particularly over the second part of 2012 and early 2013, he was "*awaiting the green light to sell the apartment for Mr Rees' company*" and he was accordingly in touch reasonably frequently with Messrs Rees, Waine and Hooks about that as they made it clear for many months that they would want the defendant to sell off the apartment "*soon*". He did not send out a listing agreement until about 6 March 2013 because he had not received absolutely firm instructions until then, when they came from Mr Waine.

[38] In answer to one of the many pressing questions from Mr Hodge, the defendant said he did not deal with Mr Rees at material times because Mr Rees had told him to deal with Mr Waine and he knew that Mr Rees was a forestry truck driver in the Tokoroa area who relied on Messrs Waine and Hooks for business matters and, particularly, over when to sell the apartment. Also, Mr Rees had made it clear to the defendant that he was to deal with Messrs Waine and Hooks over that matter. The defendant said that no alarm bells rang with him from Mr Rees not replying to his (the defendant's) telephone calls, because it had not been Mr Rees practice to respond to telephone messages.

[39] The defendant said that when Mr Rees declined to proceed with the sale to the complainant, he, the defendant, was baffled as he had been in constant touch with Mr Rees for well over a year and knew he wanted the apartment sold and that had

been constantly confirmed by Mr Waine and Mr Hooks. He said that Mr Rees had told him “*multiple times*” he just wanted the apartment sold.

[40] The defendant remarked that, with hindsight, should a similar occasion arise he would drive to the vendor and have the vendor sign a listing agreement “*no matter what*”.

### **Misconduct – Principles**

#### *Charge 1: Serious negligence/incompetence*

[41] Charge 1 is a charge of seriously negligent or seriously incompetent real estate agency work, which allegedly amounts to misconduct under s 73(b) of the Act. Merely negligent or incompetent real estate agency work is unsatisfactory conduct under s 72(c) (charge 2).

[42] The High Court has addressed the test for serious negligence in *CAC v Jhagroo* [2014] NZHC 2077 as follows:

*“[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.”*

[43] In reaching that conclusion, the Judge (Thomas J) agreed with the approach of Woodhouse J in *Wyatt v REAA* [2012] NZHC 2550 at [49] where he commented as follows on the correct interpretation of s 72 (dealing with unsatisfactory conduct):

*“... the words in s 72 should not, in my judgement, be over-refined by treating the words in s 72 on the basis that they have some technical meaning or by seeking synonyms for words which have natural meanings.”*

[44] Thomas J also referred to comments of the High Court in *Brown v REAA* [2013] NZHC 3309, at [21] where the Court 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.”*

[45] It is put that we, as a specialist body with expertise in real estate matters, are well placed to draw the line between negligence/incompetence and serious negligence/incompetence in all the circumstances of the particular case.

[46] Under the Act, an error of judgment or carelessness breaching acceptable standards will generally be unsatisfactory conduct under s 72(c). Serious negligence or incompetence, amounting to a serious departure from acceptable standards, is misconduct under s 73(b).

*Authority to List and Market a Property for Sale*

[47] In *Robinson v REAA* [2014] NZHC 2613, Lang J observed:

*“[20] There is no express requirement in either the Act or the Rules that an agent must obtain either the express authority or signatures of all the owners of a property when it is listed for sale. There is, however, a requirement under Rule 5.1 that an agent must act with “skill, care, competence and diligence” at all times when carrying out his or her duties ...”*

[48] In *Robinson* the licensee had entered into a listing agreement with one of the two registered owners of the property. The registered owners owned the property as trustees of a family trust and were in the midst of an acrimonious divorce. In the context of attempting to resolve their relationship property dispute, the owners had entered into a heads of agreement in relation to the sale of the property, pursuant to which each party undertook to appoint a real estate agent; the two agents were to have a joint sole agency in respect of the property; and the two agents were, together, to market and sell the property at auction.

[49] One of the owners engaged Barfoot & Thompson Pukekohe and executed a listing agreement in relation to the sale of the property. That listing agreement was not signed by the other owner. The issue on appeal was whether the licensee’s failure to obtain the signature of the other owner constituted unsatisfactory conduct for the purposes of the Act.

[50] At [22], Lang J accepted that *“an agent would ordinarily be wholly remiss if he or she did not obtain the express authority of all the owners of a property when it is listed for sale”*. However, His Honour noted that was not an ordinary case and found that the heads of agreement should be interpreted as not to require the signature of both owners on any listing agreement; and, rather, the heads of agreement contemplated each party engaging their own real estate agent, who would then work together to market the property for sale under a joint sole agency. On that basis the appeal was allowed and the finding of unsatisfactory conduct by the licensee was overturned.

***The Defendant’s Basic Explanation***

*The Issue*

[51] By accepting Mr Waine’s representations that he had authority to sell the apartment on behalf of Mr Rees, did the defendant’s conduct amount to misconduct for the purposes of the Act?

[52] The facts as set out above are not in dispute. The defendant accepts that he acted upon the instructions of Mr Waine in listing the apartment and selling it at auction; and that Mr Waine did not have authority to sell the apartment. The defendant accepts that he never communicated with Mr Rees directly to obtain confirmation of Mr Waine’s authority to sell the apartment.

[53] The defendant bases his response to the charge upon the following background matters:



- [a] In 2010, Mr Rees listed the apartment for sale with the defendant, who was then employed by City Sales. The apartment was passed in at auction.
- [b] In 2010, the defendant dealt with Mr Rees personally. He met Mr Rees in Putaruru to sign the listing authority and Mr Rees then asked the defendant to deal with his solicitor Mr Hooks.
- [c] After the apartment was passed in at auction, the defendant understood that Mr Rees continued to want to sell the apartment. The defendant thinks that agency agreement was never withdrawn from City Sales. The defendant continued to contact Mr Rees but was often unable to.
- [d] Some time later, Mr Rees put the defendant in touch with his accountant, Mr Waine, and asked the defendant to deal with Mr Waine and to continue to deal with Mr Hooks.
- [e] In late 2012 serious discussions recommenced about a formal marketing plan to sell the property. Mr Waine represented to the defendant that he had authority to sell the property and directed him to sell it on behalf of Mr Rees.
- [f] On the basis of his prior dealings with Mr Rees and Mr Waine, the defendant accepted Mr Waine's representations at face value and listed and sold the apartment. Throughout the process he tried unsuccessfully to contact Mr Rees, but did not think anything of this because Mr Rees had always been difficult to contact.

[54] The defendant's response to the charge is that his conduct was not seriously negligent or seriously incompetent because he took all reasonable steps to ensure that the sale process was authorised by the owner.

### ***The Submissions for the Prosecution***

[55] Mr Hodge puts it that the starting point in this case must be the fundamental principle that an agent should obtain the express authority of the owner (indeed, all the owners) of a property when it is listed for sale; and the rationale for that requirement is that licensees act with skill, care, competence, and diligence.

[56] The prosecution accepts that the defendant was not acting in bad faith in accepting Mr Waine's representations that he had authority to deal with the defendant regarding the listing and sale of the property. However, it is put that Mr Waine possessed no written authority from Mr Rees confirming his authority to sell the property on Mr Rees' behalf; and that the defendant never requested Mr Waine to confirm that he was acting on Mr Rees' instructions. Mr Hodge submits that the defendant's acceptance of Mr Waine's purported authority to act on Mr Rees' behalf, without ever directly communicating with Mr Rees to confirm that authority, was seriously negligent and/or seriously incompetent.

[57] It is also submitted for the prosecution that there was nothing about the circumstances of this case to exempt the defendant from obtaining express authority of the owner to list and sell the property. It is put that a licensee exercising due skill, care, competence and diligence would have been alerted by the circumstances of the

case to the particular need in this case to obtain the express authority of the owner of the property before listing it for sale. Mr Hodge emphasised that:

- [a] Mr Waine had nothing in writing from Mr Rees to clarify his authority to act on behalf of Mr Rees.
- [b] When the property was originally listed for sale in 2010, the defendant dealt with Mr Rees in person and obtained his signature on the listing authority. There was therefore no precedent for the defendant dealing with anyone other than the owner in terms of listing authority.
- [c] The defendant had not previously dealt with Mr Waine in respect of the property, rather, in the past the defendant had been told to contact Mr Hooks, the owner's solicitor.
- [d] At the time Mr Waine approached the defendant about listing the property, the original listing authority was over two years old and related to a different real estate firm. In the intervening time, the property had not been actively marketed for sale.
- [e] The defendant knew the listing agreement had been signed by Mr Waine on the owner's behalf.
- [f] During February and March 2013, the defendant was unable to contact the owner directly. Calls went unreturned. Although this may not have been unusual for Mr Rees, it ought to have been a signal to the defendant that it was possible that the defendant was not receiving his messages or, at least, that he should insist on speaking to Mr Rees before moving ahead to market and sell the property
- [g] The defendant forwarded Mr Hooks (the solicitor) documentation which was not responded to. That should have further alerted the defendant to the possibility that the owner had not authorised the sale and that the process should stop.

[58] Mr Hodge submits that the defendant's conduct in listing and selling the property without communicating directly with the owner either regarding his authority to sell the property, or about Mr Waine's authority to act on Mr Rees' behalf, fell well short of the degree of skill, competence, and diligence that would be expected of a licensee in compliance with professional obligations and it was seriously negligent and/or seriously incompetent conduct for the purposes of the Act.

[59] Mr Hodge noted that the defendant's conduct has not only affected the owner of the property but it also affected Mr Tian, who entered into an agreement to purchase the property only to find that it had to be cancelled because the vendor did not want to sell it. Mr Tian suffered financial loss as a consequence of not being able to purchase the property.

[60] The prosecution case is that the defendant's conduct in this case fell well short of the standard required of a competent real estate agent; and not only did the defendant fail to obtain proper listing authority at the commencement of the process, but, throughout the subsequent period (when the property was marketed, the auction reserve price set, right through until after the hammer fell), the defendant failed to ensure that he had effective authority to sell the property.

[61] It is put that there are several ways that a licensee exercising skill, care, competence and diligence might have satisfied him or herself that he or she had authority to sell the property, yet the defendant did not do so; and that failure amounts to a serious departure from the standard of conduct that vendors and purchasers alike should expect of a competent, diligent licensee.

[62] The prosecution submits that the evidence shows that, in all the circumstances, the defendant's actions amount to misconduct.

### ***The Stance for the Defendant Licensee***

[63] The essential submission put by Mr Rea for the licensee is that the allegations of serious negligence or serious incompetence by the licensee cannot reasonably be sustained and there are a number of significant factors that cause the licensee's relevant conduct to be assessed as merely unsatisfactory under the Act. He then continued to develop that theme as follows:

#### ***"No withdrawal of agency agreement, and on-going involvement of Mr Mairs, encouraged by Mr Rees***

8. *Importantly, so far as Mr Mairs was concerned, there was a continuous interest by Mr Rees to sell the property and for Mr Mairs to be involved as the salesperson acting on behalf of T Rees Investments Limited.*
9. *Although Mr Mairs was with City Sales Limited when the agency agreement was given by Mr Rees in late 2010, Mr Mairs was the individual licensee who dealt with Mr Rees and secured the listing, and Mr Mairs was responsible for marketing the property to auction. The agency agreement reverted to a general authority following the first auction, and the authority was never withdrawn.*
10. *Mr Rees has said in his brief of evidence that following the first auction, he decided to keep the property "until the market returned to normal and [he] had had a chance to sort [himself] out". However, it is apparent it was always Mr Rees' intention that the property was to be sold at some stage.*
11. *Mr Mairs remained in contact with Mr Rees and his advisers with respect to the sale of the property, and Mr Rees specifically instructed Mr Mairs to communicate with Mr Waine regarding the property. Mr Rees gave Mr Mairs Mr Waine's contact details following the first auction, and Mr Mairs would not have come to have had any involvement with Mr Waine were it not for those instructions by Mr Rees.*
12. *By putting Mr Mairs in contact with Mr Waine, Mr Rees encouraged Mr Mairs to believe that:*
  - (a) *Mr Rees still wished to sell the property;*
  - (b) *Mr Mairs was to remain the salesperson engaged for that purpose; and*
  - (e) *Mr Waine was to be the point of contact on behalf of Mr Rees.*
13. *Obviously, this was Mr Waine's understanding also, given his interpretation of Mr Rees' voicemail message as an instruction to sell, and*

*his subsequent signing of the agency agreement given to Mr Mairs on behalf of T Rees Investments Limited. There is nothing to suggest that Mr Waine is not otherwise a reasonably competent and professional accountant.*

**Mr Rees' reliance on professional advisers and previous lack of direct involvement in sales process**

14. *Notwithstanding the statements by Mr Rees and Mr Hooks in their briefs of evidence which appear to suggest otherwise, it is submitted that it is clear from the contemporaneous records of communication that Mr Rees had little, if any, direct involvement in the process of the first auction, and that Mr Hooks was the principal (if not sole) point of instructions.*
15. *Mr Rees emphasised to Mr Mairs from their first discussions the reliance he placed on his professional advisers, and although it was Mr Hooks with whom Mr Mairs dealt primarily regarding the first auction, the subsequent shift to Mr Waine was in accordance with instructions given by Mr Rees.*
16. *Mr Rees did not attend the first auction (just as he did not attend the second auction), so in the event the price bid at the auction had been high enough, it is evident that Mr Rees would have been content for someone other than him to sign the contractual documents to effect a sale of the property.*
17. *Mr Rees was clearly not a "hands on" vendor, and this was known to Mr Mairs. In the circumstances, particularly where all indications had been that there was a continuity of interest by Mr Rees to sell the property through the involvement of Mr Mairs, and where communications had been channelled through Mr Rees' advisers, it is submitted that Mr Mairs had good reason to accept the assurances by Mr Waine that he had authority to sign the second agency agreement.*

**Mr Waine's professional status**

18. *Mr Waine is a chartered accountant, and as such, instructions given by him would have had an increased air of legitimacy above those of an ordinary member of the public, similar to instructions given by a solicitor. Mr Mairs nevertheless specifically questioned by Mr Waine's authority, and this was confirmed by Mr Waine.*
19. *The point is made above that there is nothing to suggest that Mr Waine was not otherwise a reasonably competent and professional accountant. Certainly, from the perspective of Mr Mairs, there was nothing at all to suggest to him that was not the case.*

**Involvement of Mr Hooks**

20. *Although the only documentary evidence which has been located concerning involvement of Mr Hooks in the 2013 auction is the email request for approval of auction documents, Mr Mairs will say that he had a number of telephone discussions with Mr Hooks around this time, and as far as he knew, Mr Hooks had confirmed instructions from Mr Rees to act regarding the sale of the property. It was for this reason that the draft*

*auction documents were sent to Mr Hooks on behalf of T Rees Investments Limited for approval.*

21. *While it is accepted that it would be a better practice to request approval of a draft document, rather than to stipulate that the document will be used failing any changes being advised, the lack of any response by Mr Hooks indicating an absence of instructions was an additional factor that would have supported Mr Mairs' understanding that everything was in order, so far as concerned the authority to sell".*

### **Discussion**

[64] We record that the defendant appeared an honest witness to us as did the other witnesses who appeared before us. As indicated above, there is no dispute over any factual issue.

[65] Broadly, we accept Mr Rea's submissions for the defendant as we have covered them above; although we consider that the 2010 listing agreement was for a marketing process which was completed unsuccessfully in 2010, was given to another real estate firm, and cannot be interpreted as extending to the purported 2013 sale.

[66] We stress that it is a fundamental error for a real estate agent to fail to obtain a signed listing agreement from the owner vendor. However, in the unique context we have set out above, we consider that it is only fair and just to assess the licensee's conduct as unsatisfactory and not as misconduct.

[67] In our recent decisions we have had occasion to deal with s 126 of the Act which, for present purposes, covers that an agent is not entitled to any commission or expenses from a client vendor in connection with real estate agency work unless that work is performed under a written agency agreement signed by or on behalf of the client and the agent. That must be an indication from Parliament that it is basic for the marketing of realty that the vendor sign an agency agreement or listing agreement with the agent licensee. We consider that it is fundamental competence that an agent ascertain that the property owner has authorised a sale process in writing.

[68] Accordingly we dismiss the charge of misconduct but find the licensee guilty of unsatisfactory conduct. The parties are, of course, entitled to a hearing about penalty although they may prefer to deal with that by submissions on the papers.

[69] Our current thinking is that, essentially, the licensee was over-influenced by directions given to him in good faith by the very experienced and reputable accountant for the vendor, and to some extent by the vendor's solicitor, and he failed to obtain proof by signature from the vendor that the vendor had definitely decided to sell the property. The licensee should have acquired direct authority from the vendor rather than assumed authority from the vendor's accountant.

[70] There is, of course, the possibility that the vendor was given to understand by somebody that the auction price obtained by the defendant could be bettered if the vendor pulled out of the 2013 auction sale. However, we understand that there was a resale at a lower price than had been achieved by the licensee.

[71] We direct the Registrar to arrange a telephone conference of counsel with our Chairperson to discuss a timetable towards penalty.

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

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Judge P F Barber  
Chairperson

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Mr G Denley  
Member

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Ms N Dangen  
Member