

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2022] NZREADT 16

Reference No: READT 026/2021

**IN THE MATTER OF**

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

**BROUGHT BY**

**COMPLAINTS ASSESSMENT COMMITTEE 2102**

**AGAINST**

**XIAO BARRY HE**  
First Defendant

**DONGNI ANTHONY AN**  
Second Defendant

Hearing in Auckland on 11 and 12 July 2022

Tribunal:

Mrs C Sandelin (Deputy Chairperson)  
Mr G Denley (Member)  
Mr N O'Connor (Member)

Appearances:

Mr T Wheeler, on behalf of the Committee  
Mr K Perry and Mr J Tian, on behalf of the First Defendant  
Mr M Hodge, on behalf of the Second Defendant

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**DECISION**  
**(Charges)**  
**Dated 15 August 2022**

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## INTRODUCTION

[1] Complaints Assessment Committee 2102 (the Committee) has brought the following charges against Xiao Barry He and Dongni Anthony An:

- (a) a charge of misconduct against Mr He under s 73(b) of the Real Estate Agents Act (2008) (the Act) in that his conduct constituted seriously incompetent or seriously negligent real estate agency work. In the alternative, Mr He is charged with unsatisfactory conduct under s 72(b); and
- (b) a charge of misconduct against Mr An under s 73(a) of the Act in that his conduct would be reasonably regarded by agents of good standing, or reasonable members of the public, as disgraceful. In the alternative, Mr An is charged with seriously incompetent real estate agency work under s 73(b).

## BACKGROUND

[2] Mr He is a licensed salesperson under the Act and, at the time of the conduct, Mr He was engaged by Barfoot and Thompson Limited (Barfoots) Royal Heights. Mr An is a licensed salesperson under the Act and, at the time of the conduct, Mr An was engaged by Barfoots Hobsonville. The charges relate to the handling by Mr He and Mr An of a sale and purchase agreement for a property at Paitry Place, Auckland (the Property).

[3] On 16 January 2020, Mr He obtained a sole agency listing for the Property.

[4] Mr An introduced Mr and Mrs Sharma (the Purchasers) to the Property and on 23 January 2020, Mr He and Mr An prepared and presented an offer from the Purchasers to Mr and Mrs Marshall and Mr and Mrs Lal (the Vendors).

[5] An Agreement for Sale and Purchase (the first ASP) was prepared and presented in electronic form on Mr He's iPad, accepted by the Vendors, signed by all parties and then sent electronically via Apple's Airdrop facility to Mr An. On 24 January 2020, Mr An went to the Property, obtained the final signature of one of the Vendors, dated the first ASP and emailed it back to Mr He.

[6] On 28 January 2020, the first ASP was cancelled as the finance condition was not satisfied.

[7] On 11 February 2020, at their request, Mr He assisted the Purchasers to prepare another offer for the Property. Mrs Sharma had found Mr He more helpful than Mr An

so arranged to meet Mr He at the Property to prepare another offer. By this time, the Property was subject to another contract, so the new offer was being prepared as a backup offer (the backup ASP).

[8] Mrs Sharma called her husband in Fiji so they could all discuss the offer. As Mr Sharma was away for a few weeks, Mr He and the Purchasers agreed to amend a previous undated version of the first ASP which had been signed and initialled by all the parties.

[9] The Purchasers and Mr He discussed some amendments to the conditions of the offer and Mr He made these amendments on his iPad as follows:

- (a) By changing the finance condition to "No" on the front page;
- (b) By changing the LIM condition to "No" on the front page;
- (c) By changing the building condition from 15 working days to 5 working days;  
and
- (d) By inserting a backup clause (the backup clause) as clause 20.

[10] Mrs Sharma initialled the building condition and signed the backup clause.

[11] Mr He did not delete the signatures and initials of all parties when drafting the backup ASP.

[12] The backup ASP was presented to two of the vendors by Mr He on 11 February 2020 and was rejected. Later that evening, Mr He suggested to the Purchasers that they increase the price by \$5,000 by reducing the commission by \$5,000. Mr He obtained the consent of Mr An's business partner Di Weng to the reduction of the commission in order to put a better offer to the Vendors.

[13] The next morning on 12 February 2020, one of the vendors, Mr Lal, spoke with Mr He and agreed orally to the increased price.

[14] At 8:30 am on 12 February 2020, Mr He emailed a copy of the backup ASP to Mr An. The backup ASP retained the signatures and initials of all parties from the first ASP and showed the new purchase price and settlement date against those initials. Although the backup clause had been signed by Mrs Sharma, it had not been signed by any of the other parties.

[15] On the morning of 12 February 2020, Mr He spoke to Mr An on three occasions by telephone. The contents of the discussions are in dispute, but the three telephone calls were logged as follows:

- (a) at 8:30 am on 12 February 2020 for a 1 minute duration,
- (b) at 8:35 am on 12 February 2020 for a 1 minute duration; and
- (c) at 9:17 am on 12 February 2020 for a 3 minute duration.

[16] Mr He says that he asked Mr An to obtain the signatures and initials of the Vendors as this was Mr An's role as selling agent.

[17] That same morning, Mr An electronically inserted the initials of the Purchasers and Vendors into the backup clause in place of Mrs Sharma's signature and dated the backup ASP. He then emailed the backup ASP to Mr He at 11.32 am. The backup ASP was processed by Mr An through Barfoots Hobsonville.

[18] The Property was subsequently sold to other purchasers, so the backup ASP fell over.

[19] On 16 February 2020 the Vendors requested a copy of the backup ASP from Mr He, as they had not received a copy. Mr He subsequently emailed them a copy that same day.

[20] The Vendors did not sign the backup ASP, nor were they approached by either Mr He or Mr An to use their previous signatures/initials. They complained to Barfoots who made a report to the Real Estate Agents Authority (the Authority) in accordance with rr 7.1 and 7.2 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules).

[21] On 18 February 2020 Mr He prepared a timeline of events for Barfoots in which he stated that on 12 February 2020 he had met with the Vendors at the Property and that "everyone signed in the ipad". Mr He later confirmed to Barfoots and the Authority that this was not correct and he had not met with the Vendors on 12 February.

[22] The Committee inquired into the allegations, investigated and determined to lay charges against Mr He in accordance with s 91 of the Act. During the course of the investigation, the Committee became aware of the conduct of Mr An in electronically inserting the initials of the parties and therefore decided to inquire into that allegation under s 78(b) of the Act.

## **THE CHARGES**

[23] The particulars of the charges laid by the Committee are (in summary) as follows:

- (a) Mr He's conduct in using a previous signed agreement as the basis for a new offer, sending the backup ASP to another salesperson with signatures relating to the previous agreement and not ensuring the signatures of all relevant parties were obtained, constitutes seriously negligent or seriously incompetent real estate agency work.
- (b) Mr An's conduct in amending a sale and purchase agreement to include the initials of all parties instead of having them sign the document would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[24] Mr He accepts that he engaged in unsatisfactory conduct by not removing the signatures of the Vendors from the first ASP prior to sending the backup ASP to Mr An. Mr He denies that this amounts to seriously negligent or seriously incompetent real estate agency work.

[25] It is to be noted that Mr An in his initial response, dated 26 October 2021, denied the charge and the conduct. In a further response, dated 17 December 2021, Mr An accepted that he inserted the initials on the backup clause. He said he did so based on his understanding that this is what the parties wanted.

## **THE EVIDENCE**

[26] Statements of Evidence were filed by Mr He, Mr An, Mrs Navnita Sharma, Ms Grace Walsh and Mr Max House.

[27] The evidence is summarised below.

### **Mr He**

[28] Mr He confirmed that he met with Mrs Sharma on 11 February to prepare a backup offer on the Property. The Purchasers were happy for Mr He to make the changes by using an undated version of the first ASP which already contained their initials and signatures. As the Vendors rejected the backup offer, he asked Mr An's business partner, Ms Weng if they could reduce the commission by \$5,000 to raise the offer.

[29] As referred to above the Vendors orally agreed to the increased offer on 12 February and Mr He emailed the backup ASP to Mr An at 8 30 am. Mr He then says he telephoned Mr An three times as follows:

- (a) at 8:30 am to let him know that one of the Vendors, Mr Lal, had orally accepted the backup offer but that he needed to finalise the agreement which meant that Mr An had to collect the initials and signatures from the Vendors;
- (b) at 8:35 am to let him know about the commission discount agreed with Ms Weng; and
- (c) at 9:17 am to check on how Mr An was doing in finalising the backup ASP. Mr He says he reminded Mr An that he needed to collect the initials/signatures from the Vendors and Mr Sharma, as he had only obtained Mrs Sharma's initial so far. Mr He said he told Mr An that the four Vendors may not all be together so he may need to contact them separately or meet them at different locations. Mr An assured him that it was almost completed.

[30] Mr He says that at around 9:20 am Mr An called him briefly to confirm the backup ASP had been completed. Mr He says he simply trusted that Mr An would have got in touch with the Vendors to obtain their initials/signatures, or at least confirmed with them that the old ones could be used. For that reason, he did not double check the backup ASP.

[31] After the complaint was made against Mr He, he prepared a brief timeline for Barfoots. He says that timeline was prepared without knowing what the complaint against him was and he was in an emotional and upset state when preparing it. In the timeline the last entry stated that he had met the vendors at the property at 8 am on 12 February and "everyone signed in the iPad. Proceed with Anthony".

[32] Mr He stated that he acted as the listing agent, the Purchasers were Mr An's buyers, and he simply helped out Mr An with the negotiations because Mrs Sharma was more comfortable dealing with him. He said that Mr An was the selling agent and therefore responsible for obtaining the Vendors' signature/initials.

[33] Mr He states that he never intended for the Vendors' existing signatures and initials on the backup ASP to represent the acceptance of the backup offer. He said he never manipulated the signatures or initials on the backup ASP, nor did he ever instruct anyone else to do so.

**Mr An**

[34] Mr An confirmed that he introduced the Purchasers to the Property. The first ASP was signed by all parties on 23 January 2020. This was done electronically using Mr He's iPad. Mr An inserted the date of 23 January 2020 at the top of the first ASP.

[35] Mr An said that on the morning of 12 February 2020 he got a telephone call from his business partner Di Weng who said that Mr He was trying to reach him. Mr An said he had a missed call from Mr He. Mr An said that looking at Mr He's phone records it would seem he missed two calls from him, although it was possible they spoke in one of those calls. Mr An said he could not remember the exact time, but based on the phone records, it was likely that the main call he and Mr He had was at 9:17 am.

[36] Mr An said that before that morning he did not know there had been any further negotiations between the Vendors and the Purchasers about the Property. Mr An said he knew nothing about the agreement Mr He had sent through to him.

[37] Mr An said that Mr He explained to him that the Vendors and the Purchasers had agreed on a backup ASP at the new price and that he had negotiated everything. Mr An said that Mr He said the backup ASP was signed up and initialled but that he did not have all the parties' initials at the backup clause that he had inserted. Mr An said that Mr He told him he had had a call from one of the vendors that morning who wanted the agreement completed but two of the vendors were out that day.

[38] Mr An said that Mr He asked him to electronically insert the parties' initials at the backup clause because he did not know how to do that. Mr An said that Mr He told him that is what the parties wanted. Mr An said he specifically remembered asking Mr He "are you sure this is what they want?", and Mr He replying, "It's me don't you trust me?".

[39] Mr An said that from Mr He's phone records he can see that Mr He called him again at 11:04 am. Mr An could not specifically remember this call, but assumed that Mr He wanted him to return the backup ASP to him with the initials added at the backup clause.

[40] Mr An said that that is what he did and at 11:32 am he emailed the backup ASP to Mr He. Mr An said he pasted the initials of the Vendors and Purchasers over the top of Mrs Sharma's signature at the backup clause on the backup ASP. He said he did not insert any other initials or signatures into the document.

[41] Mr An said he has asked himself "a thousand times since that day why I did it". The answer is that he believed what Mr He told him and he trusted him and did what he

was asked to do. Mr An denied that Mr He told him to contact the parties directly to get their signatures and initials and said that if he had told him to do that he would have said no.

[42] Mr An said he inserted the date on the backup ASP and the solicitors' details on the back page. Mr An then processed the backup ASP through his branch.

[43] Mr An said that when he heard the Real Estate Agents Authority (the Authority) were involved he was scared. He had not told Barfoots what had happened and when he was asked what had happened he had not told the truth about what he did in relation to the initials at the backup clause.

[44] When he spoke to the Authority Mr An told them that Mr He had sent him the backup ASP using WeChat on 12 February 202 with the parties' initials at the backup clause. That was not true. Mr An said he was ashamed about what happened. Mr An said he did it because he was scared about what would happen to him.

#### **Ms Walsh**

[45] Ms Walsh gave evidence on behalf of Mr He. She had previously worked at Barfoots in their New Lynn and Mt Roskill offices. She stated that as a selling agent at Barfoots it would be her role to make sure all initials and signatures were completed, date the Agreement for Sale and Purchase, complete the transaction report, and send off to administration for processing.

#### **Mr House**

[46] Mr House gave evidence on behalf of Mr An. Mr House is the Company Compliance Manager at Barfoots. He attached a letter he had written to Mr An's counsel, Mr Hodge, in which he clarified the responsibilities that would have applied to Mr He and Mr An in the sale of the Property.

[47] He stated that the policy at Barfoots is that the listing agent for a property would establish the agency contract, including all details of the vendor by way of an agency agreement. The listing agent has no responsibility for making sure the selling salesperson has passed all the information onto the purchaser.

[48] For the selling salesperson, the policy at Barfoots is that they have the responsibility for completing the sale and purchase agreement in all aspects, presenting that to the vendor for consideration and for on-going negotiations in order to bring the offer to contract.



[49] Mr House said that, with regard to the first ASP, in terms of the Barfoots policy Mr An acted as selling salesperson and introduced the Purchasers. Mr He was the listing salesperson and both defendants worked together to process the first ASP and presented it together to the Vendors. For the backup ASP, he said Mr He acted as the selling agent. Mr He conducted all negotiations with the Purchasers and prepared the backup ASP.

[50] Under cross-examination, Mr House said that the listing agent can become so involved in the process of the sale so as to effectively become the selling agent.

### **Mrs Sharma**

[51] Mrs Sharma confirmed that she and her husband had become aware of the Property through Mr An, but after the first ASP was cancelled she contacted Mr He to put in another offer. She understood that Mr He was the main agent for the Property and she found him more helpful than Mr An.

[52] Mrs Sharma confirmed that she called Mr He on 11 February and told him they wanted to put in a backup offer. Mr He came to her house that morning. As her husband was in Fiji, and was unable to sign the new offer, Mrs Sharma said she and her husband (who they telephoned while meeting) agreed that they would amend the first ASP to turn it into a backup offer as it already had her husband's initials and signatures on it.

[53] She confirmed that Mr He made the changes to the first ASP outlined at [9] above and she then initialled the changes and signed the backup clause. As referred to above the backup ASP never went ahead and the Purchasers bought another property.

### **RELEVANT STATUTORY PROVISIONS**

[54] Section 3 of the Act states as follows:

#### **3 Purpose of Act**

- (1) The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.

...

[55] Section 72 of the Act states as follows:

#### **72 Unsatisfactory conduct**

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or
- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.

[56] Sections 73(a) and (b) state as follows:

**73 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;
- (b) constitutes seriously incompetent or seriously negligent real estate agency work;

[57] The Committee submits that Mr He breached rr 5.1, 6.1 and 6.3 of the Rules. These provide as follows:

**5 Standards of professional competence**

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

...

**6 Standards of professional conduct**

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

...

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

...

[58] The Committee is required to prove the charges against Mr He and Mr An on the balance of probabilities.<sup>1</sup>

**CHARGE AGAINST MR HE**

[59] Mr He accepts the charge of unsatisfactory conduct but denies that the conduct amounts to seriously negligent or seriously incompetent real estate agency work.

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<sup>1</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [118].

### **Submissions by The Committee**

[60] The Committee submits that Mr He's actions in editing a previous sale and purchase agreement and failing to remove the signatures of the Vendors prior to sending the backup ASP to Mr An risked the perception that the backup ASP was agreed to by all parties, when it was not. It submits that this amounts to a serious departure from rr 5.1, 6.1 and 6.3 of the Rules.

[61] The Committee submits that the key issue for the Tribunal to determine is whether Mr He, by not removing the signatures of the parties prior to editing or sending the backup ASP to Mr An, seriously departed from acceptable standards.

[62] The Committee submits that Mr He's evidence is that although Mr He left the signatures and initials relating to the previous sale and purchase agreement on the backup ASP, he never intended that they all be retained and used in the final version. It submits that Mr He relies on the evidence of Mrs Sharma that there was agreement to retain the signatures of the Purchasers, with Mrs Sharma adding her signature to the new backup clause. It submits that this is somewhat undermined by the evidence Mr He gave at the hearing, in that he anticipated Mr An acquiring the initials of Mr Sharma to the backup clause.

[63] The Committee submits that Mr He asserts that he could have copied and pasted the initials at the backup clause himself if he wanted to and that therefore it does not make sense for him to send the document to Mr An with instructions to do so. It also submitted that Mr He would not have got the signature of Mrs Sharma at the backup clause if he was going to copy and paste the initials.

[64] The Committee submits that Mr He breached his obligations to his vendor clients under r 6.1 when he edited and sent the edited version of the first ASP containing the parties' signatures to Mr An. It submits that Mr He's actions in his careless dealing with the backup ASP would bring the industry into disrepute in breach of r 6.3.

[65] It submits further that a licensee exercising skill, care, competence and diligence in the course of using a previous offer or agreement would ensure that the document had all signatures and initials that had not been agreed to, removed. It submits that best practice would be to begin with a clean agreement.

[66] The Committee submits that Mr He intentionally left the signatures on the document knowing they did not relate to acceptance of its content, sent the document outside of his control, and then failed to ensure that Mr An had appropriately acquired new signatures. Alternatively it submitted that Mr He intended to retain the signatures of

the old agreement as he knew the vendors had orally accepted the offer and allowed that document to be used.

[67] Mr Wheeler submits that if the Tribunal accepts the evidence of Mr An, that Mr He instructed Mr An to insert the initials of the parties into the backup clause, then that may elevate the conduct of Mr He to disgraceful conduct pursuant to s 73(a) of the Act. He submits that the Tribunal may of its own motion amend the charge, if it considers it appropriate to do so. However, Mr Wheeler did not seek such an amendment on behalf of the Committee.

### **Submissions by Counsel for Mr He**

[68] On behalf of Mr He, Mr Perry submits that Mr He's evidence has always been and remains that his decision to use the previous version of the first ASP was for the sole purpose of being able to retain the Purchasers' previous initials and signatures under urgent circumstances.

[69] Under cross examination and in response to questions from the Tribunal, Mr He acknowledged that he ought to have known better at the time, despite the Purchasers' requests. He has already accepted he breached his professional obligations.

[70] Mr Perry referred to an issue raised at the hearing as to whether Mr He had an obligation, regardless of his instructions to Mr An, to ensure that the backup ASP was completed correctly. Under cross-examination and questions from the Tribunal, Mr He accepted that he had an obligation to and could have checked the version of the backup ASP Mr An had sent back to him. He did not do this, as evidenced by the fact that he simply forwarded Mr An's email onto the Vendors when requested to do so.

[71] Mr Perry submits that Mr He's conduct was a failure of process. The process he should have followed of preparing a new agreement and getting the parties to the agreement to sign the relevant clauses was not followed. He submits that Mr He then believed that Mr An would finalise the steps required of him to complete the backup ASP. He submits that this was a mistake and a lapse of judgement on Mr He's part. Mr Perry submits that this flawed process and the procedural failings that occurred on the part of Mr He ought to result in a finding of unsatisfactory conduct only.

[72] With regard to the discussions during the hearing as to the distinction between a listing agent and a selling agent, Mr Perry referred to Mr House's evidence that a listing agent can be so involved in what would typically be the selling agent's job so as to effectively become the selling agent. He submits that even if Mr House's evidence is accepted, this did not reflect the parties' subjective understanding at the material time.

Mr Perry submits that the evidence of both Mr He and Mr An shows that the subjective understanding of both individuals at the material time was that Mr An was to complete tasks typically expected of a selling agent to complete.

[73] Mr Perry submits that Mr Hodge attempts to cast doubt on Mr He's evidence that he instructed Mr An to collect the parties' initials and signatures by suggesting that he could not have reasonably expected Mr An to complete that task between 8:30 am and 9:17 am on 12 February 2020. Mr Perry submits that Mr He's evidence was that this task was not impossible given the various technology tools that could be used.

### **Submissions by Counsel for Mr An**

[74] Mr Hodge submits for Mr An that Mr He's evidence is implausible and incoherent. Mr Hodge submits that there is the fundamental problem of how Mr He expected Mr An to get Mr Sharma's initials at the back up clause when Mr Sharma was in Fiji. He submits that Mr He had no answer for this when asked about it by the investigator in his interview. Mr Hodge submits that there is no suggestion that Mr He had checked to see whether Mr Sharma had access to or the ability to use any remote signature apps or similar while in Fiji. Mr Hodge submits that Mr He knew the vendors were working on 12 February 2020 and on Mr He's own evidence this allowed a maximum of 50 minutes for Mr An to get the signatures and initials from all four vendors and Mr Sharma in Fiji.

[75] Mr Hodge submits that it is implausible to believe Mr He's evidence that at the crucial stage (getting the signatures of all the parties so that there was a binding written agreement), Mr He handed everything over to Mr An to close the deal. He submits that it is particularly hard to believe Mr He's version of events given it was Mr He who conducted all the negotiations with the parties without Mr An's knowledge or involvement, the Purchasers had contacted Mr He directly and preferred to deal with him and Mr He was the listing agent.

[76] Mr Hodge submits that it is Mr He who was the driving force behind what happened and that Mr He was the primary wrongdoer. Mr Hodge submits that it would be perverse for Mr An to be found guilty of dishonesty and for Mr He to be found guilty of negligence only.

### **Discussion**

[77] We find that Mr He was not a reliable witness. Mr He gave inconsistent accounts in relation to the events of 12 February 2020. He was inconsistent in his version of events to Barfoots, and to the Committee. As referred to in [21] above, Mr He initially

told Barfoots that he met with the Vendors on 12 February to obtain their signatures when this was not true. We are not satisfied that Mr He instructed Mr An to actually obtain the signatures and initials from the Purchasers and Vendors. It is more likely that Mr He said nothing to Mr An about the initials and signatures left on the backup ASP and did not request Mr An to obtain fresh signatures and initials from the parties.

[78] Mr He stated in evidence that he specifically gave thought to the signatures on the backup ASP but decided to leave them as he did not have authority to replace them. We consider this to be a serious error of judgement. Mr He should have deleted the signatures and initials of all the parties before forwarding the document to Mr An. Mr He should also have checked the backup ASP before it was processed at Barfoots by Mr An.

[79] As Mr Perry submitted, *Complaints Assessment 20003 v Jhagroo* remains the leading authority on what constitutes an offence under s 73(b) of the Act.<sup>2</sup>

[49] The words of s 73(b) must be given their plain meaning. Whether serious negligence or serious incompetence has occurred is a question to be assessed in the circumstances of each case...the Tribunal is well placed to draw a line between what constitutes serious negligence or incompetence or mere negligence or incompetence, the Tribunal having considerable expertise and being able to draw on significant experience in dealing with complaints under the Act.

[80] *Morton-Jones v Real Estate Agents Authority*<sup>3</sup> provides an analysis of ss 73(a) and (b) of the Act as follows:

[29] If the charge is under s 73(a) the critical enquiry is whether the conduct is “disgraceful”. Conduct which involves a marked and serious departure from the requisite standards must be assessed as “disgraceful”, rather than some other form of misconduct which may also involve a marked and serious departure from the standards. The point is more than one of semantics because s 73 refers to more than one type of misconduct. In particular, s 73(b) refers to “seriously incompetent or seriously 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 agency work.

[81] We find that the error in judgement of Mr He in failing to remove the signatures and initials of the Purchasers and Vendors prior to reworking the first ASP, and prior to sending the document to Mr An, amounts to a serious departure from acceptable standards.

[82] A licensee exercising skill, care, competence and diligence in the course of using a previous offer or agreement would ensure that the document has all previous signatures and initials removed. Any signatures assenting to the contract as a whole

<sup>2</sup> *Complaints Assessment Committee 20003 v Jhagroo* [2014] NZHC 2077, at [49].

<sup>3</sup> *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804 at [29].

should be removed to avoid placing the parties at legal risk. This is of particular importance if the document is sent to another person and therefore outside the licensee's control. As submitted by Mr Wheeler for the Committee, best practice would be to begin with a clean offer.

[83] Whilst we do not consider it a necessary determination in reaching our decision, we agree with the evidence of Mr House that Mr He was acting as the selling agent when negotiating and preparing the backup ASP. He was fully responsible for the negotiations and drafting of the backup ASP. He should not have relied on Mr An to obtain the signatures of the parties.

[84] Mr He has been a licensee since 2012. As an experienced licensee, Mr He should have been aware of his obligations to act in his clients' best interests. He would have appreciated the importance of appropriately handling the sale and purchase agreements and ensuring that real estate agency work is completed competently.

[85] We find that Mr He breached his obligations to his vendor clients under rr 5.1, 6.1 and 6.3 of the Rules. His actions in his careless dealing with the backup ASP are seriously negligent and would bring the real estate industry into disrepute. We find that Mr He believed that the terms of the backup ASP had been agreed to by the parties. However, it is not acceptable for Mr He to have relied on the acquiescence of the Purchasers when amending the first ASP to create the backup ASP.

[86] We find that Mr He's conduct involves a serious departure from acceptable standards. We are satisfied that the Committee has established to the required standard that Mr He's conduct constituted seriously negligent or incompetent real estate agency work. We find Mr He guilty of misconduct under s 73(b) of the Act.

[87] We are not, therefore, required to consider whether Mr He should be found to have engaged in unsatisfactory conduct under s 72 of the Act.

#### **CHARGE AGAINST MR AN**

[88] Mr An has denied the charge of disgraceful conduct but has admitted he was negligent.

#### **Submissions for the Committee**

[89] On behalf of the Committee, Mr Wheeler referred to the multiple statements made by Mr An prior to 17 December in which he denied the alleged conduct. The Committee

acknowledged that those statements were not sworn evidence but submits they can be given weight and may be relevant in assessing credibility.

[90] The Committee also referred to Mr An's Statement of evidence dated 30 May 2022 which deviates from his previous statements in that he now asserts that Mr He requested that he insert the initials of the Purchasers and Vendors into the backup ASP. As recorded above, Mr He has denied this and maintained throughout giving evidence that he requested that Mr An obtain all the required signatures and initials.

[91] The Committee submits that the evidential disputes that arose at the hearing relate primarily to the dealings on 12 February 2020. It submits that the credibility of each witness will need to be addressed by the Tribunal.

[92] The Committee submits that as an experienced licensee, Mr An should have been aware of his obligations to act in his clients' best interests. It submits that Mr An should have appreciated the importance of appropriately handling sale and purchase agreements and ensuring that real estate agency work is completed with integrity.

[93] It submits that the insertion of the initials by Mr An (with his evidence being Mr He told him this was what the parties wanted) was dishonest. The Committee submits that if the Tribunal does not accept that Mr An's conduct is dishonest then it submits that it is seriously negligent.

[94] The Committee submits that whilst Mr An's evidence is that he was told by Mr He to insert the initials as that was what the parties wanted, that is not approval that the parties have authorised their use. It submits that Mr An has failed, at the least, to make adequate inquiries to ensure that the information from Mr He was correct. The Committee submits that there were red flags concerning the provision of that information and Mr An was readily able to access the contact information for the Vendors from the agency database but did not make any attempt to contact them. It submits that insertion of initials on that basis is dishonest.

### **Submissions by Counsel for Mr An**

[95] Mr Hodge, on behalf of Mr An, submits that the key issue for the Tribunal is whether it is satisfied to the requisite standard that Mr He is telling the truth about what he told Mr An on the morning of 12 February 2020. He submits that if the Tribunal accepts Mr He's evidence is credible and reliable, then the Tribunal will find that Mr An acted dishonestly when inserting the initials at the backup clause. However, Mr Hodge submits that every aspect of Mr He's story is implausible.



[96] Mr Hodge submits that Mr An had no intention to deceive anybody when he inserted the initials and processed the backup ASP. He submits that Mr An thought he was carrying out the wishes of the parties based on what Mr He had said to him that morning.

[97] Mr Hodge submits that the Committee has incorrectly applied the critical question of Mr An's intent to his physical act of inserting the initials at the backup clause. He submits that the issue is Mr An's state of mind when he did so. He submits that if Mr An inserted the initials thinking the parties had consented, then he acted negligently by relying on what Mr He had told him. Mr Hodge submits that the Tribunal must be satisfied that Mr He is telling the truth about what he told Mr An on the morning of 12 February 2020 in order for the disgraceful conduct charge against Mr An to be proved. He refers to the decision in *Z v Dental Complaints Assessment Committee*,<sup>4</sup> and submits that strong evidence must be relied on in a prosecution for such a serious charge as dishonesty.

[98] Mr Hodge submits that it is Mr He's alterations rather than Mr An's that created any risk of harm to the Vendors. He submits that the vendors, whilst agreeing orally to the backup ASP, were placed in a position of risk of being held to an agreement they did not sign. Mr Hodge submits that whilst the likelihood of the Purchasers successfully suing for specific performance of the backup ASP was remote, it was a risk to which the Vendors should never have been exposed. He submits that this does not excuse Mr An's decision to add the initials at the backup clause, but the alterations that created the risk of harm were the alterations already made by Mr He before he emailed the backup ASP to Mr An.

[99] Mr Hodge submits that it is implausible to believe that Mr He could have expected Mr An to obtain the signatures of the Purchasers and Vendors in a timeframe of a maximum of 50 minutes, particularly given that Mr Sharma was in Fiji and the four Vendors were working. Mr Hodge submits that whilst Mr He said that he could have inserted the initials himself, he is trying to have it both ways on this point. He submits that if Mr He had the ability to insert the initials, then he had the ability to remove the Vendors' signatures and initials from the backup ASP which would mean that the whole situation would never have arisen.

[100] Mr Hodge submits that it was established by the High Court in *Morton-Jones* that conduct of a licensee that involves a marked and serious departure from requisite standards must be assessed as being "disgraceful" rather than being some other form of misconduct which also involves a marked and serious departure from requisite

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<sup>4</sup> *Z v Dental Complaints Assessment Committee*, above n 1.

standards. Mr Hodge submits that this means that the conduct in question must be such to not only justify a finding of misconduct, but must be so serious to be regarded as “disgraceful” applying the ordinary meaning of that word. Mr Hodge submits that the Committee need to prove dishonesty on the part of Mr An in order to prove disgraceful conduct. To do that, he submits the Committee needs to be able to rely on the evidence of Mr He.

[101] It is submitted by Mr Hodge that if the Tribunal accepts that Mr He’s evidence cannot be relied on then the question for the Tribunal is whether Mr An acted dishonestly when inserting the initials based on his own account of what happened. Mr Hodge submits that this conduct was not dishonest in the circumstances described by Mr An. Mr Hodge submits that Mr An believed there was express or implied consent from the parties to insert their initials electronically at the backup clause based on what Mr He told him. Mr Hodge submits that Mr An was negligent to do what Mr He said but that he did not act dishonestly.

[102] In relation to the alternative charge against Mr An pursuant to s 73(b), Mr Hodge submits that this is another form of conduct requiring proof of a marked and serious departure from requisite standards, in the words of *Morton-Jones*, but not at such a high threshold level as disgraceful conduct. Mr Hodge submits that whilst Mr An accepted he was negligent to have trusted Mr He and inserted the initials, his negligence in doing this was certainly no worse than the licensee’s negligence in *Jhagroo*, where it was held that the threshold in s 73(b) was not met.

[103] Mr Hodge submits that in considering the degree of Mr An’s negligence the Tribunal needs to consider the facts of the case as they apply to the high threshold required for serious negligence or serious incompetence under s 73(b). Mr Hodge submits that this task is fact specific and requires a close analysis of the nature and degree of the negligent conduct in issue and the risk of harm created by that conduct. Mr Hodge submits that as Mr An inserted the initials based on Mr He’s word, and believed it was what the parties wanted, that must be taken into account by the Tribunal.

### **Submissions for Mr He**

[104] Mr Perry for Mr He submits that it is no secret that Mr An lied to both the Committee and the Tribunal on multiple occasions. Mr Perry submits that it was not until Mr An’s amended response to the charge on 17 December 2021 that Mr An finally admitted his wrongdoing. He submits further that Mr An then recently invented the new accusation that it was Mr He who specifically instructed him to insert the parties initials on the backup ASP. Mr Perry submits that Mr An clearly tried to use Mr He as a

scapegoat by falsely accusing Mr He of inserting the initials and sending him a completed version via WeChat.

[105] Mr Perry submits that the evidential dispute regarding what happened on 12 February 2020 is only relevant to the charge against Mr An as this goes towards establishing Mr An's state of mind when he inserted the parties' initials at the backup clause. He referred to Mr Hodge's submissions that Mr He is essentially a witness for the Committee for the charge against Mr An. He says that if the Tribunal accepts Mr He's evidence then Mr An would have intentionally inserted the initials of his own volition knowing that he did not have their consent to do so. Mr Perry submits that if Mr He's evidence is not accepted it would be up to the Tribunal to decide what Mr An's intentions were at the time he inserted the parties' initials.

### **Discussion**

[106] As with Mr He, we did not find Mr An to be a credible witness. Mr An consistently lied to Barfoots and the Committee. Furthermore, it was only as recently as 30 May 2022 that Mr An in his statement alleged that Mr He had told him to insert the initials. We are not satisfied that Mr He told Mr An to insert the initials on the backup clause. We find that Mr An decided to insert the Vendors' and Purchasers' initials on the backup clause (after deleting Mrs Sharma's signature).

[107] In order to find Mr An guilty of the charge under s 73(a) of the Act, the Tribunal needs to be satisfied beyond the balance of probabilities that Mr An's conduct was disgraceful. We agree with Mr Hodge's submission that strong evidence must be relied on in a prosecution for such a serious charge as dishonesty.<sup>5</sup>

[108] As referred to above, we were not satisfied by either Defendant's account as to what was discussed on the morning of 12 February 2020. Even if Mr An had been told by Mr He that he should insert the initials at the backup clause, and that was what the parties wanted, that is not approval that the parties have authorised the use of their initials. The question for the Tribunal is whether Mr An's actions were dishonest or whether they were seriously negligent or seriously disgraceful.

[109] In considering the charge against Mr An pursuant to s 73(a) of the Act, the Tribunal refers to the discussion of disgraceful conduct in *Morton-Jones* as set out above at [81] and *Complaints Assessment Committee (CAC 10024) v Downtown Apartments Ltd (in Liq)*<sup>6</sup>. The critical enquiry is whether the conduct in question is such to not only

<sup>5</sup> *Z v Dental Complaints Assessment Committee*, above n 1.

<sup>6</sup> *Complaints Assessment Committee (CAC 10024) v Downtown Apartments Ltd (in Liq)* [2010] NZREADT 6 and *Morton-Jones*, above n 3 at [29].

justify a finding of misconduct, but must be so serious to be regarded as “disgraceful” in its ordinary sense of the word. This is a high threshold. The conduct which involves a marked and serious departure from the required standards must be assessed as “disgraceful”, rather than some other form of misconduct which would more appropriately fall under s 73(b) involving a marked and serious departure from the standards relating to competence and care in conducting real estate agency work.

[110] Mr Hodge submits in order to find Mr An guilty of misconduct under s 73(a) the Tribunal needs to find that he acted dishonestly when inserting the initials at the backup clause. He submits that Mr An’s actions in inserting the initials were negligent, stupid and naïve, but not dishonest. Mr Hodge submits that had Mr An inserted the initials knowing the parties were not consenting then that would have been dishonest.

[111] We agree with Mr Hodge. We do not consider that Mr An’s actions in inserting the initials into the backup clause were any more serious than Mr He’s actions in failing to remove the initials/signatures from the backup ASP. We are not satisfied that the high threshold referred to in *Morton-Jones* to prove disgraceful conduct has been met. Mr An inserted the initials into the backup clause as he believed that was what the parties wanted. This was a serious departure from the standards required of an agent under the Act, but not dishonest. We do not find Mr An guilty of disgraceful conduct under s 73(a) of the Act.

[112] We therefore turn to the alternative charge under s 73(b) of the Act. Fundamentally, the Purchasers and Vendors had all agreed to the terms of the backup ASP, but had certainly not agreed to the addition of their initials/signatures, other than Mrs Sharma. Mr An was experienced enough to know that what he was doing was wrong when he inserted the initials at the backup clause.

[113] Mr An’s failure to take any steps to check with the parties whether he was acting correctly in inserting the initials must be taken seriously. The standards to which s 73(b) is directed relate to competence and care in conducting real estate agency work.<sup>7</sup> Mr An could easily have made his own enquiries of the Purchasers and Vendors to check that they were happy to have their signatures added. He did not do so and as a real estate agent of 6 years’ experience should have been well aware of the requirements to obtain the parties’ actual signatures on the contract.

[114] We are satisfied that the Committee has established to the required standard under s 73(b) of the Act that Mr An’s conduct constituted seriously negligent real estate agency work. We find Mr An guilty of misconduct pursuant to s 73(b) of the Act.

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<sup>7</sup> *Morton-Jones*, above n 3 at [29].

**OUTCOME**

[115] The Tribunal finds both Mr He and Mr An guilty of misconduct under s 73(b) of the Act.

[116] Penalty will be determined on the papers, and written submissions on behalf of the Committee are to be filed and served within 15 working days of the date of this decision. Written submissions on behalf of Mr He and Mr An are to be filed and served within a further 10 working days.

[117] 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 2016.

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Mrs C Sandelin  
Deputy Chairperson

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Mr G Denley  
Member

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Mr N O'Connor  
Member