

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 001

READT 028/18

IN THE MATTER OF charges laid under s 91 of the Real Estate Agents Act
2008

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE 416

AGAINST INDRA PRASAD
Defendant

Hearing: 21–23 November 2018

Tribunal: Hon P J Andrews, Chairperson
Ms N Dangen, Member
Mr N O'Connor, Member

Appearances: Mr S Waalkens, on behalf of the Committee
Mr J Khan, as nominated representative of Ms
Prasad

Date of Decision: 23 January 2019

DECISION OF THE TRIBUNAL

Introduction

[1] At the time relevant to this charge Ms Prasad was engaged as a licensed salesperson at Image Realty Limited, trading as Harcourts Image Realty Limited (“the Agency”). She faces two charges brought by Complaints Assessment Committee 416:

[a] (First charge): A charge of misconduct under s 73(b) (seriously incompetent or seriously negligent real estate agency work) of the Real Estate Agents Act 2008 (“the Act”). The Committee alleges that in the course of marketing a property at Redoubt Road, Goodwood Heights, Auckland, and having become aware of an Auckland Council project which involved widening Redoubt Road, she failed to inform all potential purchasers of the road-widening by:

[i] Failing to mention it during all open homes; and/or

[ii] Failing to mention it during sales meetings or discussions with other licensees who were acting as selling agents; and/or

[iii] Failing to bring it to the attention of potential purchasers or their representatives at the auction of the property; and/or

[iv] Failing to mention it in any written information about the property provided to potential purchasers.

In the alternative to the to the first charge, the Committee submits that if the Tribunal is not satisfied that Ms Prasad is guilty of misconduct, but that she has engaged in unsatisfactory conduct, the Tribunal may make any of the orders that the Committee could make under s 93 of the Act.

[b] (Second charge): A charge of misconduct under s 73(a) (disgraceful conduct) of the Act. The Committee alleges that she retrospectively added or expanded entries to her diary relating to the marketing of the property, and to a transaction report relating to the property, so as to record that she had disclosed the road-widening project to potential purchasers and

colleagues, and had facilitated disclosure of the road-widening at the auction of the property.

Background facts

[2] Except where stated, all references are to the period from January to September 2016.

[3] The property will be affected by the Redoubt Road-Mill Road Corridor Project, pursuant to which an area of 107m² will be acquired from the front of the property to enable Redoubt Road to be widened. Notices of requirement for the acquisition were issued in October 2014. The property was listed by Ms Prasad pursuant to a listing agreement dated 11 December 2015.

[4] Ms Prasad conducted open homes from early January to 6 February 2016. During or after one of the open homes, the resident of a neighbouring property told her about the road widening.

[5] The property was sold at auction on 6 February to Mr Kamaljit Singh. Mr Chetanya Verma, another salesperson engaged at the Agency, bid at the auction on behalf of Mr Singh. Mr Singh carried out renovations on the property and it was listed for sale by Mr Verma. The property went to auction again on 2 July. The successful bidders withdrew their offer after discovering that the road-widening project affected the property.

Complaint

[6] Mr Singh raised his complaint with the Agency (through Mr Kerry Thorstensen, owner of the Agency and auctioneer for the property) in late July. Mr Thorstensen responded by email, but a subsequent formal letter of complaint to the Agency was not responded to.

[7] Mr Singh lodged a complaint with the Real Estate Agents Authority on 23 March 2017. The essence of his complaint was that Ms Prasad was aware that part of the property would be acquired for road-widening, significantly diminishing its value, but

failed to disclose this information to him or to any other person either before or after the sale of the property at auction.

[8] Mr Singh stated that he had suffered financial loss of \$160,000, made up of renovation costs of \$40,000, holding and marketing costs related to the property, and diminished property value.

[9] The Committee inquired into the complaint and determined pursuant to s 89(2)(a) of the Act that it should be considered by the Tribunal. The Committee laid charges accordingly.

Issues to be determined

[10] Determination of both charges rests on the Tribunal's decision on factual issues. In respect of the first charge, the issue is whether Ms Prasad informed all open home attendees and her fellow salespersons that part of the property was to be acquired for road widening. It is evident from the marketing material for the property that it did not include any reference to road widening. The Committee acknowledged that Ms Prasad told *some* open home attendees about it, but we are required to decide whether she told *all* attendees and salespersons.

[11] For the second charge, the issue is whether Ms Prasad added to or expanded diary entries and a "Lister Transaction Report" so as to record giving such advice. The Committee is required to prove each charge on the balance of probabilities.

Evidence

Committee

[12] Evidence was given at the hearing by Mr Singh, Mr Verma, Mr Thorstensen, Mr Dean Edmonds (sales manager at the Agency), and Mr R Jafari (an open home attendee). Each of these was cross-examined by Ms Prasad's representative, Mr Khan.

[13] In addition, the Tribunal received file notes of interviews with persons who attended open homes, Agency salespersons who attended staff sales meetings and/or

took customers to the property, a salesperson who attended the auction, the Agency's office administrator, and the neighbouring resident who told Ms Prasad about the road widening. None of these attended the hearing.

[14] Mr Singh's evidence was that he was not aware that part of the property would be acquired for road widening when he bought the property, and he was never given any written information about road widening in the paperwork provided to him. He did not inspect the property before buying it, but did not need to do so, as it was marketed as a "do up". He instructed Mr Verma to bid at the auction on his behalf, and he trusted Mr Verma to give him any information he had about the property.

[15] Mr Singh renovated the property, then listed it for sale with Mr Verma in June. He said that he learned about the road widening project after the property was auctioned, and the offer on the property fell through when the prospective purchasers found in the course of their due diligence that it would be affected by the project.

[16] He said that Ms Prasad called him about another matter "approximately a couple of days" after he found out about the road widening, and he asked her why she had not informed him about the road widening project, and if she was aware of it. Ms Prasad said she was aware of it, and had told all agents at the Agency about it. Mr Singh subsequently contacted Mr Thorstensen. Mr Thorstensen's response was that Ms Prasad had not told him that the property would be affected by the road widening project.

[17] Mr Verma's evidence was that Ms Prasad never mentioned anything about road widening to him either before, during, or after the auction, or at any sales meeting that he attended. He said that if he had known about it he would have told Mr Singh, as he knew it would influence his decision as to whether to buy the property. Mr Verma also said that there was no mention of road widening at the auction of the property.

[18] In response to evidence given by Ms Prasad, Mr Verma denied that she had told him about road widening during a visit to the property, and he said he was not present at a sales meeting where Ms Prasad said she had mentioned it. Mr Khan put to him that a video recording had been made of the auction on a salesperson's iPad.

Mr Verma's response was that video recordings might be made of auctions if there were an available salesperson to do so, but he did not recall any recording being made of this particular auction.

[19] Mr Thorstensen was Ms Prasad's supervisor at the relevant time, and the auctioneer of the property. He said that Ms Prasad never mentioned road widening at any staff sales meetings he attended during the marketing period, and he did not become aware of it until Mr Verma marketed the property for Mr Singh. He also said that he did not mention road widening at the auction, because he did not know about it. He denied that Ms Prasad told him before the auction that he should refer to road widening in his opening comments. In particular, he denied that he had made a note of a reminder by Ms Prasad to refer to it.

[20] Mr Thorstensen said that if he had known about the road widening project, alarm bells would have rung, and he would have raised it with the vendors' solicitors. He would have disclosed it, as it would have been important information for prospective purchasers to have.

[21] Ms Prasad's evidence that a video recording was made of the auction on an Agency iPad was put to Mr Thorstensen. He responded that a recording was not made, because it was conducted outside, in front of the house, and he decided that road noise on Redoubt Road was such that a recording was not feasible. He added that the second auction was recorded, as it was conducted inside the house.

[22] A recording made by Ms Prasad on her cellphone of a conversation at the Agency in late September was put to Mr Thorstensen. The recording was unclear, but appeared to be of Ms Prasad asking about a video recording of an auction, and Mr Thorstensen's response that he did not know where it was, but might be on a back-up. Mr Thorstensen said he was not aware of any recording being made, and could not recall the conversation. However, he agreed that the recording was of his voice. He suggested that his reference to a video recording of an auction may have been in relation to the second auction.

[23] Mr Edmonds' evidence was that he ran staff sales meetings at the Agency. He did not keep Minutes of the meetings. He could not recall Ms Prasad mentioning road widening at sales meetings before the auction. He was present at the auction, but could not recall there being any mention of road widening. He said that auctions may be recorded, but could not recall whether that occurred in this case.

[24] The file notes of interviews with nine attendees at open homes showed that two recalled Ms Prasad mentioning the road widening, four did not recall her mentioning it, one was certain that she had not mentioned it, and one did not recall her mentioning it but already knew about it. One did not recall attending the open home. One of the attendees, Mr Jafari, gave oral evidence. He confirmed that he did not recall Ms Prasad mentioning road widening, but said that his visit to the open home was very brief.

[25] The Tribunal also received file notes of interviews of Agency salespersons who attended sales meetings and/or took customers to the property, and a salesperson who attended the auction. All said that Ms Prasad did not say anything to them about road widening. Mr Brugger, who attended the auction, was recorded as saying that there was no mention of road widening, and that the auction was not recorded because of road noise. The Tribunal also received file notes of interviews with the Agency's office administrator, and the resident who told Ms Prasad about the road widening project.

[26] The Tribunal was also referred to the Agency's "Lister transaction report", dated 6 February, completed by Ms Prasad after the auction. The report requires a salesperson to answer questions under the following headings:

- [a] "1. What representations were made? (Future value, boundaries, fencing, subdivision etc.)". Ms Prasad left this section blank.
- [b] "2. What 3rd party advice was sought? (What, where, when, who)". Ms Prasad wrote "N/A" in this section.
- [c] "3. GST – what representations were made in respect of GST?" Ms Prasad also wrote "N/A" in this section.

[d] “4. Chattels – what representations were made about chattels, eg. condition, replacement, included/excluded?” Ms Prasad left this section blank

[e] Underneath question 4, there is a box with two columns, one headed “Date”. Ms Prasad wrote “N/A” in this column. The other heading is “Details of inspection & negotiations”. There is a subheading under this heading “First introduced to the property”. In this column, Ms Prasad wrote:

Total Do up – Told everyone of Rd widening check with MCC.
Also Chetty came to the open home. I told him the opposite people said there is Rd widening to check with the council.

[f] The final entry required is headed “Any possible problem(s) which could cause a dispute?” Ms Prasad left this section blank.

Ms Prasad

[27] Prior to the hearing, Ms Prasad filed a statement of evidence, statements of three people who attended open homes, and the names of four other people. None of these attended the hearing.

[28] Ms Prasad produced her 2016 diary, which contains diary notes for various open homes between 2 January and 6 February (recording information given to attendees), and of a staff sales meeting on 19 January (recording information given to fellow salespersons). She also referred to marketing sheets on which she said she recorded information about the road widening project. She had not referred to these previously. The Tribunal understands that the Committee has never had them.

[29] Ms Prasad said she first became aware that Redoubt Road was to be widened when an open home attendee, who lived over the road from the property, told her on 9 January. She was told that the property would, or might, be affected. She said that from that point onwards, she informed open home attendees who expressed interest in the property to do their own due diligence enquiries before the auction. She said that

the vendors had not told her about the road widening project, but added that the property was a rental, and to her knowledge the vendors had never lived there.

[30] Mr Waalkens put to her that her diary records the neighbour speaking to her on 2 January, with no record of the neighbour's information on 9 January. Her response was that she was told on 2 January, but became "fully aware of it", "for sure," on 9 January.

[31] Ms Prasad said in her statement of evidence that she informed all salespersons about the road-widening project at a staff sales meeting on 12 January. In oral evidence at the hearing, Ms Prasad said that she told salespersons about the road widening at two sales meetings, and told them to tell all their buyers about it. Mr Waalkens put to her that her diary records a sales meeting on 19 January, but not on 12 January. Her response was that she must have forgotten to record a sales meeting in her diary.

[32] Ms Prasad further said that Mr Verma came to an open home at the property on 24 January, and complained about the state of it. She said they had a "good chat" outside the property, and she told him about the road widening, how much of the property would be taken, and what the neighbours had said. She said that Mr Verma had visited the property only once, on his own. Ms Prasad also said that two other salespersons from the Agency brought buyers to the open homes. Mr Waalkens put to her that there is no note in her diary recording those visits. She responded that they did visit, and even if she did not record it in her diary, she had told them about the road widening.

[33] She also said that before the auction she telephoned the vendors' solicitors and discussed the road widening project, and asked if this should be included in the auction sale and purchase agreement. She said she was told not to put it in writing in the contract, but the auctioneer should be told to mention it at the auction. She said she reminded Mr Thorstensen to mention the road widening, and he showed her an envelope with the road widening highlighted. At the hearing she said this was an A4-size envelope, which Mr Thorstensen gave to her at the auction, and which she kept

for some time in her car, then threw out. She said that the Committee's witnesses' evidence to the contrary was not true, and they were lying.

[34] Ms Prasad also gave evidence that it was not the case that there was too much road noise to record the auction, and a recording was made by Mr Brugger, on an Agency iPad. She said she had asked the Agency to provide the recording, but the Agency said it had been deleted, or did not ever exist. She said that if it had been deleted, the recording could be retrieved. Again, her response to questions was that the Committee's witnesses were lying.

[35] The three people who gave written statements of evidence said that Ms Prasad told them about possible road widening, and to make inquiries with the Council.

[36] Ms Prasad said that Mr Singh later asked her if she knew about the road widening project, and why she had not told him about it. She said her response was that she had told Mr Verma about it, and he and everyone else in the office knew about it. She said that when she spoke to Mr Verma, and said he should have disclosed the road widening project to Mr Singh, his response was to ask why she had told Mr Singh that "we" (that is, she and Mr Verma) knew about it.

[37] Ms Prasad also referred to the discussion with Mr Thorstensen which she had recorded on her cell phone. This recording was first provided to the Authority (and the Tribunal) during the week before the hearing. She said Mr Thorstensen admitted that the auction had been recorded, and that the recording may have been deleted. Her evidence was that Mr Thorstensen and the employees of the Agency had "ganged up" and conspired against her, and were lying.

Submissions on behalf of the Committee

Disclosure

[38] With respect to the first charge (as to disclosure of the road widening project), Mr Waalkens repeated that it is not alleged that Ms Prasad completely failed to disclose the project. Rather, it is alleged that once she became aware of it, Ms Prasad had a

clear obligation to disclose it to all prospective purchasers (whether directly, in written marketing material, or by disclosure to fellow salespersons), but failed to do so.

[39] Mr Waalkens submitted that by taking 107m² from the front yard of the property, road widening would have a significant effect on its value, giving rise to a clear obligation of disclosure. He further submitted that it was not for Ms Prasad to limit disclosure to people who expressed an interest in buying the property, because a person who had not expressed such an interest might still bid at the auction. He submitted that it was vital that Ms Prasad give disclosure to all open home attendees, and fellow salespersons.

[40] Mr Waalkens acknowledged that little weight could be given to the statements of open home attendees as to what Ms Prasad said, or did not say, to them, when they had not given evidence in person. He submitted that the evidence of Mr Singh and Mr Verma was credible and reliable, and established that Ms Prasad did not disclose the road widening project to either of them. He further submitted that the evidence of Mr Thorstensen and Mr Edmonds, together with that of other salespersons at the Agency, established that she did not disclose it at staff sales meetings, or at the auction.

[41] Mr Waalkens submitted that Ms Prasad's evidence was inconsistent and unreliable, and therefore not credible. He referred to inconsistencies between her statements in response to the charge, in her interview with the Authority's investigator, her written statement of evidence, and her oral evidence at the hearing. He submitted that her oral evidence included statements she had not made earlier, were in greater detail than her earlier statements, and referred to material not referred to, or produced, earlier.

Diary notes and transaction report

[42] With respect to the second charge, Mr Waalkens submitted that Ms Prasad's diary notes and the transaction report could not be relied on in support of her contention that she had made full disclosure, because she had retrospectively made alterations and additions to the notes and the report. He submitted that Ms Prasad had the opportunity to make these additions and alterations by having her diary in her possession

throughout the period after she marketed the property, and by having unsupervised possession of the property file after Mr Singh made his complaint.

[43] With respect to the diary notes, Mr Waalkens submitted that the entries recording disclosure of the road widening project at open homes were expressed in very similar language, and in the same type of pen, but different from that used to record the occurrence of the open home. He submitted that this indicated that entries recording disclosure had all been written at the same time.

[44] He also submitted that some of the references to disclosure had been “fitted around” other entries for the same day, or entries on other days. He submitted that this indicated that they had not been made at the same time as her original records of the open homes, but were an afterthought added to support her story.

[45] Mr Waalkens further submitted that the detail about warnings given was at a greater level than that of entries elsewhere in the diary in respect of other properties, and were inconsistent with her statements during the investigation and in her formal statement of evidence.

[46] Mr Waalkens also referred to the transaction report. He submitted that although this was completed and placed on the property file for the property immediately after the auction, Ms Prasad had added to it to refer to disclosure of the road widening. He referred to the specific reference to telling “Chetty” (Mr Verma) about the road widening when he came to an open home. Mr Waalkens submitted that Ms Prasad added to the transaction report when she obtained the property file from the Agency’s administration manager in August 2016, and had unsupervised possession of it for a short while.

[47] Mr Waalkens submitted for the Committee that the Tribunal should reject Ms Prasad’s evidence that there was some sort of conspiracy against her, and that the Agency employees had lied in their evidence.

Submissions on behalf of Ms Prasad

Disclosure

[48] Mr Khan submitted for Ms Prasad that although more of the open home attendees had said that she did not mention road widening (or did not recall her doing so), than those who said she had mentioned it, it was open to the Tribunal to make its own assessment of the evidence.

[49] Regarding Ms Prasad's disclosure to her fellow salespersons, Mr Khan submitted that the statements of salespersons who did not give evidence at the hearing, so could not be cross-examined, should be disregarded. He submitted that the only evidence for the Committee that could be considered is that of Mr Verma, Mr Thorstensen, and Mr Edmonds.

[50] Mr Khan submitted that Ms Prasad's evidence should be preferred over Mr Verma's, and the Tribunal should find that Mr Verma made one visit to the property, at the end of an open home, they were inside the property briefly, then spoke outside, at which time Ms Prasad talked about road widening. He further submitted that Mr Verma did not indicate to Ms Prasad that he would be bidding at the auction on behalf of Mr Singh, and no indication was given at the auction itself that he would be bidding.

[51] Mr Khan also submitted that Mr Verma was inconsistent in his evidence. He submitted that while Mr Verma said in evidence in chief that he had been to the property once, alone, he said in cross-examination that he had had "a couple of visits to the property", then that he had visited it twice, once with Mr Singh and once immediately before the auction, then that he had visited the property with Mr Singh and spoke with the tenant (who would not allow them into the property). He submitted that Mr Verma's evidence was contrary to Mr Singh's evidence that he did not visit the property, but relied on Mr Verma.

[52] Mr Khan submitted that nothing came out of Mr Verma's evidence with any certainty, and it was therefore not credible and not reliable. Mr Khan also submitted

that Mr Verma had not complied with his obligations to Mr Singh, and was irresponsible: he had not made any enquiries concerning the property before bidding at the auction on Mr Singh's behalf.

[53] Mr Khan submitted that Mr Thorstensen's responses to questions put to him in cross-examination were for the most part that he "could not recall", he "did not know", or "it was a long time ago". He submitted that there was no certainty in Mr Thorstensen's evidence, and it could not be relied on. Similarly, he submitted that Mr Edmonds' answers to questions from the Tribunal and in cross-examination were that he "could not remember", he "could not recall", and that he had "only a vague recollection". Mr Khan submitted that Mr Edmonds' evidence was unreliable and of no assistance to the Tribunal.

Diary notes and transaction report

[54] Mr Khan submitted that no one present at the hearing was an expert on handwriting, and there should have been independent evidence presented for the Committee. He submitted that in the absence of any such evidence, it could not be said that the entries were not made at the same time as the events being recorded.

General submissions

[55] Mr Khan submitted that there could have been a conspiracy against Ms Prasad. He submitted that in view of the fact that Mr Singh's complaint came at about the time that the Agency was closing, the company would have feared that claims against it would affect it. He submitted that the Agency and its salespersons had "plenty to lose" and would all stick together. He submitted that, whatever impact there might have been for the company, Ms Prasad's career would be detrimentally affected.

[56] Mr Khan also submitted that the investigation was one-sided, and the investigator accepted throughout what he was told by the Agency and its salespersons. He submitted that efforts had been made by the Agency to quieten Ms Prasad down, because the potential effect of the complaint and the investigation was more important to it than the effect on Ms Prasad. He acknowledged that there may have been "some

guilt” on Ms Prasad’s part, but submitted that it was not to the extent of the charges against her.

Discussion

Disclosure

[57] We address, first, the evidence for the Committee.

[58] The investigator’s notes of his telephone discussions with open home attendees indicate that there is evidence that Ms Prasad did not tell at least one of them about the road widening. His notes of discussions with other salespersons indicate that Ms Prasad did not tell them about the road widening, at a sales meeting or at any other time. With the exception of Mr Jafari (an open home attendee), none of these people gave evidence at the hearing.

[59] Pursuant to s 109 of the Act, we may:

... receive as evidence any statement, document, information, or matter that may, in its opinion, assist it to deal effectively with the matters before it, whether or not that statement, document, information, or matter would be admissible in a court of law.

[60] Section 109 is subject to s 105, pursuant to which the Tribunal must comply with the rules of natural justice. In this case, except for Mr Jafari, we only had the investigator’s brief notes. We did not have statements of evidence from any of the attendees and salespersons. There was no opportunity for any of them to be cross-examined. We have concluded that we should disregard that evidence. The only evidence that we can give weight to and take into account is that of Mr Singh, Mr Verma, Mr Thorstensen, Mr Edmonds, and Mr Jafari, and that of Ms Prasad.

[61] Mr Singh trusted and relied on Mr Verma to give him any relevant information about the property. It was not suggested that he was given any information by Ms Prasad, directly. We accept his evidence that he did not know about the road widening project until he marketed the property for sale after renovating it.

[62] We accept Mr Verma's evidence that he would have told Mr Singh (a purchaser customer) about the road widening project, if Ms Prasad told him about it. He was acting in Mr Singh's interests, and it was significant information Mr Singh needed to have before deciding whether to instruct him to bid at the auction. He was out of New Zealand on the day that Ms Prasad said she told salespersons about the road widening and we do not consider that Ms Prasad's detailed diary note of telling Mr Verma about the road widening at the property on 24 January can be relied on to establish that he was told in person. The fact that Mr Singh bought the property not knowing of the road widening project supports Mr Verma's evidence that Ms Prasad did not tell him about it.

[63] With regard to Mr Thorstensen's evidence, we accept that alarm bells would have rung immediately if he had been told that a property he was about to sell at auction was subject to a project that would result in the acquisition of a significant part of the property for road widening. We accept his evidence that such information could not be ignored, and he would have discussed the matter with Ms Prasad, as her supervisor, and he would have contacted the owners of the property and their solicitors. That he did not do so supports his evidence that Ms Prasad did not mention the road widening project to him.

[64] The issue of whether the auction was recorded on an Agency iPad was canvassed in detail at the hearing. There was no dispute that the auction was held outside the house. We accept Mr Thorstensen's evidence that it was not recorded, because the surrounding road noise made it not feasible. We cannot give Ms Prasad's recording of a discussion on her cellphone any weight. It was not clear enough to establish exactly what was put to Mr Thorstensen, and what his response was.

[65] Mr Edmonds' and Mr Jafari's evidence was of little assistance. While he said he "ran the sales meetings", Mr Edmonds did not take any Minutes of them, and he could not specifically recall the meeting at which Ms Prasad said she informed salespersons of the road widening. Likewise, his evidence that he could not recall the auction being recorded was of little assistance. Mr Jafari was at the open home for only a short time, and could not give reliable evidence as to what Ms Prasad said, or did not say.

[66] We turn to Ms Prasad's evidence that she told open home attendees and fellow salespersons about the road widening project. She relied on entries in her diary in support of her evidence.

[67] Mr Waalkens referred us to the Tribunal's decision in *Complaints Assessment Committee 409 v Rankin*.¹ In that case, the licensee was found guilty of misconduct in respect of a failure to advise prospective purchasers that the property they were interested in buying (and did buy) had failed a test for methamphetamine contamination. He failed both to advise them orally, and to disclose a written report he had received.

[68] The licensee referred to his diary entries for the relevant transaction. The Tribunal found that it could not rely on the diary notes as support for the licensee's evidence, because of inconsistencies between the diary notes and other evidence given by the licensee.²

[69] In the present case, the Tribunal is faced with evidence on behalf of the Committee that Ms Prasad did not tell all open home attendees, and all salespersons at the Agency, about the road widening. Ms Prasad contends that she did, and refers to her diary notes as supporting her contention. As was the case in *Rankin*, we are required to decide whether we can rely on Ms Prasad's diary notes as supporting evidence.

[70] Ms Prasad said in evidence at the hearing that she always made notes of her open homes in her diary immediately at the end of the open home or, if she were busy, the following day. She said she wrote everything down, and further said that her diary entries were always accurate. Having examined Ms Prasad's diary notes, we have identified a number of matters which cause us concern as to the reliability of the diary:

[a] Ms Prasad, and the vendors' solicitors, told the investigator that the vendors did not know about the road widening project when the property was listed. There is no record of Ms Prasad advising the vendors of her

¹ *Complaints Assessment Committee 409 v Rankin* [2017] NZREADT 59.

² At paragraph [50].

having learned about it. Road widening, and the consequent loss of 107m² from the property, would inevitably have a significant impact on the sale price. This clearly gave rise to an obligation of disclosure. We would have expected that Ms Prasad would have advised her vendors immediately upon learning of the road widening project, sought their urgent instructions as to how to proceed with marketing the property, and would have recorded her discussion with them. There is no record of Ms Prasad having done this.

- [b] The diary refers to a neighbour having advised Ms Prasad of the road widening on 2 January. However, she said in her statement of evidence that the neighbour told her on 9 January. At the hearing, Ms Prasad said the neighbour first told her about road widening on 2 January, then she found out “for sure on” 9 January. The diary has no record of finding out “for sure” on 9 January.
- [c] Ms Prasad said in evidence that she told fellow salespersons about the road widening project at a sales meeting on 12 January. Her diary records “day off” for each day in the period 11 to 15 January. However, there is a sales meeting recorded on 19 January.
- [d] There is a specific, detailed, reference in the diary entry for 24 January to telling Mr Verma about the road widening project. On that date Ms Prasad did not know he would be the successful bidder at the auction, on behalf of Mr Singh. We could find no other record of disclosure to specific salespersons who brought buyers to the property.
- [e] The diary has entries on 3 and 4 May describing, in detail, discussions with Mr Singh and Mr Verma about disclosure of the road widening project. At that date, no issue as to disclosure had arisen, as Mr Singh did not market the property until two months later.
- [f] In each of the diary entries for 2, 9, 16, and 21 January the word “may” appears to be written over another word or, in one case, the word “might”

appears to be written over another word. We find it unusual that the same correction is made in each of these entries.

[71] In the light of the issues referred to above, we do not find the diary notes to be a reliable record of Ms Prasad having informed all open home attendees, and all fellow salespersons at the Agency, of the road widening project.

[72] Having accepted the evidence of Mr Singh, Mr Verma, and Mr Thorstensen, it follows that we do not accept Ms Prasad's evidence that she informed all attendees at open homes, and all salespersons in the Agency (in particular, Mr Verma) about the road widening.

[73] It is evident from the marketing material that no written advice of the road widening was given. Ms Prasad's evidence that she told anyone who expressed an interest in buying the property does not establish that she told everyone. We accept Mr Waalkens' submission that it was not for her to select who should be informed. As he submitted, the significance of the effect of the road widening project on the property made it vital that anyone who came to an open home, and anyone who might develop an interest in the property, was fully informed about it.

[74] We find that Ms Prasad failed to inform all attendees at open homes, and all her fellow salespersons, about the planned road widening. In light of the seriousness of the effect of the road widening project, the failure to give full disclosure must be regarded as seriously incompetent or seriously negligent real estate agency work. We find Ms Prasad guilty of misconduct on the first charge.

Diary entries and transaction report

[75] Mr Waalkens submitted that the entries recording disclosure of road widening (that she "told everyone") appear to be entered in the same type of pen, but different from that used for the entry recording that the open home was to be, or had been, conducted. Mr Waalkens also submitted that entries appeared to have been "squashed in" around other entries recording matters around the times of open homes.

[76] From our own perusal of the original diary, while it appears that some of the records of disclosure have been made with the same type of pen, but different from that used for the record of the open home itself, that is not the case in all entries of disclosure. Further, it appears that there are entries, not related to the property, where Ms Prasad has written in a similar manner, and with, in each case, what appears to be a different type of pen from that used for the record of an associated appointment.

[77] Accordingly, we are not persuaded that the type of pen and language used is conclusive as to the diary entries recording information given of the road widening project. However, the entries show a consistency in the detail of the record of information given to open home attendees, and the manner in which it is recorded, that may be taken into account when considering whether the diary records were added at a later time rather than at, or shortly after, the open homes.

[78] Mr Waalkens also submitted that the transaction report was added to, in order to record that Ms Prasad told Mr Verma about the road widening project. Mr Waalkens referred to section 1 of the report, which requires a salesperson to set out any representations made, which Ms Prasad left blank. He submitted that if, as Ms Prasad contends, she told Mr Verma about the road widening project, it would be expected that she would have recorded this on the transaction report when she completed it after the auction. She did not do so. The statement that she told Mr Verma that the neighbour had told her about the road widening is set out in the “Details of inspection and negotiations” section.

[79] Ms Prasad denied having altered anything on the property file. She said that the transaction report was completed at the time of the sale of the property. She further said that the office administrator (whose evidence was that Ms Prasad asked for the file but did not say what she wanted it for) knew that every time the Agency paid her commission she would see and copy her commission sheets from the file, and this occasion was no different from any other.

[80] We have perused the original of the transaction report. It appears to us that the entry recording that Ms Prasad had “told everyone of Rd widening” and that Mr Verma “came to the open home [and] I told him as well” has been written with a different pen

from that used for the words “Total Do-up”, which appears to be the same as that used for other entries on the form (including Ms Prasad’s signature).

[81] Further, Ms Prasad’s evidence was that other salespersons brought customers to open homes, and there is no reference to their having done so, or that she told them about the road widening project. The record is of information given to Mr Verma, only.

[82] As at the date of the transaction report (6 February), no issue had been raised as to road widening affecting the property. On Ms Prasad’s evidence, everyone had been told about it, including other salespersons, and Mr Thorstensen had mentioned it at the auction. It is apparent on the face of the transaction report that Ms Prasad did not at that time consider it necessary, or appropriate, to record having given open home attendees, and fellow salespersons, information as to the road widening project. Likewise, there would be no reason for considering it necessary, or appropriate, at that time to record providing that information to open home attendees in general, and Mr Verma in particular, in the “Details of inspection & negotiations” section.

[83] We are conscious that we have not received any expert hand-writing evidence in relation to the diary entries or the transaction report. However, there was no dispute that Ms Prasad wrote the entries, and the transaction report, and it may be that expert evidence may not have assisted the Tribunal to determine whether the references to road widening were written immediately after an open home, or the auction, or at a later time.

[84] However, the consistency of the entries recording information given to open home attendees regarding the road widening project, and the specific records as to informing Mr Verma, at a time when she would not have been alerted to any issue regarding disclosure, leads us to conclude on the balance of probabilities that both the diary entries and the transaction report have been added to after Ms Prasad became aware of Mr Singh’s complaint.

[85] Section 73(a) of the Act provides:

Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful

[86] As the Tribunal said in *Complaints Assessment Committee 10024 v Downtown Apartments Ltd (In Liq)*:³

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.

[87] In considering the charge against Ms Prasad, we refer to the Tribunal's discussion of disgraceful conduct in the judgment of his Honour Justice Woodhouse in *Morton-Jones v Real Estate Agents Authority*, in particular, his Honour's discussion of s 73(a) of the Act.⁴ His Honour said:⁵

... 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.

His Honour went on to say that:⁶

"If the work was not real estate agency work, but the person doing the work was a licensee, the appropriate provision for a charge would be s.73(a).

[88] When determining whether conduct would reasonably be regarded as disgraceful by agents of good standing, the Tribunal takes into consideration the standards that an

³ *Complaints Assessment Committee 10024 v Downtown Apartments Ltd (In Liq)* [2010] NZREADT 6, at paragraph [55].

⁴ *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804.

⁵ At paragraph [29].

⁶ At paragraph [30].

agent of good standing should aspire to, including any special knowledge, skill, training or experience such person may have. The standard of proof required before the Tribunal can find a charge under s 73(a) proved is the balance of probabilities.⁷

[89] It is clear from *Morton-Jones* that it is important not to conflate the two separate issues of liability (whether the conduct was disgraceful) and penalty (the consequences of a finding that conduct was disgraceful), which must be considered in dealing with a charge under s 73(a). The proper approach is that the Tribunal must:

- [a] First consider whether the licensee's conduct was disgraceful, then
- [b] Secondly, if such a finding is made, consider whether the found conduct affects the licensee's fitness to hold a licence (see s 36(1)(c) of the Act and (for example) the Tribunal's decision in *Revill v Registrar*).⁸ This enquiry is properly undertaken at the penalty stage.

[90] We accept Mr Waalkens' submission that Ms Prasad added to her diary entries and the transaction report for the purpose of supporting her contention that she "told everyone" (and Mr Verma in particular) about the road widening project, when she learned of Mr Singh's complaint. We also accept his submission that her conduct in doing so would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[91] We are satisfied that the Committee has proved the second charge against Ms Prasad, and find her guilty of disgraceful conduct.

Orders

[92] We find Ms Prasad guilty of misconduct under s 73(b) of the Real Estate Agents Act 2008 on the first charge. We find Ms Prasad guilty of misconduct under s 73(a) of the Act on the second charge.

⁷ Pursuant to s 110(1) of the Act.

⁸ *Revill v Registrar* [2011] NZREADT 41.

[93] Submissions as to penalty on behalf of the Committee are to be filed and served no later than **1 February 2019**. Submissions by or on behalf of Ms Prasad are to be filed and served no later than **22 February 2019**. The parties are to advise the Tribunal in their respective submissions whether a hearing is sought for oral submissions as to penalty to be given, or if penalty may be determined on the papers. The Tribunal has set aside **27-29 March 2019** for a penalty hearing, if one is required.

[94] 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

Mr N O'Connor
Member