BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 70

READT 051/17

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 412
AGAINST	GURPREET GREWAL First Defendant
AND	PREET & CO REAL ESTATE LIMITED Second Defendant
AND	JOSEPH VOORDOUW Third defendant
AND	GARRY MASON Fourth defendant

On the papers

Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms N Dangen, Member
Submissions received from:	Mr S Waalkens, on behalf of the Committee Mr T Rea, on behalf of Mr Voordouw Ms S Woods, on behalf of Mr Mason
Date of Decision:	2 November 2018

DECISION OF THE TRIBUNAL
(PENALTY)

Introduction

[1] Following a defended hearing on 13 July 2018, the Tribunal found Mr Voordouw and Mr Mason guilty of misconduct, pursuant to s 73(b) of the Real Estate Agents Act 2008 ("the Act").[1] Prior to the hearing, Mr Voordouw admitted a further charge of misconduct, also under s 73(b) of the Act. The Tribunal has received submissions as to penalty.

Facts

[2] The relevant events occurred between early June and late September 2017. At that time, Mr Voordouw was Branch Manager, Ellerslie, of Harcourts Preet & Co Real Estate Limited ("the Agency"). Mr Mason was Chief Operations Officer, Manukau, of the Agency.

[3] The first defendant in this proceeding, Mr Grewal, was managing director of the Agency. Up until the events resulting in the charges against Mr Voordouw and Mr Mason, Mr Grewal had signed the trust account declarations, and was the sole signatory for the release of funds from the trust account. He was not involved in the hearing of the charges against Mr Voordouw and Mr Mason.

[4] On 13 June 2017, Mr Voordouw signed a trust account statutory declaration that the balance of the Agency's trust account as at 31 March 2017 was $2,671,208. The declaration was incorrect, as the actual balance was $2,351,737.50.

[5] On 4 August, Mr Voordouw signed a monthly trust account reconciliation statement for June 2017, stating that the balance of the trust account as at 30 June was $1,334,067.56. In fact, the balance of the trust account was $334,067.56, a discrepancy of $1million. On the same day, Mr Voordouw signed a monthly trust account reconciliation statement for July 2017, stating that the balance of the trust account as at 31 July was $1,339,070. In fact, the balance of the trust account was

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1 *Complaints Assessment Committee 412 v Voordouw and Mason* [2018] NZREADT 47, 7 September 2018.

$339,070, again a discrepancy of $1million. At the time he signed the statements Mr Voordouw was provided with, but did not check, the bank statements.

[6] At the time he signed the trust account reconciliation statements, Mr Voordouw was told that $1million had been transferred out of the Agency's trust account into another Agency account. He was also told that two purchase deposits had been deposited into the wrong bank account and needed to be transferred to the trust account. Mr Voordouw was concerned and spoke to Mr Mason. They agreed that the matter was serious and required an immediate explanation. Mr Voordouw then emailed Mr Grewal, stating that the matter was "completely unacceptable" and that Mr Grewal was to confirm that day that $1 million and the two purchase deposits had been deposited into the trust account.

[7] Pursuant to r 7.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), a licensee who has reasonable grounds to suspect that another licensee has been guilty of unsatisfactory conduct "may" make a report to the (then) Real Estate Agents Authority ("the Authority"). Pursuant to r 7.2, a licensee who has reasonable grounds to suspect that another licensee has been guilty of misconduct "must" make a report to the Authority. Neither Mr Voordouw nor Mr Mason made a report to the Authority concerning the transferred $1million, or the incorrectly deposited purchase deposits.

[8] Mr Voordouw and Mr Mason met with Mr Grewal on 7 August. Mr Grewal agreed to investigate and report back. Mr Mason recorded in notes made after the meeting that there was potentially a breach of s 122 of the Act (which sets out agents' duties regarding handling of money received in their capacity as agents), that there could be a misconduct under s 73 of the Act, and there was "potentially fraud". Despite a reference to rr 7.1 and 7.2 in Mr Mason's notes, no report was made to the Authority.

[9] Mr Voordouw emailed the Agency's auditor on 8 August, and asked him to "have a look at the trust account and report back". This request did not indicate the scale of the issue, or any urgency. Mr Voordouw sent a follow-up email to the auditor on 17 August, but again made no mention of the scale of the issue, or any urgency.

[10] Mr Voordouw, Mr Mason, Mr Grewal and the general manager of the Agency met on 24 August. Mr Mason and Mr Voordouw reiterated their concern as to misconduct, and an obligation to report to the Authority. Mr Grewal said the money would be returned to the trust account "by Thursday", and he would explain where it had gone. Mr Grewal also said he would seek advice from the Agency's solicitor. He reported that the solicitor had confirmed that they were "doing the right thing".

[11] In a draft management letter dated 25 August, following a meeting with Mr Grewal, Mr Voordouw, Mr Mason, and the general manager, the auditor stated that "as you are aware, there is $1,000,000 used out of the trust account to finance the purchase of some branches". Although Mr Voordouw and Mr Mason said in evidence that this was in conflict with their understanding of the meeting, neither took the matter up with the auditor.

[12] Mr Voordouw sent emails to Mr Grewal on 25 and 28 August, and 1 September, noting his concern that the $1 million had not been deposited into the trust account. He said this had to be organised urgently, or the auditor would have no alternative but to make a report to the Authority.

[13] On 8 September, Mr Voordouw learned, and informed Mr Mason, that a further $200,000 had been transferred out of the trust account on 1 and 2 August. This had not been shown in the July reconciliation. Mr Grewal could not explain the transfer. Again, neither Mr Voordouw nor Mr Mason made a report to the Authority.

[14] Further emails to Mr Grewal, stressing the urgency of his addressing and rectifying the situation, did not have any effect. The matter was referred to the Agency's Franchisor for New Zealand, and a report pursuant to r 7.2 was made to the Authority on 28 September.

Tribunal findings

[15] We found that there were a number of "trigger points", after the initial discovery on 4 August that there was $1 million missing from the trust account, at which a

reasonably competent licensee would have concluded that there were reasonable grounds to suspect that Mr Grewal had been guilty of misconduct in this case:

[a] after the meeting with Mr Grewal on 7 August, where Mr Mason's notes referred to potential breaches of s 122 of the Act and rr 7.1 and 7.2, the possibility of misconduct under s 73 of the Act, and potential fraud;

[b] after the meeting with Mr Grewal on 24 August, where there was reference to "deemed misconduct" and Mr Grewal responded that the money would be returned, and he would be able to explain where it had gone;

[c] on receipt of the auditor's draft management letter, of 25 August, referring to $1 million used to finance the purchase of some branches;

[d] after 25 August, when increasingly urgent emails to Mr Grewal failed to elicit a response; and

[e] on the discovery on 8 September that a further $200,000 was missing from the trust account.

[16] We found that Mr Voordouw's and Mr Mason's conduct in failing to make a report under r 7.2 constituted seriously incompetent and/or seriously negligent real estate agency work under s 73(b) of the Act. In particular:

[a] They relied on the auditor to take steps. This did not absolve them of their personal obligations under r 7.2.

[b] They should have gone to greater lengths to make the auditor aware of the seriousness of the issue and the need for urgent investigation, and to query the auditor as to his reference to $1 million having been used to finance the purchase of branches, or as to whether they should make a report to the Authority;

[c] Despite considering a potential breach of s 122 of the Act and potential fraud, they left the investigation of the missing $1 million to Mr Grewal, and relied on him to seek legal advice and advise the franchisor, when the proper course would have been to notify the auditor and report to the Authority, which could then have taken appropriate action.

[d] Despite the trigger points referred to earlier, they did not make a report to the Authority, and that failure could not be justified on the basis of waiting for the auditor to take action, giving Mr Grewal a chance to remedy the situation, wanting to advise the franchisor before taking action, or relying on solicitors' advice (as reported by Mr Grewal) that they were doing the right thing.

Penalty principles

[17] The principal purpose of the Act is to "promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work."[2] The Act achieves these purposes by regulating agents, branch managers, and salespersons, raising industry standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.[3]

[18] Penalties for misconduct and unsatisfactory conduct must be determined bearing in mind the need to maintain a high standard of conduct in the industry, the need for consumer protection, maintenance of confidence in the industry, and deterrence.

[19] A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The Tribunal should impose the least

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2 Section 3(1) of the Act.
3 Section 3(2).

punitive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.[4]

[20] We accept that Mr Voordouw and Mr Mason do not pose any risk of engaging in similar conduct in the future, and that personal deterrence is not required. General deterrence must be considered, as it is appropriate to send a strong message to the industry as to the importance of the statutory provisions concerning agencies' trust accounts, and of the reporting obligations (personal to all licensees) under rr 7.1 and 7.2 of the Rules.

[21] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As relevant to the present case the Tribunal may:

[a] Make any of the orders that a Complaints Assessment Committee may impose under s 93 of the Act (these include censuring or reprimanding the licensee, and ordering the licensee to undergo training or education);

[b] Impose a fine of up to $15,000; and/or

[c] Order cancellation or suspension of the licensee's licence;

Submissions

Assessment of the misconduct

[22] Mr Waalkens submitted for the Committee that the conduct of Mr Voordouw and Mr Mason should be placed towards the upper range of misconduct under s 73(b). He submitted that their failure to make a report to the Authority showed a clear failure to consider the consumer protection objectives of the Act, and was a serious breach of acceptable standards.

[23] Mr Waalkens also submitted that this was not an instance of a minor discrepancy in the trust account, or a technical error producing a negligible loss, but one where a significant sum of money was unaccounted for. He submitted that it should have been

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[4] See *Complaints Assessment Committee 409 v Ganesh* [2018] NZREADT 27, at [19], *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30, and *Morton-Jones v The Real Estate Agents Authority* [2016] NZHC 1804, at [128].

at the forefront of Mr Voordouw's and Mr Mason's minds that misappropriation of client funds in the trust account to that level would undoubtedly constitute misconduct, engaging their r 7.2 obligation.

[24] He submitted that licensees, particularly those in positions of responsibility within an agency, have a duty to assist in regulating the industry, and protecting its reputation, by reporting misconduct when they suspect it. He acknowledged that Mr Voordouw and Mr Mason had no role in removing the funds, but submitted that they could have prevented any further misconduct by making a report to the Authority.

[25] Mr Waalkens further submitted that notwithstanding that protecting the Agency's clients should have been foremost, they understated the situation to the auditor, failed to alert him to the urgency and scale of the situation, and continued to rely on Mr Grewal to investigate the matter and seek advice from the solicitor, thus reaching the high threshold of seriously incompetent and/or serious misconduct.

[26] Mr Rea submitted for Mr Voordouw that while there was serious negligence, and therefore misconduct, it should not be characterised as being towards the upper range of serious negligence misconduct. He submitted that if Mr Voordouw and Mr Mason had merely neglected making a report and had not considered their obligations or undertaken inquiries, then their conduct could properly be characterised as being at the upper level, but that was not the case here.

[27] He submitted that the circumstances could have been much more serious, and the characterisation of "at the upper end of misconduct" does not properly recognise Mr Voordouw's and Mr Mason's serious consideration of their obligations, or the steps taken by them to investigate before they considered it appropriate to make a report to the Authority of suspected misconduct.

[28] He also submitted that the seriousness of an allegation that a licensee had removed $1 million from the Agency's trust account would cause reasonable licensees to exercise greater caution before making the allegation.

[29] Ms Woods also submitted, on behalf of Mr Mason, that the conduct should be placed in the low level of misconduct, rather than the high level.

Mr Voordouw

[30] Mr Waalkens submitted that Mr Voordouw's misconduct in signing three incorrect trust account reconciliations (in respect of which he admitted a charge of misconduct) was particularly serious, given that at the time he was the sole individual responsible for fulfilling the duties of a company licensee, he failed to check any declarations and accounts against the Agency's bank statements, and he signed two of the declarations (on 4 August) notwithstanding being told that there was $1 million missing from the trust account.

[31] He submitted that Mr Voordouw should receive an uplift on the penalty determined for his breach of r 7.2 to reflect the further charge of misconduct, in order to recognise the importance the Authority places on complying with trust account audit regulations. However, he acknowledged that Mr Voordouw's acceptance of the charge can be considered a mitigating factor. He submitted that the appropriate penalty orders in respect of Mr Voordouw would be censure, a fine in the vicinity of $8,000 to $10,000, and an order to complete further education.

[32] With respect to the signing of trust account reconciliations, Mr Rea submitted that the Authority's submissions did not adequately recognise the reliance placed by Mr Voordouw on the experienced administrative staff who presented documentation for him to sign. Regarding the reconciliation signed after being told that trust money was unaccounted for, he referred to Mr Voordouw's explanation that he was not thinking clearly, but very quickly recognised his error and contacted the auditor. He submitted that a much more "cavalier" approach would be required before Mr Voordouw's conduct could be placed at the upper end of misconduct.

[33] Mr Rea submitted that a number of mitigating features should be taken into account:

[a] Mr Voordouw admitted the charge of misconduct relating to signing the trust account reconciliations.

[b] He acted honestly and in good faith and believed he was acting diligently in performing his obligations, and fairly towards Mr Grewal.

[c] He did not obtain any personal gain from his conduct, and has suffered financially as a result of the Agency's failure, having lost his investment in it. He has also suffered significant stress as a result of the charges against him and publicity surrounding the case.

[d] He has had a long and unblemished career in the industry, and has not previously been the subject of any disciplinary finding, at any level, and he is at a very low risk of re-offending.

[e] He is currently employed in the industry, but has concerns regarding his future as a result of the effect that the findings of misconduct will have on his professional reputation.

[34] Mr Rea submitted five character references on behalf of Mr Voordouw. All of those who provided references were given a copy of the Tribunal's decision. All spoke very highly of Mr Voordouw's honesty, integrity, and diligence, despite knowing of the misconduct findings. He submitted that the references demonstrate the high esteem in which Mr Voordouw is held by those who know him.

[35] Mr Rea acknowledged that appropriate penalty orders would include censure, further training regarding trust account supervision, and a fine. He submitted that the level of fine should take into account the Tribunal's assessment of the seriousness of Mr Voordouw's conduct, and the mitigating factors referred to. He further submitted that the penalty orders should take into account the fact that the findings of misconduct will have a significant penalty effect in themselves, given the importance of licensees' reputations and the publication of decisions on the Authority's register.

Mr Mason

[36] Mr Waalkens submitted that the appropriate penalty orders in respect of Mr Mason would be censure, and a fine in the vicinity of $6,000 to $8,000. As Mr Waalkens understood that Mr Mason had now retired from working in the industry, he did not suggest an order for further education.

[37] Ms Woods submitted that Mr Mason's conduct should be assessed as being at the lower end of the range of serious negligence misconduct. She set out the following factors which, she submitted, are relevant to assessing the appropriate level of Mr Mason's misconduct:

[a] He took significant steps (if ultimately ineffective) to investigate the matter, including making ongoing inquiries of Mr Grewal and the auditor, and being involved in developing new procedures so that this type of situation could not occur in the future.

[b] Although he did not make a report to the Authority, he took the matter very seriously, including considering his obligations under the Rules.

[c] He was only peripherally involved in the matter: he was not responsible for the trust account, did not take any steps that involved knowingly misrepresenting the nature of the trust account discrepancies, was not privy to the Agency's financial affairs, and was not responsible for compliance matters relating to the trust account.

[38] Ms Woods also submitted that a number of mitigating factors needed to be taken into account:

[a] There was no prospect of Mr Mason obtaining any personal benefit from the breach, he is at low risk of engaging in similar conduct, and he has recognised that he made a mistake in not making a report to the Authority.

[b] He has paid dearly for his mistake and its consequences. He felt it necessary to, and did, resign from the Agency on 27 October 2017,

resulting in significant disruption and hardship. Contrary to Mr Waalkens' understanding, Mr Mason has not retired from the industry, but has found it difficult to obtain alternative employment, and may yet face further employment consequences.

[c] The Committee and Tribunal process has been very stressful for Mr Mason and his family, and his standing and reputation in the industry has been damaged. This comes at the tail end of a long career in which he has always been very highly esteemed and respected, he has never previously faced any complaint against him, and he has held positions of significant responsibility in the industry.

[d] Mr Mason's character and standing in the industry are demonstrated in the character references given on his behalf.

[39] Ms Woods submitted that the matters referred to above strongly tend against a fine in the range suggested by the Committee, and a fine of such magnitude would be excessively punitive. She also submitted that as Mr Mason does not presently have any responsibility for trust accounting, and does not intend to take on any such responsibility, an order for further training is not appropriate.

Discussion

Assessment

[40] Breaches of r 7.2 have been considered at the Complaints Assessment Committee level, but not by the Tribunal. The Committees' decisions in *Wallbutton*[5] and *Bayleys Real Estate Limited*,[6] were discussed in the Tribunal's substantive decision.

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5 CA4011267, *J Wallbutton*: Decision of Complaints Assessment Committee 10058, 17 December 2010.

6 C08765, *Bayleys Real Estate Limited*, Decision of Complaints Assessment Committee 403, 26 July 2016.

[41] In *Wallbutton*, the licensee made a report to the Authority six weeks after becoming aware that another licensee had misappropriated funds client. During that six weeks Ms Wallbutton took immediate action to remove the other licensee from their position, interviewed staff, and contacted her accountant, auditor, franchisor, banker, and solicitor. The Complaints Assessment Committee said that she had "carefully and tirelessly ensured that all the client funds held by her business were recouped and correct".

[42] However, Ms Wallbutton did not report the matter to the Authority. The Committee considered that it was "understandable and commendable" that Ms Wallbutton did not want to accuse the other licensee without having the full facts, and her priority was to ensure the public did not suffer loss. However, it was absolutely clear in r 7.2 that she had an obligation to inform the Authority once the extent of the offending became clear, and a report should have been made as a matter of course. The Authority would then have determined what, if any, action should be taken. The Committee made a finding of unsatisfactory conduct.

[43] In *Bayleys Real Estate Limited*, the Authority received an anonymous complaint that a salesperson engaged by the Agency had forged or falsified a rental appraisal and presented it to prospective purchasers. The prospective purchasers had complained to the agency, which investigated the matter. The salesperson admitted the falsification. While the agency imposed sanctions on the salesperson, it did not make a report to the Authority.

[44] The agency said that it had decided that the salesperson's conduct was not misconduct, but unsatisfactory conduct, in respect of which a report to the Authority was not mandatory. The Committee reached the opposite conclusion. It had no doubt that the salesperson's conduct was potentially misconduct, in that the falsified document was to be presented to a financial institution, and there could be serious repercussions. Accordingly, the agency had reasonable grounds to suspect misconduct, and should have made a report to the Authority.

[45] As demonstrated by our findings of misconduct, Mr Voordouw's and Mr Mason's conduct was more serious than that in either of these cases, by a considerable

margin. They did not take the steps undertaken either by Ms Wallbutton, or by Bayleys.

[46] We do not accept the submissions for both Mr Voordouw and Mr Mason that they "investigated" the fact that $1 million was missing from the Agency's trust account. They left the investigation first to Mr Grewal, then to the auditor. They did not themselves go through the Agency's bank statements to identify improper payments, or ask any of the administrative staff to do so.

[47] Their request to the auditor was, as we found in the substantive decision, understated: the auditor was merely asked (by Mr Voordouw) to "have a look at the trust account and report back to me", and there was no mention of the amount missing, or of any urgency. Further, they did not follow up on the auditor's reference to $1,000,000 having been "used out of the trust account to finance the purchase of some branches".

[48] We accept that this was a lapse of judgment, but it was a serious one, and inevitably serious repercussions would follow. A shortfall of $1 million in an agency's trust account must immediately have been recognised as a most serious event: either it was an administrative or accounting error of extraordinary magnitude, which had to be corrected immediately, or it was misappropriation of the same nature.

[49] Faced with this shortfall, licensees with the depth of experience and standing in the real estate industry of Mr Voordouw and Mr Mason should have been prompted to do, and been able to do, a great deal more than they did, and much more quickly. The magnitude of the shortfall was not grounds for caution in making a report, it was grounds for making a report, immediately.

[50] We accept Mr Waalkens' submission that Mr Voordouw's and Mr Mason's conduct should be placed in the upper range of serious misconduct.

Mitigating factors

[51] Both Mr Voordouw and Mr Mason have had long careers in the industry. As said in the character references submitted to the Tribunal, they have both earned excellent reputations for honesty, integrity, and diligence. They have both contributed significantly to the industry. Neither has previously faced any form of disciplinary action. We accept that there is very little, if any, risk of either of them engaging in similar conduct in the future.

[52] We also accept that the charges have had significant personal and financial implications for both Mr Voordouw and Mr Mason. Both have suffered considerable stress, and the impact on their careers in the industry is obvious. We accept that the fact of the findings of misconduct will in themselves constitute a significant penalty.

Appropriate penalty

[53] In this case, we have considered as a starting point what the penalty would be for the misconduct found in this case in the absence of any mitigating factors. We have then applied the mitigating factors in order to determine the final penalty.

[54] Counsel for both Mr Voordouw and Mr Mason accepted that an order for censure should be made, and a fine imposed. Both made submissions as to the quantum of the fine.

[55] In respect of Mr Voordouw, the starting point for a fine must take account of the fact that he has been found guilty of misconduct on two separate charges: first, in relation to signing the trust account reconciliations despite knowing they were incorrect by more than $1 million and secondly, in relation to the breach of r 7.2. In both matters, he was responsible for the Agency's trust account, and he was more aware of the financial affairs of the Agency. Having been made aware that $1 million had been transferred out of the trust account, there were no grounds on which he could reasonably have relied on the Agency's administrative staff.

[56] We have taken Mr Voordouw's guilty plea on the charge relating to the trust account reconciliations into account, and have concluded that the starting point for the fine in respect of Mr Voordouw must be $8,000.

[57] In respect of Mr Mason, we consider the fine in respect of the breach of r 7.2. While he was not in Mr Voordouw's position in relation to the Agency, we do not accept Ms Woods' submission that he was "only peripherally involved" in the matter. Mr Voordouw sought his advice immediately after he had signed the trust account reconciliations on 4 August, and he was thereafter involved in all discussions and meetings. After 4 August, Mr Mason was involved to the same extent as Mr Voordouw. We have concluded that the starting point for the fine in respect of Mr Mason must be $6,000.

[58] We accept that the findings of misconduct in this case must in themselves send a strong message to the industry of the importance of the obligations imposed by r 7.2. They will also send a strong message to the industry that the obligation is personal to licensees and cannot be left to, for example, an agency's auditor. However, those obligations are of such importance to the consumer protection purposes of the Act that it is appropriate to include an element of general deterrence in the starting points for the fines in this case.

[59] We recognise that there are significant factors to be taken into account in mitigation. For each of Mr Voordouw and Mr Mason, the starting point for the fine will be reduced by $2,000.

Orders

[60] Mr Voordouw is censured and ordered to pay a fine of $6,000. The fine is to be paid to the Authority within 20 working days of the date of this penalty order.

[61] Mr Mason is censured and orders to pay a fine of $4,000. The fine is to be paid to the Authority within 20 working days of the date of this penalty order.

[62] We do not consider it necessary, in either case, to make an order as to further education.

[63] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews
Chairperson

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Mr G Denley
Member

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Ms N Dangen
Member