BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 13

READT 023/17

IN THE MATTER OF	Charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 414
AGAINST	SONIA TAFILIPEPE Defendant

READT 043/18

IN THE MATTER OF	Charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 416
AGAINST	SONIA TAFILIPEPE Defendant

Hearing	4–6 March 2019, at Christchurch
Tribunal:	Hon P J Andrews, Chairperson Ms N Dangen, Member Ms C Sandelin, Member
Appearances:	Mr J Simpson, on behalf of the Committees Mr W Todd, on behalf of Ms Tafilipepe
Date of Decision: Recalled and Re-issued	11 April 2019 10 May 2019

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Tafilipepe faces two sets of charges:

[a] Brought by Complaints Assessment Committee 414 ("the 414 charge"):

[i] A charge of misconduct under s 73(a) of the Real Estate Agents Act 2008 ("the Act") (disgraceful conduct); and in the alternative:

[ii] A charge of misconduct under s 73(c) of the Act (wilful or reckless breach of the Act or the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules")).

[b] Brought by Complaints Assessment Committee 416 ("the 416 charge"):

[i] A charge of misconduct under s 73(c) of the Act; and in the alternative:

[ii] A charge of misconduct under s 73(b) of the Act (seriously negligent or seriously incompetent real estate agency work).

[2] Ms Tafilipepe denies both charges.

[3] The charges arise out of transactions involving earthquake-damaged properties, following the Christchurch earthquakes on 4 September 2010 and 20 February 2011. The Tribunal was advised that such properties have often been sold on an "as is" basis (that is, on the understanding that they are earthquake-damaged) to companies or persons who specialise in buying them to repair, for later sale or rental.

[4] All relevant events occurred during the period from early May 2016 to the beginning of March 2017. At that time Ms Tafilipepe held an agent's licence, and was the owner of three franchises for Mike Pero Real Estate Limited ("MPRE"). She maintained a list of potential buyers of "as is" properties ("her "as is" list") to whom she sent information on "as is" properties. The two sets of charges are concerned with her conduct in respect of a number of such properties.

A. The 414 Charge

Facts

[5] Ms Tafilipepe was contacted on 11 May by Ms Cokojic, in relation to a property in Avondale Rd, owned by Ms Cokojic's fiancée. They arranged to meet at the property on 16 May. Ms Tafilipepe asked Ms Cokojic to send her a copy of the Earthquake Commission "Scope of Works" for the property,[1] and Ms Cokojic did so.

[6] Ms Tafilipepe arrived at the property at approximately 11.10 am on 16 May. She was accompanied by [ ] one of the buyers on her "as is" list. Ms Cokojic's evidence was that he was introduced to her as a specialist in "EQ-damaged "as is" properties". She presumed that he was an agent. Ms Tafilipepe's evidence was that she introduced [ ] as an "EQC" specialist. Ms Cokojic was not told in advance that he would be attending with Ms Tafilipepe. There is a dispute as to why it was that [ ] attended the property, and what information Ms Tafilipepe provided him with beforehand (in particular the Scope of Works).

[7] Ms Tafilipepe and [ ] were at the property for approximately 10 minutes, and viewed the interior. There was some discussion of work Ms Cokojic intended to do on the property, being interior painting and re-doing the bathroom. Ms Tafilipepe asked Ms Cokojic what her price expectation was for the property, and indicated that Ms Cokojic's expectation of about $200,000 was between $20,000 and $50,000 too high.

[8] While it was not disputed that [ ] viewed the interior and (briefly) the exterior of the property, there is a dispute as to the extent to which he was present during the discussions as to Ms Cokojic's price expectations, and Ms Tafilipepe's response. Ms Cokojic's evidence was that he was present. Ms Tafilipepe's evidence was that he was outside.

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[1] Copies of "Scope of Works" documents in the EQC website (www.eqc.govt.nz/Canterbury-earthquakes) show that (in the present context) a Scope of Works is a summary of the earthquake damage to a property identified by the EQC assessment team. Land, building and room by room damage is listed along with an indication of how this damage is to be repaired.

[9] Approximately 20 minutes after leaving the property Ms Tafilipepe telephoned Ms Cokojic and left a message. Ms Cokojic returned the call at 12.02 pm. Her evidence was that Ms Tafilipepe told her that she had been talking to [ ], they both agreed that the price range sat at around $150,000 to $180,000, and that "we can get an offer to you this afternoon for $150,000, with extended settlement, no conditions etc". Ms Tafilipepe's evidence was that she confirmed that there "would be interest from the buyers who had missed out on similar properties", and said that an extended settlement "would likely be achievable".

[10] At 2.21 pm, Ms Cokojic sent an email to MPRE. She expressed concern about her meeting with Ms Tafilipepe, and the subsequent telephone conversation. Her concern was that the offer referred to by Ms Tafilipepe would come from [ ], and that, in the circumstances, he should not have been present at the property without her permission.

[11] MPRE identified Ms Tafilipepe as the salesperson who had dealt with Ms Cokojic. Ms Cokojic's email was forwarded to Ms Tafilipepe, who emailed a response to her at 3.23 pm the same day. She apologised for the "misunderstanding" about [ ]'s identity, and stated that he was "an agent who is new with [MPRE] and is working with me at the moment". This was a false statement, as he was not, and had never been, associated with MPRE.

[12] Ms Cokojic's complaint was investigated internally by MPRE's compliance manager, Mr Finnerty. In a conversation with Mr Pero of MPRE, Ms Tafilipepe named another salesperson at the agency as having been present at the property. This was also a false statement. On 18 May, during the course of the internal investigation, Ms Tafilipepe admitted that she had taken [ ] to the property, and that she had been wrong to do so. She admitted that she had lied to Ms Cokojic and to Mr Pero.

[13] On 19 May (three days after Ms Tafilipepe's and [ ]'s visit to the property), Ms Cokojic lodged a complaint with the Real Estate Agents Authority. The Committee determined to inquire into her complaint, and this was investigated by an Authority investigator. In the course of the investigation, Ms Tafilipepe told the investigator that

she had sent the Scope of Works to [ ]. Later in the investigation, Ms Tafilipepe said that she must have been mistaken in saying that.

[14] We record that Ms Tafilipepe advised the Tribunal that she had tried to obtain access to her MPRE emails, but this was either refused, or offered on terms that were unreasonable and not acceptable to her. She said that, as a result, not all of her emails were considered by the Committee.

The 414 charge

[15] The 414 charge was laid on 17 July 2017. It alleges, in summary, that Ms Tafilipepe:

[a] brought [ ], a prospective purchaser, to the property without Ms Cokojic's prior consent or authority;

[b] misled Ms Cokojic as to [ ]'s purpose for attending the property;

[c] disclosed confidential information (the Scope of Works, Ms Cokojic's price expectation, and an oral appraisal of the property) to [ ] without Ms Cokojic's prior consent;

[d] marketed the property to [ ] without Ms Cokojic's written authority or agreement;

[e] lied to Ms Cokojic by saying that [ ] was a new licensee working with her at MPRE; and

[f] attempted to mislead the Committee by denying that she had provided [ ] with a copy of the Scope of Works.

[16] We turn to consider each of the above elements.

Did Ms Tafilipepe bring [ ], a prospective purchaser, to the property without Ms Cokojic's prior consent?

[17] It was not disputed that Ms Tafilipepe did not have a signed agency agreement, and did not obtain Ms Cokojic's prior consent for [ ] to be present at the property. The issues to determine are whether he was a prospective purchaser, and whether Ms Cokojic gave consent to his presence when he and Ms Tafilipepe arrived there.

Was [ ] a prospective purchaser?

[18] Mr Simpson submitted for the Committee that the Tribunal could reasonably infer that [ ] was a prospective purchaser or that, at least, the possibility of his being a prospective purchaser could not be excluded, from:

[a] he is an "as is" buyer, either for himself, or on behalf of others;

[b] he had bought "as is" properties through Ms Tafilipepe before;

[c] his evidence was that he always viewed properties that he might otherwise have walked away from if he had "just looked at the property or taken someone's thoughts on the property";

[d] Ms Cokojic's evidence of Ms Tafilipepe's statements in the telephone call at 12.02 pm, from which it could be inferred that the offer "we could get" that afternoon would come from [ ] as he had just viewed the property; and

[e] the absence of any evidence that [ ] actually gave the advice as to repair costs that was said to be the reason for his presence at the property.

[19] We note, first, that the evidence given by Ms Tafilipepe and [ ] differed as to whether he offered to attend at the property, as he was free at the time (Ms Tafilipepe's evidence) or she asked him to attend ([ ]'s evidence). We accept his evidence: as he said, if Ms Tafilipepe had not asked for his help, he would not have known about it.

[20] Ms Tafilipepe's evidence was that [ ] came to the property for the sole purpose of providing advice as an "EQC specialist". She said that "he would be able to help me gain a more comprehensive understanding of the property after I had discussed with him the likely cost of the repairs". At the hearing, Ms Tafilipepe said that she could "100%" rule [ ] out as a prospective purchaser, because she knew where he was buying. She said that she knew he had no interest in the property, and there was "zero" risk of his becoming interested in buying it.

[21] There was no evidence that [ ] was connected in any way with the EQC or of his having any particular credentials as an "as is", or "EQC" specialist. Further, there is no evidence, in numerous email exchanges between him and Ms Tafilipepe, that she ever sought his advice, or that she received advice as to likely repair costs of this particular property. All communications between Ms Tafilipepe and [ ] that were in evidence indicate that their contact was as salesperson and potential buyer, respectively, and that she promoted properties to him. There is nothing in those communications that suggests to us that there are any missing emails that would indicate differently.

[22] We accept that [ ] did not in fact make an offer to buy the property, and that in this case, the fact that it was across the road from a red zone would have deterred him from buying it himself. However, we do not accept that there was a "zero" chance of his becoming interested in buying the property, whether for himself, or on behalf of someone else, or that he had a general interest in the property as a buyer of "as is" properties.

[23] Further, we accept Ms Cokojic's evidence regarding her telephone discussion with Ms Tafilipepe, shortly after she and [ ] had been at the property. We accept that the reference to [ ], and the statement that "we can get an offer to you this afternoon" (reported very soon thereafter to MPRE) supports an inference that he was a prospective purchaser.

[24] On the balance of probabilities, we are satisfied that [ ]'s presence at the property was, at least in part, as a prospective purchaser, whether for himself, or on behalf of another person.

Did Ms Tafilipepe obtain Ms Cokojic's prior consent to [ ] being at the property with her?

[25] Ms Tafilipepe was required to obtain the vendor's consent before she brought any unlicensed person onto the property, whether as a "specialist", or for any other reason. She did not have any authority by way of an agency agreement. Her evidence was that Ms Cokojic freely agreed to [ ] entering the property, and it was submitted that this amounted to the required consent. Mr Todd submitted that Ms Cokojic was happy for him to be at the property, and that she only changed her view as to consent after she believed he was looking to buy the property.

[26] We do not accept this submission. Even if it were sufficient for consent to be given orally, the submission begs the question of whether Ms Cokojic gave it having been fully informed as to [ ]'s identity and his purpose in being there. This would have included the fact that he was a buyer of "as is" properties, and had previously bought such properties through Ms Tafilipepe. It would also have included the fact that this was his only qualification as an "as is" or "EQC" specialist, and (if this were the case) that he had no interest in buying the property.

[27] Ms Cokojic was not given this information. We note that at the hearing, Ms Tafilipepe said that in addition to telling Ms Cokojic that [ ] was an "as is" specialist, she said that he "works with as is properties". This additional information would not have been sufficient for the purpose of gaining informed consent, as a person may "work with as is properties" in ways which do not comprise buying, repairing, then selling them. We are satisfied that any "consent" Ms Cokojic gave was not informed consent.

[28] We therefore find that the Committee has proved that Ms Tafilipepe arranged for [ ], a prospective purchaser, to attend at the property with her, without obtaining Ms Cokojic's prior consent. We accept that this was a breach of Ms Tafilipepe's duty to act in good faith and deal fairly with Ms Cokojic, under r 6.2 of the Rules.

[29] As an observation, we note Ms Tafilipepe's evidence in relation to the 416 charge, that she had not taken any steps towards marketing a particular property, because she did not have an agency agreement signed by all the registered owners of

that property. Her submission as to the consent given by Ms Cokojic is inconsistent with her later evidence.

Did Ms Tafilipepe mislead Ms Cokojic as to [ ]'s purpose for attending the property?

[30] The element of "misleading" Ms Cokojic is not confined to whether [ ] was present as a "prospective purchaser". Ms Cokojic was entitled to know and understand what his credentials and background were, and that required that she was given more information, as set out at paragraph [26], above.

[31] Ms Cokojic's evidence was that, had she known that [ ] was a buyer of "as is" properties, she would not have allowed him access. Having had him introduced as a "specialist", she understood that he had specialist knowledge of earthquake-damaged properties, and was present in a professional capacity. As recorded at paragraph [27], above, Ms Cokojic's understanding would not have been corrected by being told that he "works with "as is" properties".

[32] We are satisfied on the balance of probabilities that, by not providing Ms Cokojic with required information (in particular that he was a buyer of "as is" properties), the Committee has proved that Ms Tafilipepe misled Ms Cokojic as to the purpose of [ ] being present at the property. This was a breach of her duty not to mislead Ms Cokojic, or provide her with false information, under r 6.4 of the Rules.

Did Ms Tafilipepe disclose confidential information (the Scope of Works, Ms Cokojic's price expectation, and an oral appraisal of the property) to [ ], without Ms Cokojic's prior consent?

[33] It was not disputed that Ms Tafilipepe asked Ms Cokojic to email her a copy of the Scope of Works for the property, and that Ms Cokojic did so. Nor was it disputed that Ms Cokojic did not authorise Ms Tafilipepe to disclose the Scope of Works to [ ] (or anyone else). The issue is whether Ms Tafilipepe provided it to [ ]. The Committee contended that Ms Tafilipepe emailed it to him.

[34] Mr Simpson submitted that there was inconsistent evidence as to whether Ms Tafilipepe emailed the Scope of Works to [ ]. He referred to Ms Tafilipepe's statement

to the Authority's investigator that she had emailed it to him, her later evidence that she thought she had sent it, but must have been mistaken, his statement to Ms Tafilipepe (forwarded to the investigator) that he had not received it, and his evidence at the hearing that if he had received it, he had not read it.

[35] Mr Simpson submitted that the Tribunal could infer that Ms Tafilipepe emailed the Scope of Works to [ ], on the basis of:

[a] her original statement to the Committee that she had done so, and that was her common practice;

[b] evidence (in relation to the properties referred to in the 416 charge) that she emailed other Scopes of Works to him; and

[c] evidence given by an MPRE employee that she had seen an email from Ms Tafilipepe to [ ] attaching a Scope of Works for the property, with the message "another one to look at".

[36] Mr Simpson further submitted that, at the least, the Tribunal could infer that Ms Tafilipepe discussed matters relating to the Scope of Works with [ ], and that this was the catalyst for having him attend at the property. He referred to Ms Tafilipepe's and [ ]'s evidence that the reason for his going to the property was to assess the cost of repairing it.

[37] Mr Todd referred to [ ]'s evidence at the hearing, that he had no information as to the property prior to going there, except for having located it on a map. He submitted that the Tribunal should accept Ms Tafilipepe's evidence at the hearing that she did not email the Scope of Works to him, and his statement forwarded to the investigator that he did not receive it.

[38] We accept on balance of probabilities that Ms Tafilipepe correctly said in her original statement to the investigator that she sent the Scope of Works to [ ], (that being her common practice). Her later different evidence came after she learned of

his statement that he had not received it. She said that when she learned of his statement, she thought she must have been mistaken.

[39] Further, on Ms Tafilipepe's evidence that she asked [ ] to assist her in understanding the property, in particular as to the cost of repairs, we consider that it is likely that she would, at least, have mentioned the Scope of Works when she raised with him the possibility of his looking at the house with her. It contained information that was highly relevant to his assessment of the cost of repairs. It would have been reasonable for him to enquire, when asked to help Ms Tafilipepe with assessing likely cost of repairs, as to what the Scope of Works said.

[40] We record that we have reached this conclusion without taking into account the evidence given by the MPRE employee, referred to in paragraph [35][c], above.

[41] Mr Simpson further submitted that by virtue of having been present at the property with Ms Tafilipepe, [ ] gained a general understanding of the property, including as to the extent of damage and necessary repairs, and was privy to Ms Cokojic's price expectation of $200,000 and Ms Tafilipepe's response that a realistic range was $150,000 to $180,000.

[42] The evidence of Ms Cokojic, Ms Tafilipepe, and [ ] differed as to who was with whom when Ms Tafilipepe discussed Ms Cokojic's price expectations. Ms Cokojic's evidence was that the discussion of price expectations was in the presence of all three, while Ms Tafilipepe's evidence at the hearing was that price expectations were discussed only by herself and Ms Cokojic (as [ ] had gone outside). Ms Tafilipepe was more equivocal in her statement of evidence, where she referred to "we" having inspected the property, then "I" having spoken to Ms Cokojic as to her price expectation. She did not say that [ ] was not present when that occurred. [ ] recalled going through the property, but could not recall any discussion as to what the property was worth.

[43] Clearly, by virtue of having been present at the property, [ ] gained a general understanding of the property, including as to the extent of damage and necessary repairs.

[44] On the balance of probabilities, we accept Ms Cokojic's evidence that [ ] was present during her discussion with Ms Tafilipepe about her price expectations. We found Ms Cokojic a credible witness, whose evidence was consistent from the time she first made a complaint to MPRE, about three hours after Ms Tafilipepe and [ ] had been at the property, and two hours after her telephone discussion with Ms Tafilipepe. As noted above Ms Tafilipepe's evidence was not consistent, on this or other matters such as the reason for [ ]'s presence at the property.

[45] We therefore find that the Committee has proved that Ms Tafilipepe provided [ ] with a copy of the Scope of Works for the property, that (by his presence at the property) he was able to obtain a general understanding of the property, and that he was privy to Ms Tafilipepe's discussion of Ms Cokojic's price expectations. This was a breach of Ms Tafilipepe's obligations to act in good faith and deal fairly with Ms Cokojic (under r 6.2).

Did Ms Tafilipepe market the property to [ ] without Ms Cokojic's written authority or agreement?

[46] The Committee alleges that Ms Tafilipepe breached r 9.6 of the Rules, which provides:

> Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.

Did Ms Tafilipepe market the property to [ ]?

[47] While the issue as to what constitutes "marketing" was discussed by counsel primarily in the context of the 416 charges, it requires consideration here, as the Committee alleges that Ms Tafilipepe breached r 9.6 by marketing the property to [ ] without there being an agency agreement in place. We note that we were advised by counsel that the intent and use of the word "market" in r 9.6 has not previously been considered by the Tribunal.

[48] Mr Simpson submitted that "marketing" is not confined to "marketing to the public", such as signage placed on a property and advertisements in the media. He submitted that such an interpretation is unduly restrictive, and ignores the intent of r

9.6, which is to ensure that vendor clients have the protection of a listing agreement before any action is taken towards selling their property.

[49] In the present case, he submitted, [ ] was given the address of the property, and the information contained in the Scope of Works. Further, by being at the property with Ms Tafilipepe, he obtained a general understanding of it, and information as to Ms Cokojic's price expectations and Ms Tafilipepe's response. Mr Simpson submitted that this amounted to marketing the property.

[50] Mr Todd submitted for Ms Tafilipepe that the word "market" in r 9.6 should not be given its ordinary meaning. He submitted that a higher standard must apply, and that the interpretation had to be coloured by the examples given in r 9.6. He submitted that placing information on a website and a sign on the property are very public statements that a property is available for sale. He also submitted that neither of these says only that the property may be coming up for sale, or is a request to advise the salesperson of a possible interest.

[51] We do not accept the submission for Ms Tafilipepe. First, it is evident from the wording of r 9.6 that the examples given are not an exclusive definition of what constitutes "marketing" a property. They set out two aspects of marketing which are "included". It is self-evident that other methods of "marketing" are also within the definition, and there is no indication of any methods that are excluded.

[52] The Rules must be interpreted and applied so as to be consistent with the purposes of the Act. The overall purpose of the Act, as set out in s 3(1), 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.

[53] The narrow interpretation contended for by Ms Tafilipepe is not consistent with the purposes of the Act. A broad interpretation is required in order to meet the consumer-protection purpose of the Act.

[54] We derive some assistance from the definition of "advertising" (which we understand to be a sub-set of the more general "marketing") in the Fair Trading Act 1986, as:

> Any form of communication made to the public or a section of the public for the purpose of promoting the supply of goods or services or the sale or granting of an interest in land.

[55] The above definition refers to "any" form of communication, which is to "the public or a section of the public". Thus, "advertising" (and in the context of the Act and Rules, "marketing") is not restricted to any particular form of communication. There is no reason under the Act and Rules to limit marketing to such actions as website advertisements or roadside signage. Marketing can occur by many other means, not the least of which would be personal contact.

[56] Further, the distinction made between the "general public" and a person on Ms Tafilipepe's "as is" list is misconceived: in each case, a property is marketed by a licensee making information about the property available, by whatever means, with the intention of, eventually, securing a sale of the property (whether to a member of general public, or an "as is" buyer.)

[57] We interpret the phrase "market or offer" in r 9.6 as referring to any action taken or thing done which has the intention of stimulating interest in that property such that a sale (or other disposition) of the property may occur. Further, marketing is not confined to giving information to a person who has been identified by the licensee as having a particular interest in the particular property being marketed. If that were the case, the examples given in r 9.6 would not be within the definition of marketing, as their intention is to arouse such interest among as yet unidentified persons.

[58] Every piece of information given to someone other than the vendor of a property can be information that may lead to that other person taking the next step towards what the licensee hopes will be an eventual purchase, and is "marketing" the property.

[59] In the present case, [ ] was invited to see the property, he obtained knowledge of it, and of the vendor's price expectation and Ms Tafilipepe's assessment of a realistic price. He had a lot more information than a member of the general public

would have received by way of a website or signage. Had he so wished, he was in a good position to proceed to make an offer, or to pass on the information so that another person could do so. The definition of "marketing" cannot depend on whether the person marketed to has any intention of buying the property that is marketed.

[60] We are satisfied that Ms Tafilipepe marketed the property to [ ]. Under r 9.6, that should only have occurred if she was authorised to do so through an agency agreement.

Was Ms Tafilipepe authorised to market the property to [ ]?

[61] There was no dispute that Ms Tafilipepe did not have an agency agreement in place giving her authority to market the property – whether to [ ] or anyone else. We have considered whether the consent given by Ms Cokojic for him to enter the property could be regarded as sufficient authority for Ms Tafilipepe to market the property to him. We have concluded that it cannot be so regarded.

[62] First, Ms Cokojic was not the owner of the property. Only the owner could have given authority for the property to be marketed. Secondly, even if Ms Cokojic were the owner, as discussed earlier, the consent given by her was not fully informed consent, and cannot be relied on to authorise marketing.

[63] We conclude that the Committee has proved that Ms Tafilipepe breached r 9.6 by marketing the property to [ ] without authorisation through an agency agreement.

Did Ms Tafilipepe lie to Ms Cokojic when she told her that [ ] was a new agent working with her at MPRE who had sold a lot of "as is" properties?

[64] Ms Tafilipepe admitted that she lied when telling Ms Cokojic that [ ] was a new member of MPRE, working with her. While she offered an explanation (that she had panicked), it can only be seen as a clear breach of her obligation under r 6.4, not to mislead or provide false information to Ms Cokojic.

[65] We do not accept the submission for Ms Tafilipepe that it makes a difference that the lie came after Ms Cokojic had made a complaint to MPRE, and Ms Tafilipepe wanted to protect MPRE's reputation, or that the impact of the lie was "minor".

Whenever it occurred, for whatever reason, and irrespective of its ultimate impact, it was a false statement, in breach of r 6.4. The Committee has proved this breach.

[66] As recorded earlier, Ms Tafilipepe also lied to MPRE when she stated that the person who accompanied her to the property was another MPRE salesperson.

Did Ms Tafilipepe attempt to mislead the Committee by denying she provided the Scope of Works to [ ]?

[67] We have referred earlier to Ms Tafilipepe's statements to the Authority's investigator as to whether she provided a copy of the Scope of Works to [ ]: she said first that she did provide it then, after an email exchange with him in which he said he did not receive it, said that she had been mistaken.

[68] Mr Simpson submitted that if the Tribunal accepts that the Scope of Works was sent to [ ], then her statement that she had been mistaken in saying so is false and an attempt to mislead the Committee. He submitted that anything less than honesty in a licensee's dealings with the Committee brings the real estate industry into disrepute, in breach of r 6.3 of the Rules.

[69] Mr Todd submitted that when she was asked the question by the Authority's investigator, she was not sure if she had sent the Scope of Works to [ ]. He submitted that Ms Tafilipepe then asked him if he had received it, and he responded that he had not.[2] He submitted that all Ms Tafilipepe did thereafter was to pass this on to the investigator. Accordingly, he submitted, irrespective of the Tribunal's finding as to whether Ms Tafilipepe sent the Scope of Works to [ ], Ms Tafilipepe had not attempted to mislead the Committee.

[70] We have found that Ms Tafilipepe provided the Scope of Works to [ ]. However, we are not satisfied that the Committee has established on the balance of probabilities that Ms Tafilipepe's statement that her earlier statement that she had sent the Scope of Works to him was mistaken, was a deliberate attempt to mislead the Committee.

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[2] We note that at the hearing, [ ] could not recall whether he had received the Scope of Works, but said that if he did receive it, he had not read it.

Did Ms Tafilipepe breach r 6.3 of the Rules?

[71] Mr Simpson submitted that Ms Tafilipepe's conduct also amounted to conduct which would bring the industry into disrepute, in breach of r 6.3.

[72] Rule 6.3 provides that "a licensee must not engage in any conduct likely to bring the industry into disrepute". Rule 6.3 was discussed briefly in the Tribunal's decision in *Jackman v Complaints Assessment Committee 10100*,[3] where the Tribunal approved of another Committee's discussion of r 6.3 in *Re Raos*.[4] In that case the Committee described conduct that would justify a finding of a breach of r 6.3 as conduct that:

> … if known by the public generally, would lead them to think that licensees should not condone it or find it to be acceptable. Acceptance that such conduct is acceptable would … tend to lower the standing and reputation of the industry.

[73] Rule 6.3 is not tied to any other professional obligation. It is not necessary to consider it in the context of conduct that is negligent or incompetent to such a degree as to reflect on a licensee's fitness to practice. We consider solely whether the conduct is "likely to bring the industry into disrepute".

[74] We adopt the comments accepted by the Tribunal in *Jackman* and consider whether Ms Tafilipepe's conduct was such that if known by the public generally, was more likely than not to lead members of the public to think that licensees should not condone it or find it to be acceptable. The authorities set out above do not support a proposition that r 6.3 envisages conduct that is of a significantly more serious nature than conduct that may constitute a breach of other rules.

[75] We have concluded that Ms Tafilipepe's conduct, in particular in bringing [ ] to the property without properly informing Ms Cokojic as to who he was and the purpose of his being there, disclosing information to him without proper authorisation, and lying to her about [ ] in her later telephone call, was conduct that if known by the public generally, was more likely than not to lead members of the public to think that

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3 *Jackman v Complaints Assessment Committee 10100* [2011] NZREADT 31, at [65].

4 *Re Raos* Complaint No. CA4315602 [2011] NZREAA 159, at 4.39 (in that case, the Committee concluded that the relevant conduct did not breach r 6.3).

licensees should not condone it or find it to be acceptable. Accordingly, we find that the Committee has proved that Ms Tafilipepe breached r 6.3 of the Rules.

Finding on the 414 charge

[76] We have found that the Committee has proved that Ms Tafilipepe:

[a] brought [ ], a prospective purchaser, to the property without Ms Cokojic's prior consent or authority (in breach of r 6.2 of the Rules);

[b] misled Ms Cokojic as to [ ]'s purpose for attending the property (in breach of r 6.4);

[c] disclosed confidential information (the Scope of Works, Ms Cokojic's price expectation, and an oral appraisal of the property) to [ ] without Ms Cokojic's prior consent (in breach of r 6.2);

[d] marketed the property to [ ] without Ms Cokojic's written authority or agreement (in breach of r 9.6);

[e] lied to Ms Cokojic by saying that [ ] was a new licensee working with her at MPRE (in breach of r 6.4); and

[f] by her conduct, brought the real estate industry into disrepute (in breach of r 6.3).

[77] The Committee has charged Ms Tafilipepe with misconduct under s 73(a) (disgraceful conduct), with an alternative charge under s 73(c) (wilful or reckless breach of the Act or Rules).

[78] We consider first whether the charge of disgraceful conduct is made out. As the Tribunal said in *Complaints Assessment Committee 10024 v Downtown Apartments Ltd (In Liq)*:[5]

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5 *Complaints Assessment Committee10024 v Downtown Apartments Ltd (In Liq)* [2010] NZREADT 6, at [55].

> "The word disgraceful is in no sense a term of art. In accordance with the usual rules it is to be given its natural and popular meaning in the ordinary sense of the word."

[79] In his discussion of disgraceful conduct under s 73(a) in *Morton-Jones v Real Estate Agents Authority*, his Honour Justice Woodhouse said:[6]

> [29] … If the charge is under s 73(a) the critical enquiry is whether the conduct is "disgraceful". Conduct which involves a marked and serious departure from the requisite standards must be assessed as "disgraceful", rather than some other form of misconduct which may also involve a marked and serious departure from the standards. The point is more than one of semantics because s 73 refers to more than one type of misconduct. In particular, s 73(b) refers to "seriously incompetent or negligent real estate agency work". Work of that nature would also involve a marked and serious departure from particular standards; the standards to which s 73(b) is directed are those relating to competence and care in conducting real estate work.

[80] Thus, conduct charged against a licensee under s 73(a) may be found to be disgraceful (whether or not it is in the course of, or related to, real estate agency work) if it meets the ordinary meaning of "disgraceful", that is whether the licensee's conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful.

[81] We are satisfied that the Committee has proved the charge of misconduct, in respect of the element that Ms Tafilipepe lied to Ms Cokojic. We find her guilty of misconduct under s 73(a) of the Act, that is, disgraceful conduct, on that element. We are satisfied that lying to a client would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful. On the remaining elements of the 414 charge, we do not accept that Ms Tafilipepe's conduct constituted a reckless or wilful breach of the Act or Rules. However, pursuant to s 110(4) of the Act, we are satisfied that Ms Tafilipepe has engaged in unsatisfactory conduct under s 72 of the Act. We assess Ms Tafilipepe's conduct as being at the higher end of the scale of unsatisfactory conduct.

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6 *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804, at [29].

The 416 charge

[82] The 416 charge was laid on 14 August 2018, following further investigations by the Authority of Ms Tafilipepe's dealings in respect of "as is" properties, post-dating Ms Tafilipepe's dealings with Ms Cokojic. Ms Tafilipepe is charged with misconduct under s 73(c)(i) and (iii) (wilful or reckless breach of the Act or Rules), or in the alternative, seriously incompetent or seriously negligent real estate agency work.

Facts

[83] In mid-2016 the Authority received a complaint that Ms Tafilipepe had contacted the owner of a property directly, and discussed the pricing of a property with a prospective purchaser when she did not have an agency agreement in place giving her authority to do so. The complaint was referred to the Authority's Early Resolution Facilitator. On 16 September 2016, the Facilitator sent Ms Tafilipepe a "Reminder to meet your obligations as a licensee" ("the compliance letter").

[84] After summarising the complaint, the compliance letter stated:

> The Authority recommends you review your practices.
>
> Based on the information we have received, we recommend you review your practices to ensure you meet your obligations as a licensee. We recommend you familiarise yourself with Section 126 of the Real Estate Agents Act 2008, rule 9.6 and rule 9.9 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012: …

[85] After setting out s 126 of the Act (which provides that a licensee is not entitled to commission or expenses in connection with real estate agency work unless there is an agency agreement in place), and r 9.6 of the Rules (which is set out at paragraph [46], above) the compliance letter stated (in summary):

[a] the letter was not a finding of unsatisfactory conduct, and would not be recorded on the public register;

[b] a copy of the letter would be kept on Ms Tafilipepe's file along with any information she chose to provide, and the information would help the

Authority decide how to respond if another complaint about Ms Tafilipepe's professional conduct were received;

[c] a copy of the letter had been sent to the complainant and Ms Tafilipepe's manager;

[d] Ms Tafilipepe could send the Authority a reply if she wished; and

[e] if the complainant, or Ms Tafilipepe, were dissatisfied with the Authority's response they could insist that the complaint be referred to a Complaints Assessment Committee.

[86] Between 22 September 2016 and 1 March 2017, Ms Tafilipepe sent emails to [ ] and other persons on her "as is" list, giving details of eight "as is" properties, including the addresses of the properties, comparative market appraisals, and vendors' price expectations. There was no agency agreement in place for any of these properties. The Committee alleged that Ms Tafilipepe had marketed the properties without authority through a signed agency agreement.

Was Ms Tafilipepe marketing the properties?

[87] We have set out counsels' submissions and our discussion regarding the meaning of the word "market" in r 9.6 in paragraphs [48] to [60], above, in relation to the 414 charge. We found that the examples in r 9.6, of putting information on a website, or placing a sign on a property, do not exclude other forms of marketing. We also found that a broad interpretation of "marketing" is required to meet the consumer-protection purpose of the Act. We found that by sending [ ] a Scope of Works, and enabling him to be privy to Ms Cokojic's price expectations, Ms Tafilipepe was marketing the property.

[88] It is not necessary to repeat those submissions and our discussion. It follows from our discussion that Ms Tafilipepe's actions in respect of the eight properties referred to in the 416 charge amounted to marketing them to [ ] and other persons on her "as is" list. We are satisfied that Ms Tafilipepe marketed the properties.

Was an agency agreement required?

[89] There was no dispute that there was no agency agreement in place, for any of the properties. At the hearing, Ms Tafilipepe contended that a vendor's permission was sufficient for her to "see if anybody was interested in their property", and an agency agreement would not be required until she went onto the property with a buyer, or put forward offers.

[90] We reject this contention. It is not what r 9.6 says. The wording of the rule is clear: "unless authorised by a client, through an agency agreement, a licensee may not offer or market land …".

Submissions

[91] Mr Simpson submitted that Ms Tafilipepe should be found guilty of misconduct under s 73(c)(iii) of the Act: that is, that she wilfully or recklessly contravened r 9.6. He submitted that the compliance letter put Ms Tafilipepe on notice as to the need to have an agency agreement in place before offering or marketing a property, and the need to review her practice. He submitted that Ms Tafilipepe was well aware of her obligations (and confirmed this in her evidence at the hearing). However, she had ignored the Authority's specific advice, and continued to send information on "as is" properties to [ ] and others, without having an agency agreement. Mr Simpson further submitted that some of this had occurred within six to 13 days of the compliance letter.

[92] He referred to four other properties, raised in cross-examination of Ms Tafilipepe, which she had dealt with before the complaint which led to the compliance letter. Ms Tafilipepe said that she did not have an agency agreement for any of the properties, but she had "instructions from the vendors".

[93] Mr Simpson referred to the Tribunal's statement in *Summit Real Estate Limited v Real Estate Agents Authority (CAC 10012)*,[7] that the agency agreement is the cornerstone of the current Act and its regulatory regime, and is the foundation of

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[7] *Summit Real Estate Limited v Real Estate Agents Authority (CAC 10012)* [2011] NZREADT 88, at paragraphs [18]-[19].

important, substantial consumer-protection provisions. He submitted that Ms Tafilipepe's conduct in marketing the eight properties could only be regarded as a wilful breach of r 9.6, or at the least, a reckless breach, in that she had turned a blind eye to the requirements of r 9.6.

[94] Ms Tafilipepe described the compliance letter at the hearing as being in respect of a complaint that was not accurate and was "not taken through". She said that it was an allegation, not the truth. She said that "reaching out to potential buyers" is part of complying with her duties to vendors. She said that if anyone on her "as is" list expressed an interest in a property, she would "pause" so that an agency agreement could be obtained. She said there was no point in putting the cart before the horse and signing an agency agreement. It was first necessary to ascertain whether there was interest in the property.

[95] Ms Tafilipepe also said that many of the vendors of "as is" properties were "fragile" and "stressed", and did not want people coming through their properties. She said that in those cases it was in their interests that she provided information on the properties to the (limited) people on her "as is" list.

[96] Mr Todd referred to the decision of Complaints Assessment Committee 416 stating that:[8]

> It is not uncommon in the industry for prospective purchasers to view a property before a listing agreement is in place. The key point in terms of timing is ensuring that the listing agreement is signed before any negotiations take place.

[97] He also referred to the decision of Complaints Assessment Committee 405, stating that:[9]

> The Committee notes there is nothing wrong with proactive cold calling, but that does not permit, as in this case, a licensee to short circuit the process.

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8 *Re Complaint No. C20739*, 3 April 2018, at paragraph 3.1(a).
9 *Re Complaint No. C08370*, 16 February 2016, at paragraph 3.4.

[98] He submitted that these are the standards against which Ms Tafilipepe judged her behaviour. He submitted that she had operated at all times with the best interests of her clients at heart, and on the express instructions of the owners of the properties.

[99] Mr Todd further submitted that Ms Tafilipepe had not engaged in any "seriously" incompetent or "seriously" negligent conduct. He submitted that none of the vendors of the eight properties had complained, and there had been no loss or harm to any of the vendors.

Discussion

[100] We refer, first, to the compliance letter. It provides no support for Ms Tafilipepe's opinion that because the complaint was "false", "not established", and "not taken further", she was entitled to ignore it. The letter did not say that the complaint was not established, or was inaccurate. It set out the information the Authority had received and made recommendations, based on said that information.

[101] It was not for Ms Tafilipepe to decide that because she considered that the complaint allegation was inaccurate, and there was no finding against her, she was not required to comply with the compliance letter. If she considered the complaint to be unjustified, the proper course was (as recorded in the letter) to respond to the Authority accordingly. She did not do so.

[102] We reject the submission for Ms Tafilipepe that being on her "as is" list meant only that the person concerned "may" be interested in a property, such that sending information to that person was not "offering" or "marketing" a property. By definition, Ms Tafilipepe's "as is" list was of people whom she knew already had an interest in "as is" properties. Her purpose in sending the information on a particular property was to generate specific interest in that property.

[103] We do not agree with the view expressed by Complaints Assessment Committee 416 in Complaint 20739 that an agency agreement is not required before a prospective purchaser is taken through a property. Viewing allows the "viewer" to see every nuance of the property. The viewer obtains far more information than is conveyed by

information printed on a website, or placed on road signage, and written information such as a comparative market appraisal or a Scope of Works goes well beyond that level.

[104] Nor do we agree that an agency agreement is not "key" until such time as there are negotiations between a vendor and a prospective purchaser. Vendor clients are entitled to the protection provided by an agency agreement from the outset, whereas negotiations are more likely to come at a late stage of the marketing and sale process. If this is the "common" industry practice, it is contrary to purpose of the Act, and it is misconceived. Rules take precedence over industry practice.

[105] If it is the case that a vendor is fragile, or stressed, and does not want people coming through the property, then that situation can be covered in the agency agreement, pursuant to which the licensee can be instructed to market the property to a limited and particular group. We reject the submission that the fact that vendors were "fragile", and did not want people coming through their property, absolved Ms Tafilipepe from obtaining an agency agreement before she took any steps aimed at obtaining a sale.

[106] We agree with Complaints Assessment Committee 405 in Complaint C08370 that there is nothing wrong with proactive cold calling, and that it does not permit short-circuiting the requirement for an agency agreement. But what that means is that as soon as the licensee goes beyond the cold call, an agency agreement is required.

[107] We accept Ms Tafilipepe's submission, that "reaching out to potential buyers" is part of acting in her clients' best interest. However, that submission begs the question as to the existence of an agency agreement before she does so. "Reaching out to potential buyers" of a property is marketing the property, and an agency agreement must be in place before that occurs. Consent by the vendors in any other form, whether oral or written, does not constitute authority through an agency agreement.

[108] We observe that Ms Tafilipepe said in her statement of evidence that she invariably obtained written confirmation (by email) from a vendor to enter a property

before an agency agreement was signed. However, at the hearing, she said that she generally had oral agreement. We observe that, even if an emailed agreement to enter a property constituted an agency agreement, the emails Ms Tafilipepe said she was not able to retrieve would not necessarily have shown the required authority from the vendors of the eight properties listed in the 416 charge.

[109] Finally, we reject the submission that we should take into account, when considering the 416 charge, that none of the vendors of the eight properties took issue with Ms Tafilipepe's approach, and there was no evidence of any harm. Consideration of disciplinary breaches is not dependent on proof of harm.

[110] We have concluded that Ms Tafilipepe must be found guilty of misconduct under s 73(c)(iii) (wilful or reckless contravention of r 9.6) the 416 charge. She was adamant that she knew and understood the Rules. Therefore, she knew what r 9.6 provided. Further, she was reminded of the provision in the compliance letter. Yet very shortly thereafter, she contravened it by marketing properties to her "as is" list without proper authority by way of a signed agency agreement.

[111] We are not satisfied that Ms Tafilipepe acted with the intention of breaching r 9.6, but we are satisfied that even after being reminded of it, she turned a blind eye to its requirements and continued her previous marketing practice. We find that the Committee has proved that her breach of r 9.6 was reckless. That is, she knew that what she was doing was likely to breach r 9.6, but carried on with that practice regardless.

Orders

[112] We find Ms Tafilipepe guilty of misconduct as follows:

[a] misconduct under s 73(a) of the Act (disgraceful conduct) in respect of the element of lying to Ms Cokojic in the 414 charge, by saying that [ ] was an MPRE salesperson;

[b] unsatisfactory conduct under s 72 of the Act in respect of the remaining elements of the 414 charge (bringing [ ] onto the property without Ms Cokojic's consent, misleading Ms Cokojic as to his purpose in attending at the property, disclosing information as to the property to him, marketing the property to him without authority through an agency agreement, and bringing the industry into disrepute); and

[c] misconduct under s 74(c)(iii) of the Act (wilful or reckless contravention of the Act or Rules) in respect of the 416 charge (marketing properties to [ ] and others on her "as is" list without authorisation through an agency agreement).

[113] Counsel are to confer and advise the Tribunal if an oral hearing is requested for submissions as to penalty and, if so, to advise the Tribunal of an appropriate timetable for filing submissions. In the event that counsel agree that penalty may be determined on the papers, counsel are to advise the Tribunal of an appropriate timetable for filing submissions

[114] 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.

_____
Hon P J Andrews
Chairperson

_____
Ms N Dangen
Member

_____
Ms C Sandelin
Member