BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 18

READT 028/2020

IN THE MATTER OF	a charge laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 1905
AGAINST	DARREN BRADY Defendant
Hearing:	24-25 March 2021, at Auckland
Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin, Member Ms F Mathieson, Member
Appearances:	Mr S Waalkens, on behalf of the Committee Mr R Hargreaves and Ms H Bowering-Scott, on behalf of Mr Brady
Date of Decision:	28 April 2021

DECISION OF THE TRIBUNAL

Introduction

[1] Complaints Assessment Committee 1905 ("the Committee") has charged Mr Brady with one charge of misconduct under s 73(b) of the Real Estate Agents Act 2008 ("the Act").

Agreed facts

[2] The Tribunal was provided with an Agreed Summary of Facts. In summary:

[a] Mr Brady is a licensed agent engaged at Harvey's Real Estate Papakura ("the Agency"). He has a professional relationship with Mr Charles Ma, who is a property developer and director of Karaka & Drury Ltd ("K&D"). K&D is engaged in the substantial "Auranga" development near Drury. Prior to 2016, Mr Brady had acted for Mr Ma and K&D in multiple property transactions.

[b] In July 2016 Mr Brady, acting on behalf of Mr Ma, approached the owners ("vendors") of the property at 389 Bremner Rd ("the property") to ascertain if they wished to sell it to K&D. He had been introduced to them following his having acquired a neighbouring property at 415 Bremner Road for K&D. Mr Brady presented the vendors with offers by K&D to buy the property in August 2016, February 2017, May 2017, and early June 2017. With the exception of the offer presented in May 2017 (which was in response to an invitation to tender from the vendors) the offers were presented on Agreements for Sale and Purchase that recorded the Agency's name and Mr Brady as manager and salesperson in the "sale by" section.

[c] On 27 June 2017, the vendors entered into a sole agency agreement with Bayleys Real Estate Limited ("Bayleys") to sell the property by tender. The property was listed by Bayleys on or around 6 July 2017. Shortly thereafter, Mr Brady entered into an oral conjunctional arrangement with Bayleys pursuant to which he would receive a share of the commission on

the sale if the property were sold to a purchaser introduced by him ("the conjunctional arrangement").

[d] On behalf of K&D Mr Brady presented a further offer to buy the property to the vendors, through Bayleys. The offer, for $4 million (inclusive of GST), was accepted on 6 September 2017 and settlement was to be completed on 2 April 2018. The purchaser was recorded on the Agreement for Sale and Purchase as "Karaka and Drury Limited and/or nominee".

[e] On 20 March 2018, K&D entered into a Deed of Nomination with Marmitmor Limited ("Marmitmor"), of which Mr Brady is the sole director and a 50 percent shareholder, pursuant to which Marmitmor became the purchaser of the property. Marmitmor's purchase of the property was settled on 4 April 2018.

[f] Mr Brady did not obtain the vendors' informed consent in the prescribed form for Marmitmor to become the purchaser of the property, as is required by s 134 of the Act, and did not provide the vendors with an independent valuation of the property, as is required by s 135 of the Act.

[g] Mr Brady retained his share of the commission ($26,850 plus GST) paid in respect of the sale of the property.

[3] On 26 November 2018 the Authority received an anonymous complaint about Mr Brady's conduct, as to whether the purchase by Marmitmor was "within the rules".

The charge

[4] The charge of misconduct under s 73(b) of the Act alleged that in accepting the nomination to Marmitmor, completing Marmitmor's purchase of the property, and taking a commission on the sale, Mr Brady breached ss 134 and 135 of the Act, and rr 5.1, 6.1, 6.2, 6.3, 9.1, and 9.14 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"). In the alternative, the Committee alleged that if the Tribunal were not satisfied that Mr Brady is guilty of misconduct, it could

find that he had engaged in unsatisfactory conduct (under s 72 of the Act). Particulars of the alleged breaches by Mr Brady may be summarised as follows:

[a] s 134: failing to obtain the vendors' informed consent, in the prescribed form, to Marmitmor's acquisition of the property;

[b] s 135: failing to provide the vendors with an independent valuation of the property, before seeking their consent;

[c] r 5.1: failing to recognise and comply with his professional obligations when Marmitmor was nominated as purchaser, failing to obtain an agency agreement with K&D, and failing to recognise his professional obligations as a buyer's agent when acting for K&D and becoming also the vendors' agent when he entered into the conjunctional arrangement;

[d] r 6.1: failing to comply with his fiduciary obligations, by acting in a position of conflict by presenting offers to the vendors when he was also agent for K&D, entering into the conjunctional arrangement while acting as K&D's agent, entering into the Deed of Nomination and failing to inform the vendors of the nature and extent of the conflict, and obtaining a benefit from the transaction without the vendors' informed consent;

[e] r 6.2: failing to act in good faith and deal fairly with all parties to the transaction, by representing himself as agent for the vendors in Agreements for Sale and Purchase whilst also being the agent for K&D;

[f] r 6.3: engaging in conduct likely to bring the industry into disrepute, by acting so as to obtain legal ownership of the property for Marmitmor without complying with his obligations under the Act, retaining commission in circumstances when he had acted in breach of ss 134 and 135, representing himself as being agent for the vendors without an agency agreement and while also being the agent for K&D, and acting as agent for both the vendors and K&D at the same time;

[g] r 9.1: failing to act in the best interests of his clients (the vendors and K&D), by acting in a position of conflict, failing to inform K&D of the nature and extent of the conflict when representing himself as the vendors' agent when presenting offers to the vendors, failing to fully inform the vendors when becoming their agent that he was acting for K&D, purchasing the property through Marmitmor without obtaining the vendors' informed consent or providing the required independent valuation, and retaining commission after acquiring the property; and

[h] r 9.14: acting in a capacity that would attract more than one commission in the same transaction, by entering into the conjunctional arrangement when he was entitled to ask for commission from K&D for the services provided as buyer's agent for K&D.

[5] In his response to the charge, Mr Brady denied that he had engaged in either misconduct or unsatisfactory conduct. At the hearing, Mr Brady acknowledged that he had breached ss 134 and 135, and that he had engaged in unsatisfactory conduct, but denied the charge of misconduct.

Evidence

[6] The Tribunal heard evidence from Mr Peter Sullivan (licensed salesperson at Bayleys) who was the listing and selling agent for the property, Mr Rangi Callahan (Authority investigator), Mr Brady, and Mr Ma. Written statements of evidence were filed for each witness and they were available for cross-examination.

[7] Mr Sullivan said that during Bayley's marketing of the property, he was approached by Mr Brady who said he was representing Mr Ma of K&D, a prospective purchaser. Mr Sullivan said that Bayleys had acted on other transactions involving Mr Brady and Mr Ma, and that all dealings in the transactions were through Mr Brady. He said that he and Mr Brady agreed orally that if K&D bought the property, Mr Brady would be paid a share of the commission paid by the vendors, as part of a conjunctional arrangement. This was later confirmed by email.

[8] Mr Sullivan further said that throughout the transaction, he understood that the purchaser of the property was to be Mr Ma, through K&D. He said he did not find out until after settlement (when he was contacted by the Authority) that Mr Brady had purchased the property through Marmitmor. In answer to questions in cross-examination, Mr Sullivan accepted that once an agreement for sale and purchase becomes unconditional, the transaction moves out of his hands, and he would not expect to be told if there is a change. However, he also said that if he had been told that Mr Brady had become involved as purchaser, he would have recalled the commission paid to him.

[9] Mr Callahan's evidence was as to his investigation of the complaint, involving enquiries of the vendors (through their solicitor), Mr Sullivan, and Mr Brady. We record his evidence that the vendors did not want to be involved in the charges.

[10] Mr Brady said he had been chosen to join Mr Ma's team some six years ago. He said he had helped Mr Ma and K&D with acquisitions of property (for which he did not charge a fee), and had acted on the sale of numerous properties (for which he charged commission), although he was not the sole selling agent for Auranga. He said he and the Agency also had a role as a conduit for engagement by K&D with the local community, which involved working with local groups such as schools, Lions Clubs, gardening groups, and walking groups, in relation to the Auranga development.

[11] Mr Brady said that for the purchase of the property, there was no "buyers' agency agreement" with Mr Ma or K&D. He said that up until the time he entered into the conjunctional arrangement he was acting personally on behalf of Mr Ma to try and facilitate his purchase of the property.

[12] As to Marmitmor becoming the nominated purchaser of the property, Mr Brady said that after entering into the Agreement for Sale and Purchase, K&D attempted to organise the finance required, but was unable to. He said Mr Ma approached a number of people he thought might be able to settle the transaction. He said Marmitmor potentially had the ability to obtain finance, and on 27 February 2018 he applied to his bank for finance. This was approved on 20 March and documented on 29 March 2019.

After receiving confirmation from the bank, he and Mr Ma agreed that Marmitmor would take a nomination of the Agreement for Sale and Purchase.

[13] Mr Brady said that "this was all communicated to the vendors directly or via the solicitors". He said further that discussions with the vendors were focussed on the settlement date, which was "complicated" by the Easter break. The discussions ended with agreement that interest for late settlement would be paid for the period from 29 March to 2 April 2018. He noted that the day after settlement, one of the vendors emailed the owner of a neighbouring property, asking that the neighbour invoice Mr Brady for the use of water. He said this showed that the vendors were aware that his company was the purchaser of the property. He received payment of his commission share 10-15 days after settlement.

[14] Mr Brady's evidence was that at all times he was "doing my best to ensure that everyone was happy". He said the vendors negotiated a purchase price that was agreeable to them, the vendors had a valuation report which was guiding their acceptable sale price, and no one wanted the sale to fall through. He also said that he never intended to be the purchaser and at the time Mr Ma and the vendors signed the Agreement for Sale and Purchase he did not know there was even a possibility that the transaction would result in Marmitmor acquiring the property. He further said that all parties were very aware that he was the director of Marmitmor, the nominated purchaser.

[15] In answer to questions in cross-examination, Mr Brady accepted that he had acted in his capacity as a real estate agent on K&D's purchase of the neighbouring property at 415 Bremner Rd, which also involved a conjunctional arrangement with Bayleys. In respect of the present case, Mr Brady accepted that he was working as a real estate agent in relation to that purchase by K&D and the purchase of the property, but maintained that that was only after the conjunctional arrangement was entered into.

[16] Mr Brady accepted that where he had acted to facilitate K&D's acquisition of properties he stood to obtain benefits as a result of being appointed selling agent "down the line" later, and that he also stood to gain and did receive benefits "in the endgame"

from other business interests with Mr Ma (such as running the Auranga Residents' Society).

[17] He also accepted that he had not thought of getting the vendors' consent to the nomination of Marmitmor, providing an independent valuation, or repaying the commission paid to him, and that he had not told the vendors that they were, in the circumstances, entitled to cancel the Agreement for Sale and Purchase. He accepted that he should have done all of those things. He said it was an error of judgment or careless, but he believed everyone was aware what was happening, and no one was unhappy about it. He did not accept that his conduct went beyond simple carelessness.

[18] Mr Ma said he asked Mr Brady to approach the owners of the property as it adjoined another property he had purchased, and was important for its access to the coast. He was also interested in building a home for himself at the rear of the property. He said it was always intended that K&D would be the purchaser of the property, but by February 2018 it became obvious that K&D would not be able to complete the purchase. He said he unsuccessfully approached a number of parties to see if someone else could settle it, then approached Mr Brady. He said it became evident that Marmitmor had the ability to facilitate settlement, and Mr Brady agreed to accept the nomination. He said "it all happened at short notice".

[19] Mr Ma said he had had a "long and trusting relationship" with Mr Brady. Mr Brady was in his "trusted circle", and he discussed confidential matters with him. He accepted that he had described Mr Brady as "our agent" in a communication to the Authority, but said he did not mean that in the sense of being a "real estate agent", and he did not have a commercial contract with Mr Brady in respect of acquisitions of property. He said Mr Brady had approached landowners on K&D's behalf to purchase property, but he made it clear to Mr Brady that he would not be paid for this work.

[20] Mr Ma was not aware that Mr Brady had a conjunctional arrangement in respect of the property, or that he been paid a commission on the purchase of the property. He considered that Mr Brady achieved a fair price for the property.

Submissions

[21] On behalf of the Committee, Mr Waalkens submitted that in the light of Mr Brady's acknowledgement of having breached ss 134 and 135 of the Act, the issues for determination are whether Mr Brady was carrying out real estate agency work prior to the conjunctional arrangement, whether he failed to comply with rr 5.1, 6.1, 6.2, 6.3, 9.1 and/or 9.14, and whether his conduct amounts to seriously incompetent or seriously negligent real estate agency work.

[22] Mr Waalkens submitted that it is clear that at all times Mr Brady was carrying out real estate agency work for Mr Ma and K&D. He referred to the evidence of his professional agent-client relationship with Mr Ma in the course of which he had provided real estate services in the past, his having liaised with Mr Ma in respect of the property for well over a year and presented purchase offers on Agency-branded forms, on which he was recorded as manager and salesperson, shown Mr Ma the property, and engaged in correspondence with the vendors and their solicitors concerning the offers. He also referred to Mr Ma having referred to Mr Brady as "our agent" in correspondence on K&D letterhead, during the Authority's investigation of the complaint.

[23] He submitted that Mr Brady accepted that he was carrying out real estate agency work as from when he entered into the conjunctional arrangement, but the Tribunal should have no difficulty in finding that Mr Brady had carried out real estate agency work for the vendors and Mr Ma prior to the conjunctional arrangement. He submitted that Mr Brady's submission that he was not carrying out real estate agency work prior to the conjunctional arrangement (on the grounds that there was no agreement that he would be paid) could not succeed, as whether or not a licensee is to be paid is not determinative of whether there is "real estate agency work".[1] He submitted that the focus must be on what Mr Brady did, and the evidence showed that he provided real estate agency services.

[24] Mr Waalkens acknowledged that the allegations of breaches of the Rules to some extent overlap with each other, and with the allegations of breaches of ss 134 and 135.

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1 Citing *Edinburgh Realty Ltd v Sievwright* [2016] NZHC 2898.

He submitted that the breaches were established by Mr Brady's failure to obtain a buyer's agency agreement with K&D, his having allowed himself to be in a conflict of interest by acting at the same time for K&D and the vendors and failing to comply with his fiduciary obligations to both clients, and failing to fully inform the vendors of the nature and extent of the conflict when he entered into the Deed of Nomination.

[25] Mr Waalkens submitted that Mr Brady's conduct is more than a mere failure to comply with the formal requirements of ss 134 and 135, as he failed to follow the correct procedure to bring the conflict of interest to the vendors' attention prior to settlement, and failed to explain (in writing) that as his company Marmitmor was to become the nominated purchaser, he would be in a conflict by being a related person securing a benefit (legal title to the property).

[26] He further submitted that Mr Brady's conduct in acting with no agency agreements, acquiring legal title to a client's property while retaining commission, and failing to advise the vendors of the proposed nomination or of K&D's inability to complete the sale is completely at odds with his professional obligations as a licensee, and this conduct is likely to bring the industry into disrepute, in breach of r 6.3

[27] Mr Waalkens submitted that Mr Brady's conduct clearly amounts to seriously incompetent or seriously negligent real estate agency work, and thus misconduct. He acquired (through Marmitmor) his client's property. Mr Waalkens submitted that this is a most serious breach of a licensee's fundamental disclosure obligations. He referred to the Tribunal's decisions in *Complaints Assessment Committee 414 v Goyal*,[2] *Complaints Assessment Committee 403 v Zhang*,[3] *Complaints Assessment Committee v Reed*,[4] *Complaints Assessment Committee 412 v Manvinder Singh*,[5] and *Complaints Assessment Committee 402 v Dunham*.[6]

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2 *Complaints Assessment Committee 414 v Goyal* [2017] NZREADT 58.
3 *Complaints Assessment Committee 403 v Zhang* [2018] NZREADT 30.
4 *Complaints Assessment Committee v Reed* [2017] NZREADT 6.
5 *Complaints Assessment Committee 412 v Manvinder Singh* [2019] NZREADT 4.
6 *Complaints Assessment Committee 402 v Dunham* [2016] NZREADT 26.

[28] He submitted that on the authority of these decisions, a finding of "seriously incompetent or seriously negligent real estate agency work" is justified. He submitted that as an experienced salesperson , Mr Brady would have had a good awareness of his professional obligations, and a licensee's acquisition of a client's property is the most obvious area of conflict in real estate transactions. He submitted that this conflict was one that should clearly have been recognised.

[29] Mr Hargreaves advised the Tribunal that he had instructions from Mr Brady that he would return to Bayleys the full amount of the commission he received.

[30] He submitted for Mr Brady that a failure to comply with ss 134 and 135 does not always amount to seriously incompetent or seriously negligent conduct (and therefore misconduct), and should not do so in this case. He referred to Mr Brady's acknowledgement that he had made an error of judgment, and fallen short of the standards expected of licensees, and submitted that a finding of unsatisfactory conduct would be at the correct level of seriousness.

[31] He also submitted that Mr Brady had made a limited acknowledgement that he had seen how it could be said that at the point where he approached the vendors and introduced Mr Ma to the property, he was undertaking real estate agency work. He invited the Tribunal to make its own finding as to the extent of Mr Brady's real estate agency work. He submitted that Mr Brady should be found to have engaged in unsatisfactory conduct at a "higher" level, but not found guilty of misconduct.

[32] Mr Hargreaves submitted that Mr Brady did not consider that he was carrying out real estate agency work when he approached the vendors on behalf of K&D. Rather, he considered it to be a personal engagement for the Auranga development, and no commission was to be paid to him. In particular, he submitted that Mr Brady's work was not "in trade", and it was general assistance to locate and negotiate with potential buyers.

[33] He also submitted that Mr Ma's reference to Mr Brady as "our agent" was not an acknowledgement that he was carrying out real estate agency work. He submitted

that Mr Ma's understanding of the term "agent" was simply as a person acting on behalf of another, not as a "real estate agent" under the Act.

[34] He further submitted that the question whether Mr Brady was a buyer's agent for K&D is superseded by his acknowledgement that from the time of the conjunctional arrangement, Mr Brady was acting as agent for the vendors.

[35] As to whether Mr Brady's conduct was misconduct or unsatisfactory conduct, Mr Hargreaves first submitted that significant factors are that he did not intend to buy the property, and Mr Ma confirmed that his approach to Mr Brady was a last resort after other investors considered the purchase to be too risky.

[36] Secondly, he submitted that both parties to the Agreement for Sale and Purchase knew that Marmitmor was the nominated purchaser. He submitted that the fact that Marmitmor took the nomination does not establish any concealment of the nomination, and the vendors' solicitors had a copy of the Deed of Nomination. He noted Mr Sullivan's acknowledgement that once the Agreement for Sale and Purchase was signed, he had no further involvement in the transaction.

[37] Thirdly, he submitted that there is no indication that the vendors suffered any loss, and in fact the vendors achieved a record price for the area on the sale, Mr Ma was also satisfied that the price was fair, and Bayleys received commission on the sale. Mr Hargreaves noted that the price and terms accepted by the vendors were exactly the same as those offered previously through Mr Brady, but in the present case Bayleys benefitted by receiving commission.

[38] Mr Hargreaves referred to the Tribunal decisions cited by Mr Waalkens and submitted that the present case can be distinguished from those in which the licensee was found guilty of misconduct.

[39] He submitted that Mr Brady has admitted that the formalities were not complied with, the matter had not been handled well, and he should have done better. However, he submitted that this is not a case where the licensee had disguised the fact that he is the purchaser of the relevant property, for personal gain. He submitted that Mr Brady

accepts the consumer-protection purposes of the Act, but that did not alter the fact that this is not a "concealment" case; it is not a case where the identity of the purchaser was "not disclosed", rather, the disclosure was done informally.

Discussion

Was Mr Brady carrying out real estate agency work prior to the conjunctional arrangement?

[40] Section 4 of the Act includes the following definition (as relevant to the present case):

> **Real estate agency work or agency work**–
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> (a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction;
>
> (b) …
>
> (c) does not include–
>
> (i) The provision of general advice or materials to assist owners to locate and negotiate with potential buyers; or
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> …

[41] Mr Brady's evidence was that in approaching the vendors on behalf of K&D he was not carrying out real estate agency work, he was attempting to facilitate a purchase of the property by K&D. In the course of those approaches he presented the vendors with Agreements for Sale and Purchase which identified the sale as being "by" the Agency, and identified himself as manager and salesperson. He also prepared a lengthy submission in support of a tender offer, which was sent to the vendors' solicitors, on the Agency's letterhead. Mr Brady admitted that the purpose of the approaches was to facilitate a purchase by K&D. We find Mr Brady's actions constituted "work done or services provided … on behalf of another person for the purposes of bringing about a transaction".

[42] Mr Hargreaves submitted that Mr Brady's approaches were not "in trade" (and therefore not within the definition of "real estate agency work") because Mr Brady was not paid a commission or other fee, and had no buyer's agency agreement. As a

starting point, to our discussion of this submission, we note the observation of his Honour Justice Cooper in *House v Real Estate Agents Authority*, that:[7]

> It is plain from the statement of statutory purpose in s 3 of the Act that the main object of the legislation is the promotion and protection of the interests of consumers in respect of real estate transactions, and the promotion of public confidence in the performance of real estate agency work. I accept that given that statutory purpose and the regulatory apparatus contained in the Act, a narrow and literal approach to the definition of "real estate agency work" would be inappropriate.

[43] In his judgment in *Edinburgh Realty v Sievwright*, his Honour Justice Mander was required to determine whether two licensees' involvement in the sale of a property owned by them (with a third person) as trustees of a family trust was within the definition of "real estate agency work". The licensees claimed that it was not, as the sale was a private sale and no commission was payable.

[44] His Honour accepted a submission on behalf of the Real Estate Agents Authority that even if the sale were a private sale, it was still one that was carried out "in trade". He observed that the fact that no commission was to be paid on the sale was not determinative and was largely immaterial.[8] We accept that the question whether Mr Brady was carrying out real estate agency work prior to the conjunctional arrangement is to be determined on the evidence of what he did, and the question whether or not he was paid is largely immaterial.

[45] We further note that notwithstanding that he was not expecting to be paid a fee if he succeeded in acquiring properties, Mr Brady accepted that "down the line" he expected he would receive instructions when properties were sold, as part of the Auranga development. He also accepted that he was the only real estate agent in Mr Ma's "inner circle" of trusted advisers and stood to gain, and did receive, benefits from everything he did for Auranga in "the endgame".

[46] We do not accept Mr Hargreaves' submission that Mr Brady's work was within the exception in paragraph (c)(i) of the definition. Paragraph (c)(i) excludes "the provision of general advice or material to assist owners to locate and negotiate with

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7 *House v Real Estate Agents Authority* [[2013] NZHC 1619, [2013] NZAR 1148, at [45].
8 *Edinburgh Realty*, fn 1, above, at [69].

potential buyers". As he described it, Mr Brady's work was to assist a potential buyer to locate and negotiate with an owner (potential vendor). As such, it was outside the exclusion.

[47] We conclude that Mr Brady was carrying out real estate agency work for K&D prior to the conjunctional arrangement, when he approached the vendors and presented offers pursuant to which K&D would buy the property. We accept that he did not have a buyer's agency agreement, but that does not lead to the conclusion that his work was not real estate agency work.

[48] While we are satisfied that Mr Brady was carrying out real estate agency work for K&D prior to the conjunctional arrangement, the evidence does not lead us to conclude that he was also carrying out real estate agency work for the vendors at that time. The evidence is limited to Mr Brady's approaches to the vendors and their solicitors. While we accept that the insertion of Mr Brady's and the Agency's name appears in the "sale by" section of Agreements for Sale and Purchase is a representation that he was acting as agent for the vendors, there is nothing in the evidence that suggests that he was in fact acting as such.

The allegations of breaches of the Rules

[49] As Mr Waalkens acknowledged, the allegations that Mr Brady breached the provisions of a number of Rules overlapped to some extent with each other, and with the allegations that he breached ss 134 and 135 of the Act.

(a) Rule 5.1

[50] Rule 5.1 provides:

> **5.1** A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

[51] We agree that that in providing real estate services to K&D without an agency agreement, acting for both the vendors and K&D in the same transaction, and later allowing Marmitmor to become the nominated purchaser without complying with the

statutory requirements, Mr Brady has demonstrated a lack of skill, care, competence, and diligence in his real estate agency work. We find him in breach of r 5.1.

(b) Rule 6.1

[52] Rule 6.1 provides:

> **6.1** A licensee must comply with fiduciary obligations to the licensee's client.

[53] We have found that Mr Brady was carrying out real estate agency work for his "buyer" client (K&D) throughout, and for the vendors from the time of the conjunctional arrangement. He owed fiduciary obligations to K&D throughout, and to the vendors from the time of the conjunctional arrangement.[9] From that time his professional obligations should have been to either K&D or to the vendors, but not both. Those fiduciary obligations did not allow him to observe a duty of loyalty to opposing sides of a transaction. We accept that he was from that time in a conflicted position, and in breach of his obligations under r 6.1.

(c) Rule 6.2

[54] Rule 6.2 provides:

> **6.2** A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

[55] The Committee's case was based on Mr Brady having represented himself to the vendors as their agent in Agreements for Sale and Purchase while he was also the agent for K&D. We have accepted that the entry of the Agency's name and Mr Brady's name as manager and salesperson in the "sale by" section of the Agreements for Sale and Purchase presented to the vendors prior to the conjunctional arrangement can be seen as a representation that he was acting as agent for the vendors, but we have not found that he was in fact acting as the vendors' agent at that time.

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[9] See *Premium Real Estate Ltd v Stevens* [2009] NZSC 15, [2009] 2NZLR 384, at [72], citing *Bristol & West building Society v Matthew* [1996] EWCA Civ 533, [1996] 4 All ER 698.

[56] Apart from the entry on the Agreements for Sale and Purchase, nothing was put before us to indicate that Mr Brady did not act in good faith or deal fairly with all parties prior to the conjunctional arrangement. With regard to the period after the conjunctional arrangement, it is clear that Mr Brady's involvement in the transaction was on behalf of K&D (and he did no work on behalf of the vendors), and that Mr Sullivan was acting for the vendors. Again, there was nothing put before us that indicated that Mr Brady failed to act in good faith and deal fairly with all parties after the conjunctional arrangement.

[57] We therefore do not find Mr Brady in breach of r 6.2.

(d) Rule 9.1

[58] Rule 9.1 provides:

> **9.1** A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.

[59] We accept that in acting in a position of conflict, failing to inform K&D of the extent of the conflict following the conjunctional arrangement, failing to fully inform the vendors following the conjunctional arrangement that he was acting for K&D, allowing Marmitmor to take the nomination without obtaining the vendors' informed consent or providing the required valuation, and retaining commission after Marmitmor acquired legal title to the property, Mr Brady failed to act in the best interests of both his K&D and the vendors.

[60] We therefore find Mr Brady in breach of r 9.1.

(e) Rule 9.14

[61] Rule 9.14 provides:

> **9.14** A licensee must not act in a capacity that would attract more than 1 commission in the same transaction.

[62] The Committee's case rested on Mr Brady's having received a share of the commission paid by the vendors, and his acknowledgement that (while he would not be paid a fee by Mr Ma or K&D on its purchase of the property) he would obtain a benefit at some later stage. It was submitted that the definition of "commission" in the Act is wide enough to encompass a later benefit.

[63] "Commission" is defined in s 4 of the Act as follows:

> **Commission** means remuneration by way of commission, fee, gain, or reward for services provided by an agent in respect of a transaction

[64] While we accept that the definition extends beyond the traditional view of it being an agreed percentage of a sale price, paid by the vendor to the agency, the prohibition is against acting in a capacity that would attract more than one commission "in the same transaction". That was not what occurred in the present case. Mr Ma was adamant that no commission or other fee was to be paid to Mr Brady on K&D's purchase of the property, and the vendors only paid one commission to Bayleys. Any benefit Mr Brady might obtain through work done for K&D or Mr Ma in other transactions would not be "in the same transaction" as the sale and purchase of the property.

[65] We therefore do not find that Mr Brady was in breach of r 9.14.

(f) Rule 6.3

[66] Rule 6.3 provides:

> **6.3** A licensee must not engage in any conduct likely to bring the industry into disrepute.

[67] In its decision in *Jackman v Complaints Assessment Committee 10100*, the Tribunal repeated the description conduct that would justify a finding of a breach of r 6.3 in an earlier Complaints Assessment Committee decision as conduct that:[10]

> … 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

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[10] *Jackman v Complaints Assessment Committee 10100* [2011] NZREADT 31, at [65], citing *re Raos* Complaint No CA4315602, 9 June 2011..

> conduct is acceptable would … tend to lower the standing and reputation of the industry.

[68] The Tribunal's decision in *Complaints Assessment Committee 414 v Goyal* has already been referred to.[11] Mr Goyal was engaged by the vendors of two neighbouring properties to market them for sale. They were both purchased by a regular client of his for a development. After Agreements for Sale and Purchase were signed, Mr Goyal made payments totalling $178,000 into the client's bank account. The client was not able to settle the transactions, and shortly before settlement a company controlled by Mr Goyal accepted a nomination of each agreement and subsequently settled the purchases. The Tribunal found on the evidence that Mr Goyal had at least some financial interest in the development, from the outset.

[69] Mr Goyal was charged with, and admitted, breaches of ss 134 and 135 of the Act, and rr 6.1, 6.4, and 9.1 of the Rules. He was also charged with, but denied, a breach of r 6.3. In its discussion of that charge, the Tribunal adopted the comments accepted in *Jackman*, and added that:[12]

> Rule 6.3 is not tied to any other professional obligation. … We consider solely whether the conduct is "likely to bring the industry into disrepute".

[70] The Tribunal found that Mr Goyal's conduct was in breach of r 6.3. The Tribunal referred in particular to his failure to disclose to the vendors his personal interest in the purchase of the two properties, his personal financial dealings with the original purchaser, and his failure to disclose his concern as to the associate's ability to settle the purchases as being conduct 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 acceptable.[13]

[71] Mr Waalkens submitted that Mr Brady's conduct (as previously set out) was completely at odds with his professional obligations as a licensee and that this conduct was likely to bring the industry into disrepute. Mr Hargreaves submitted that Mr Brady's conduct, taken as a whole, was not such as would justify a finding of breach of r 6.3. On the contrary, he submitted, there was nothing which the public would find

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11 *Complaints Assessment Committee 414 v Goyal*, fn 2, above.
12 *Goyal*, at [32].
13 *Goyal*, at [34].

unacceptable in Mr Brady having stepped in to give effect to the parties' agreed sale, to their mutual benefit.

[72] The fact that Mr Brady has admitted breaches of ss 134 and 135, and the Tribunal has found him in breach of rr 5.1, 6.1 and 9.1 does not in and of itself lead to a finding that he should also be found in breach of r 6.3. In the circumstances of the present case, where there is no evidence that Mr Brady had, or expected to have, any personal interest in the purchase of the property before Mr Ma's "last resort" request, we are not persuaded that a finding of a breach of r 6.3 is justified.

Should Mr Brady be found guilty of misconduct under s 73 of the Act?

[73] In *Complaints Assessment Committee 20003 v Zhagroo*, her Honour Justice Thomas considered an appeal by a Complaints Assessment Committee against a finding by the Tribunal of unsatisfactory conduct against Mr Zhagroo. The Committee contended that the Tribunal should have made a finding of misconduct.[14] As to the determination whether conduct is "seriously incompetent or seriously negligent" (and therefore misconduct under s 73(b) of the Act) or is "incompetent or negligent" (and therefore unsatisfactory conduct under s 72(c)), her Honour observed that:[15]

> The words of s 73(b) must be given their plain meaning. Whether serious negligence or serious incompetence has occurred is a question to be assessed in the circumstances of the case. …

[74] Licensees' obligations under ss 134 and 135 of the Act were considered by the Court of Appeal in its judgment in *Barfoot & Thompson Ltd v Real Estate Agents Authority*.[16] The Court's summary of the relevant principles may be paraphrased as follows:[17]

[a] The consent required by s 134 is effective only if given in the prescribed form (Form 2 of the Schedule to the Real Estate Agents (Duties of

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14 *Complaints Assessment Committee 20003 v Zhagroo* [2014] NZHC 2077.
15 *Zhagroo*, at [49].
16 *Barfoot & Thompson Ltd v Real Estate Agents Authority* [2016] NZCA 105, [2016] NZAR 648.
17 At [12]–[16], [45]–[48].

Licensees) Regulations 2009) and if the independent valuation required by s 135 is provided.

[b] The independent valuation must be given to the client either before seeking the client's consent or, with the agreement of the client, within 14 days after consent is given.

[c] The conflict of interest between the client and the licensee is self-evident. The licensee's loyalties are divided between the duty owed by an agent to act in the best interests of the vendor clients, and the licensee's self-interest in securing an agreement on terms favourable to himself or herself.

[d] A licensee's objective as would-be purchaser necessarily conflicts with the best interests of the client as vendor. Moreover, the licensee may be in possession of information that the client could reasonably expect to be confidential and of other material that ought properly be disclosed to the client.

[75] It is useful to compare the circumstances of the present case with those in which determinations have previously been made. In *Goyal*, the Tribunal rejected a submission that it should make a finding of unsatisfactory conduct, on the basis of Mr Goyal's inexperience, that no one (for example solicitors) alerted him to the need to comply with ss 134 and 135 when he allowed his company to take the nomination, that neither vendor suffered any pecuniary loss, and that it was in the interests of all parties that the transactions settled. While not satisfied that Mr Goyal's breaches were wilful or reckless, the Tribunal found that they constituted seriously incompetent or seriously negligent real estate agency work and found him guilty of misconduct under s 73(b) of the Act.[18]

[76] The facts of *Zhang* are similar to those of the present case, in that Mr Zhang had introduced a buyer to a property being marketed by another licensee in his agency. He had no dealings with the vendor. He had not intended to buy the property himself, but stepped in and took a nomination ten days before settlement, when his buyer did not

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18 *Goyal*, fn 2 above, at [57]–[68.

want to complete the purchase.[19] He accepted that he had given no thought to his obligations under the Act and Rules, and admitted breaches of ss 134 and 135 of the Act and rr 5.1, 6.1, 6.3, and 9.1 of the Rules. The Tribunal rejected a submission that his conduct constituted unsatisfactory conduct and made a finding that it was seriously incompetent or seriously negligent real estate agency work and thus misconduct under s 73(b) of the Act.[20]

[77] There is also similarity in the facts of *Reed*,[21] where a licensee who was marketing a property for a vendor client made a sudden decision that he would buy it for himself. Mr Reed gave no thought to his obligations under the Act and Rules and failed to meet the requirements of ss 134 and 135 of the Act. The Tribunal also found him in breach of rr 10.2 and 10.3 (as to the provision of appraisals and comparable sales data to vendor clients) and 9.1 (as to acting in clients' best interests and in accordance with their instructions). The Tribunal found Mr Reed's conduct constituted seriously incompetent or seriously negligent real estate agency work and that he was guilty of misconduct under s 73(b) of the Act.[22]

[78] In *Manvinder Singh*, the licensee did not purchase the property for which he was the listing salesperson, but he lent money to an existing client so that the client could purchase it.[23] Pursuant to s 136 of the Act, he was required to disclose in writing to all prospective parties to the transaction that he stood to benefit financially from it (other than by way of commission). He failed to do so, and accepted that his conduct constituted seriously incompetent or seriously negligent real estate agency work. The Tribunal made a finding of misconduct under s 73(b) of the Act.

[79] Counsel also discussed the Tribunal's decision in *Complaints Assessment Committee 402 v Dunham*.[24] Ms Dunham was charged with a breach of s 136 of the Act, by failing to disclose to prospective purchasers, in writing, that her parents were the vendors of a property she was marketing. It was accepted that she had orally disclosed that the vendors were "relatives" or "family members". The Tribunal made

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19 See *Zhang*, fn 3 above, at [6]–[8].
20 At [42]–[46].
21 *Complaints Assessment Committee 408 v Reed*, fn 4 above.
22 At [72]–[86].
23 *Complaints Assessment Committee 421 v Manvinder Singh*, fn 5 above, at [9]–[14].
24 *Complaints Assessment Committee 402 v Dunham* [2016] NZREADT 2016.

a finding of unsatisfactory conduct in respect of that charge. We note that Ms Dunham was also charged with failing to disclose proposed construction on a neighbouring property, which would affect the views from the property, in respect of which the Tribunal made a finding of misconduct under s 73(c)(iii) of the Act (wilful or reckless contravention of the Rules).

[80] The Tribunal's discussion in *Zhang* is relevant to the present case:[25]

> [42] … the obligations under ss 134 and 135 are fundamental to the Act's purpose of promoting public confidence in the performance of real estate agency work. … the obligations as to disclosure continue to apply after a sale and purchase agreement becomes unconditional, until settlement.
>
> [43] There can be no doubt that licensees are expected to know what their obligations are, and that they persist until settlement. Licensees' obligations are emphasised in initial and on-going training which they are required to complete.
>
> [44] The Tribunal's findings in *Dunham*, *Reed*, and *Goyal* make clear the seriousness with which breaches of disclosure obligations are regarded. As Mr Zhang gave no thought to his obligation to make disclosure, and made no disclosure, in any form, his failure to do so cannot be considered to be at the level of unsatisfactory conduct rather than misconduct.
>
> [45] Having stood back and considered all of the circumstances, we have concluded that the fact that Mr Zhang had no involvement with the vendor, and no input into negotiations leading to the agreement for sale and purchase, does not absolve him from liability, or lessen his culpability to the extent of reducing it from misconduct to unsatisfactory conduct. Once he decided he or his wife would take the nomination and complete the purchase of the property, he was required to comply with ss 134 and 135. He had ten days in which to give thought to his obligations, consider whether he needed to comply with his obligations and, if he was uncertain, raise the matter with his manager, then advise the vendor in writing.

[81] We accept Mr Waalkens' submission that the authorities cited support a finding of misconduct. Mr Brady told the Tribunal that he had been a real estate agent for 38 years. He is a licensed agent under the Act, and is the principal agent at the Agency, employing 26 people. He was, or should have been, well aware of his obligations under the Act and Rules, yet he gave no thought to the requirements of ss 134 and 135 when he agreed to the nomination of Marmitmor to complete the purchase of the property. Nor did he give any thought to the self-evident conflict of interest he was in and the obligations that arose as a result.

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25 *Zhang,* fn 3 above, at [43]–[46].

[82] Further, Mr Brady's submission that the nomination "occurred at short notice" (by implication, a submission that there was insufficient time to give consideration to, or comply with, ss 134 and 135) is not sustainable. Marmitmor's application for finance was made on 27 February 2018, some four weeks before the settlement date. He had ample time after applying for finance to consider what his obligations were in the event that funding was approved. There was also time after funding was approved on 20 March to comply with his obligations.

[83] We reject Mr Hargreaves' submission that the fact that all parties knew and accepted that Marmitmor was his company reduces the seriousness of his conduct from misconduct to unsatisfactory conduct. Mr Brady's experience in the industry should have made him aware that the provisions of the Act and Rules are not mere formalities that may be disregarded "by consent".

[84] Having stood back and considered the agreed facts, our findings as to Mr Brady's breaches of ss 134 and 135 of the Act and rr 5.1, 6.1, and 9.1 of the Rules, and the relevant authorities, we are satisfied that Mr Brady should be found guilty of misconduct under s 73(b) of the Act.

Outcome

[85] The Tribunal finds Mr Brady guilty of misconduct under s 73(b) of the Act.

[86] The Committee will receive submissions as to penalty. Submissions for the Committee are to be filed and served within 15 working days of the date of this decision, and those for Mr Brady are to be filed and served within a further 15 working days. Counsel are to confer and advise the Tribunal's case manager as to whether an oral hearing as to penalty is sought.

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

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Hon P J Andrews
Chairperson

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Ms C Sandelin
Member

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Ms F Mathieson
Member