

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 39

READT 071/15

IN THE MATTER OF

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

BROUGHT BY

COMPLAINTS ASSESSMENT
COMMITTEE 403

AGAINST

STANLEY ROBB
Defendant

Hearing:

31 May 2017, at Christchurch

Tribunal:

Hon P J Andrews, Chairperson
Mr G Denley, Member
Ms C Sandelin, Member

Appearances:

Ms K Lawson-Bradshaw, on behalf of the
Committee
Mr S Caradus, on behalf of Mr Robb

Submissions received from:

Mr G Brittain, on behalf of Maketu Estates
Ltd

Date of Decision:

22 June 2017

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Robb faces two charges of misconduct under section 73(c)(iii) of the Real Estate Agents Act 2008 (“the Act”), laid by Complaints Assessment Committee 304 (“CAC 403”). On both charges Mr Robb is charged in the alternative with unsatisfactory conduct under s 72 of the Act.

[2] The charges relate to Mr Robb’s conduct as listing salesperson of a kiwifruit orchard at Te Puke, for Maketu Estates Ltd (“Maketu”). The first charge concerns Mr Robb’s conduct in relation to a potential purchaser of the orchard, Mr Lemon. Mr Robb is charged with having wilfully or recklessly contravened rules 6.2 and 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”) (“the first charge”). Mr Robb admits misconduct on this charge. The second charge concerns Mr Robb’s conduct in relation to the vendor, Maketu. He is charged with having wilfully or recklessly contravened rules 6.4, 9.1, and 9.4 (“the second charge”). Mr Robb admits unsatisfactory conduct on this charge, but denies misconduct.

[3] The hearing on 31 May 2017 was concerned with two issues:

- [a] whether Mr Robb should be found guilty of misconduct on the second charge; and
- [b] depending on the Tribunal’s finding as to the second charge, what penalty should be imposed in respect of both the first and second charges.

Factual background

[4] Maketu owned a large kiwifruit orchard at Te Puke. The orchard was affected by the PSA disease in 2010. Before it was hit by the disease, Mr Robb (a licensed salesperson employed by PGG Wrightson Real Estate Ltd (“Wrightsons”) had appraised it at \$16 million; afterwards, he appraised it on a “bare land” basis at \$3 million, and suggested to the directors of Maketu (Messrs Ross and Colin Stevenson) (“the Stevensons”) that they would be doing well if it sold for \$4 million.

[5] On 5 October 2012, Mr Robb signed an agency agreement with Maketu for the sale of the orchard. It was agreed that the orchard would be sold at auction on 16 November, unless sold prior. According to Mr Robb, the Stevensons had not prepared sufficient information for the sale process, and what information they had prepared was inadequate or incorrect.

[6] The events that led to the charges being laid occurred between 5 October 2012 and 15 November 2012.

[7] Mr Lemon is a director of Jace Investments Ltd (“Jace”). He sought information about the orchard and viewed it on 9 November. He subsequently emailed Mr Robb to say he was definitely interested in purchasing it. Mr Lemon had an association with a kiwifruit packhouse, MPAC. Mr Robb had never met Mr Lemon, and was not aware of his association with MPAC.

[8] Mr Lemon asked for further information (as to what was actually for sale, and what variety of licences were included), and for a draft sale agreement that he could send to his solicitors. There was a discussion about the Stevensons’ price expectations. In later proceedings there was a dispute as to what was said. Mr Lemon said that Mr Robb mentioned \$3.8 million, and that he indicated that he was able to pay that price. On 12 November, Mr Lemon again expressed interest and again asked for a draft sale agreement.

[9] Mr Robb advised the eventual purchaser, Mr Paul Jones, that the orchard was for sale when it was first listed. At that time, Mr Jones did not express interest in buying it. Mr Jones was associated with another kiwifruit packhouse, DMS. Mr Robb knew Mr Jones and was aware of his association with DMS. Mr Jones viewed the orchard in late October or early November and had a number of conversations about the orchard with Mr Robb in the period up to 13 November.

[10] Mr Robb met with the Stevensons on 12 November. He outlined buyer interest, including that of Mr Lemon. The Stevensons agreed that, because not all of the requisite information had been compiled, the auction would be cancelled and draft sale agreements would be sent to any interested parties. Having telephoned

three potential purchasers, Mr Robb sent draft sale agreements to Mr Jones and Mr Lemon on 13 November (the third potential purchaser having advised that he did not want to pursue it). Mr Lemon asked for more information about what was for sale when he spoke to Mr Robb.

[11] On 14 November the Stevensons met with Mr Robb, before a meeting arranged between the Stevensons and Mr Jones. The purpose of the earlier meeting with Mr Robb was to discuss outstanding issues that had to be addressed, and to discuss buyer interest. Mr Robb said that there were two potential purchasers. The Stevensons knew that Mr Jones was one of them. Again, there was later a dispute as to whether Mr Robb named Mr Lemon as the second purchaser and what response, if any, the Stevensons made.

[12] Mr Robb received a telephone call from Mr Lemon during the meeting between himself and the Stevensons, and left the meeting to take the call. Mr Lemon confirmed his interest in buying the orchard and asked for further information, including details about Zespri licences. Mr Robb said he would call Mr Lemon back. When he returned to the meeting with the Stevensons, Mr Robb did not tell them that the call had been from Mr Lemon and that Mr Lemon had confirmed his interest in buying the orchard.

[13] During the meeting with Mr Jones, and before they accepted his purchase offer (at \$3.8 million), the Stevensons asked Mr Robb if there were any other buyers. Mr Robb answered “no”. The Stevensons considered Mr Jones’ offer to be a bad deal but reached a “handshake agreement” to sell the orchard to Mr Jones, after they were told that there was no other interest.

[14] After the meeting, Mr Robb telephoned Mr Lemon and said that the sale was on hold, and that the Stevensons’ price expectation was now \$5 million. Mr Robb did not mention the “handshake agreement”, but said that the sale was “on hold”. The Stevensons signed an agreement for Sale and Purchase with Mr Jones on 15 November 2015.

[15] In a telephone conversation on 16 November, Mr Lemon told the Stevensons that he would have been prepared to pay \$4–4.5 million. Mr Lemon submitted a counter offer, but that could not proceed, as Mr Jones declared his offer unconditional.

Subsequent proceedings

Disciplinary proceedings

[16] The Stevensons complained to the Real Estate Agents Authority in April 2013, alleging that Mr Robb had deliberately misled them, and Mr Lemon and Jace, regarding Mr Lemon's interest in the orchard. Jace made a similar complaint. A Complaints Assessment Committee considered the complaints in July 2014 and decided that no further action should be taken. Maketu and Jace appealed to the Tribunal. The Tribunal allowed the appeals on 21 September 2015, on the basis that the complaints were to be referred to CAC 403 on the expectation that further charges should be laid. CAC 403 decided on 3 November 2015 to lay a charge of misconduct against Mr Robb in respect of his dealings with Mr Lemon, and a charge of unsatisfactory conduct in respect of his dealings with Maketu.

[17] Maketu appealed to the Tribunal against CAC 403's decision to lay a charge of unsatisfactory conduct, rather than misconduct, in respect of Mr Robb's dealings with them. In a decision dated 11 July 2016, the Tribunal allowed the appeal and remitted the matter back to CAC 403 to reconsider the charge of unsatisfactory conduct.¹

[18] CAC 403 laid amended charges on 15 September 2016, charging Mr Robb with misconduct in respect of his dealings with both Mr Lemon (the first charge), and Maketu (the second charge), with alternative charges of unsatisfactory conduct.

¹ *Maketu Estates Ltd v The Real Estate Agents Authority (CAC 403)* [2016] NZREADT 48.

High Court proceedings

[19] In June 2013, Maketu issued proceedings in the High Court, pleading that Mr Robb and Wrightsons had engaged in misleading and deceptive conduct while in trade (in breach of s 9 of the Fair Trading Act 1986) and, in the alternative, that Mr Robb had breached his fiduciary duty, or a duty of good faith, to Maketu. In his judgment delivered on 29 October 2014, his Honour Woolford J held that:²

[a] Mr Robb had engaged in misleading and deceptive conduct in failing to tell Mr Lemon about the “handshake agreement” with Mr Jones, and by failing to disclose Mr Lemon’s interest to Maketu, leading to Maketu believing that Mr Jones was the only interested party.³

[b] Mr Robb had breached his fiduciary duty of loyalty to Maketu, but his conduct fell just short of breaching a duty of good faith (if such a duty existed).⁴

[20] Maketu was awarded damages of \$1,101,375.⁵

Should Mr Robb be found guilty of misconduct on the second charge?

The relevant Rules

[21] The Rules referred to in the second charge against Mr Robb provide:

Rule 6.4: A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.

Rule 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.

Rule 9.4: A licensee must not mislead customers as to the price expectations of the client.

² *Maketu Estates Ltd v Robb* [2014] NZHC 2664, (2014) 16 NZCPR 166.

³ At [59]–[62].

⁴ At [63]–[68].

⁵ At [115]. (The market value of the orchard at the time of sale was accepted by the Judge as being \$4.945 million.)

[22] Notwithstanding the reference to r 9.4 in the second charge, counsel in fact made submissions based on the wording of r 9.3, which provides:

A licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest, unless otherwise instructed by the client.

[23] The references to the wording of r 9.3 rather than r 9.4 are not material to our consideration of the two issues before the Tribunal. Whether Mr Robb is guilty of misconduct on the second charge and if so, what penalty should be imposed, can be determined by reference to rr 9.1 and 6.4.

Submissions

[24] Ms Lawson-Bradshaw submitted that misconduct is the proper finding. She submitted that the purpose of the Act and the Rules is to ensure that there is trust and confidence in the relationship between a licensee and vendor. She submitted that the duty imposed on licensees by r 9.1 to act in the best interests of their clients is a core obligation. She submitted that a primary reason why a vendor engages a licensee to sell a property is to obtain the licensee's assistance to obtain the best possible price for the property. If vendors cannot rely on their licensees to act in their best interests then the relationship of trust and confidence is undermined and the purpose of the Act is subverted.

[25] She submitted that Mr Robb made a deliberate decision not to tell the Stevensons about Mr Lemon's telephone call and interest in buying the orchard, and a deliberate decision to tell them that there were no buyers other than Mr Jones. She submitted that Mr Robb lied to the Stevensons and, in those circumstances, misconduct is the only finding that could be made.

[26] In support of this submission, Ms Lawson-Bradshaw submitted that Mr Robb is not a junior, inexperienced, salesperson. He has been a salesperson for many years, and is clear as to his obligations. He knows that an important part of his role is to get the best possible price for his clients, acting as intermediary between his clients and potential purchasers.

[27] Ms Lawson-Bradshaw submitted that information as to a potential purchaser is the type of information that is fundamental to a licensee's role in the sale process, and must be passed on to a vendor. Thus, when such information is deliberately withheld, the breach of the Rules must be considered wilful.

[28] Ms Lawson-Bradshaw referred to a possible submission for Mr Robb, that the reason he did not tell them about Mr Lemon's telephone call, and did not tell them of his interest in buying the orchard, was that he believed that the Stevensons did not consider that Mr Lemon had the necessary "horsepower" to complete a sale and, therefore, were not interested in dealing with him. She submitted that even if that were the case, it was still incumbent on Mr Robb to tell the Stevensons that there was still a potential purchaser other than Mr Jones. She further submitted that even if Mr Robb's motive for not disclosing Mr Lemon's interest was that he did not want to disrupt the negotiations with Mr Jones, that did not allow him to breach his professional obligations to the Stevensons.

[29] Ms Lawson-Bradshaw submitted that if the Tribunal did not consider that Mr Robb had wilfully breached his professional obligations, then his conduct must be regarded as reckless. She submitted that Mr Robb knew what his obligations were, so in not telling the Stevensons about Mr Lemon's interest (conveyed to Mr Robb as recently as in the telephone call during his meeting with the Stevensons), Mr Robb must be found guilty of a reckless breach of the Rules.

[30] Mr Caradus submitted for Mr Robb that this is not a case of outright dishonesty. Rather, Mr Robb said something to the Stevensons that was not correct. He saw Mr Lemon as having repeatedly asked for more and more information, without ever making an offer. Mr Robb accepted that he had misapprehended the level of Mr Lemon's interest, and thus made a mistake.

[31] Mr Caradus also submitted that a distinction must be made between Mr Robb's lie to Mr Lemon (when he said that the Stevensons' price expectations had increased to \$5 million, and that the sale process was on hold), and Mr Robb's omission to tell the Stevensons about Mr Lemon's telephone call, and interest in buying the orchard.

He submitted that while the former was, as Mr Robb had admitted, misconduct, the latter could not be misconduct under s 73 of the Act.

[32] He submitted that Mr Robb's reason for not telling the Stevensons about Mr Lemon's call was that the Stevensons already knew of Mr Lemon's interest from earlier discussions, and had dismissed it. In the circumstances, he submitted, it was reasonable for Mr Robb to consider that telling the Stevensons of another telephone call would not change anything, and that he did not need to disclose it.

[33] Mr Caradus submitted that while in hindsight Mr Robb accepts that he should have told the Stevensons about Mr Lemon's telephone call, his failure to do so on 14 November could only be unsatisfactory conduct. He submitted that the Tribunal should consider what occurred from Mr Robb's perspective on the day. This was that the Stevensons were not interested in selling to Mr Lemon; their only interest was in Mr Jones or another potential purchaser (who had withdrawn at the time the draft sale agreements were sent out on 13 November).

[34] Mr Caradus also submitted that Mr Robb's response "no" to the question whether there were any other buyers was a shorthand way of saying "since you do not want to deal with Mr Lemon, and Mr Lemon keeps on asking for more questions, there are no other buyers".

[35] Finally, Mr Caradus submitted that to say that "not passing on information" is a deliberate decision, and thus misconduct, must as a matter of law, be wrong; if that were the case then every failure to pass on information must be misconduct.

The Tribunal's approach to a charge of wilful or reckless breach of the Act and/or Rules

[36] Ms Lawson-Bradshaw referred us to the Tribunal's discussion of the approach to be taken to charges under s 73(c) of the Act in *Complaints Assessment Committee 20005 v Cui*,⁶ and *Real Estate Agents Authority (CAC 20004) v Clark*.⁷ In both decisions, the Tribunal referred to comments made by Phillips J in the Supreme

⁶ *Complaints Assessment Committee 20005 v Cui* [2015] NZREADT 1.

⁷ *Real Estate Agents Authority (CAC 20004) v Clark* [2013] NZREADT 62.

Court of Victoria in *Zaitman v Law Institute of Victoria* on the issue of wilfulness and recklessness.⁸ In *Cui*, the Tribunal said, at [46]:⁹

...Accordingly, if we conclude that when assessed in the round, the defendant contravened any of the rules listed [in a charge of wilful or reckless breach of the Rules], and that when she did so, she was aware of the possibility that her conduct might involve a contravention of a rule, then she will be guilty of misconduct ...

[37] We accept Ms Lawson-Bradshaw's submission that in order to establish misconduct under s 73(c)(iii), the Committee does not need to establish that Mr Robb had a dishonest intention to mislead or otherwise breach professional standards. We further accept her submission that to prove a wilful or reckless breach of the Rules, the Tribunal is required to find, on the balance of probabilities, that Mr Robb either knew that his conduct would breach a Rule or Rules (wilfulness), or that he foresaw the possibility that his conduct would be in breach and proceeded regardless (recklessness).

Submissions

[38] Both Ms Lawson-Bradshaw and Mr Caradus referred to the judgment of his Honour Woolford J in the High Court. In particular, Mr Caradus relied on the Judge's assessment of the reasons Mr Robb gave for not telling the Stevensons about Mr Lemon's interest, which were reflected in the submissions made by Mr Caradus in this hearing.

[39] We must repeat the observation made in the Tribunal's decision on Maketu's appeal concerning the charges laid by CAC 403, which was that his Honour was not required to (and did not) consider Mr Robb's professional obligations under the Act and Rules and, in particular, his specific obligations under the Rules to his client, Maketu.¹⁰ Those obligations are, however, the focus of a disciplinary hearing.

⁸ *Zaitman v Law Institute of Victoria* [1994] VicSC 778 (9 December 1994) at p 52.

⁹ *Cui*, above fn 6, at [46].

¹⁰ *Maketu v The Real Estate Agents Authority (CAC 403)*, above n 1, at [46].

[40] Bearing that in mind, the following paragraphs are of assistance in this proceeding. After finding that “Mr Robb misled Mr Lemon on 14 November when he chose not to tell him that Mr Jones and the Stevenson brothers had reached an agreement in principle”,¹¹ his Honour went on:¹²

I regret that I have to make this finding [of misleading and deceptive conduct in relation to Mr Lemon] as Mr Robb is a man of good character, but I have reached the view that, on this occasion, he has committed a regrettable lapse of judgment. ... Mr Robb had reached the erroneous view that [Maketu] was not interested in negotiating with Mr Lemon and thought that if he told Mr Lemon about the agreement in principle it might in some way cause difficulty with the deal with Mr Jones. ...

[41] The Judge then considered Mr Robb’s conduct in relation to the Stevensons. He said:¹³

Having made that finding [that Mr Robb misled Mr Lemon] it is not necessary to make a detailed finding on whether or not Mr Robb misled the Stevenson brothers by not disclosing to them Mr Lemon’s continued interest in the orchard. I note it is likely Mr Robb did not appreciate the significance of Mr Lemon’s interest. It is also likely that it was Mr Robb’s opinion that Mr Jones was the only buyer, and this opinion was honestly held. However, that opinion was expressed as a statement of fact by Mr Robb when he told the Stevenson brothers that Mr Jones was the only buyer at the meeting on 14 November. Ultimately it was not open to Mr Robb to mislead Mr Lemon and fail to disclose his interest in order to avoid upsetting the deal with Mr Jones. His failure to do so misled the Stevenson brothers into believing that Mr Jones was the only buyer of the orchard.

[42] The Judge’s award of damages in Maketu’s favour followed from his finding that:¹⁴

... I am satisfied that Mr Robb breached his duty of loyalty as [Maketu’s] agent. ... Mr Robb actively misled Mr Lemon for little reason. To my mind that is probative evidence that Mr Robb had an undue preference for Mr Jones that did not align with his client’s interests. Although it was not an overt conflict I consider Mr Robb’s partiality is sufficient to find that Mr Robb acted in breach of his duty of loyalty in a manner that went beyond mere carelessness on his part.

[43] We accept Ms Lawson-Bradshaw’s submission that the obligation under r 9.1 that licensees must act in their clients’ interests is a core obligation. It can fairly be

¹¹ *Maketu Estates Ltd v Robb*, above n 2, at [59].

¹² At [60].

¹³ At [62].

¹⁴ At [67].

described as fundamental to the relationship between a licensee and a vendor. The same can be said of the obligation under r 6.4 not to mislead, provide false information, or withhold information that should in fairness be provided.

[44] Regardless of his opinion as to the Stevensons' attitude, and his assessment of Mr Lemon's ability to settle a purchase, it was not for Mr Robb to decide whether to pass on to the Stevensons information as to Mr Lemon's definite interest in buying. It was not for him to decide (even if he was correct about the Stevensons' unwillingness to deal with Mr Lemon) that their attitude would not change.

[45] If there is a scale of information between that which must be passed on to a licensee's client and that which need not be (we do not need to decide whether there is such a scale), then information regarding another potential purchaser must be at the highest end of that scale. It is information that must be passed on, in order for licensees to comply with their obligation to act in their client's best interests. There may be some force in Mr Caradus's submission that licensees do not have to pass on every piece of information they receive (again, this is not a matter we have to decide), but this cannot be one of them.

[46] We do not accept Mr Caradus's submission as to there being a distinction between "omitting to tell" (in this case, Mr Robb omitting to tell the Stevensons about Mr Lemon's interest in buying) and "telling a lie" (as in Mr Robb's statements to Mr Lemon). That is not a material distinction for a finding as to liability: an *omission* to do something is not in and of itself any less serious than the *commission* of something. The focus must be on the actual conduct.

[47] Nor do we accept that Mr Robb's "omission" could not be described as deliberate. Whatever his reasons for doing so, Mr Robb's omission to tell the Stevensons about Mr Lemon's telephone call was not accidental. Mr Robb made a conscious decision not to tell them. He also made a conscious decision to tell the Stevensons that there were no other buyers, rather than tell them that Mr Lemon had expressed a definite interest. That is sufficient to take his conduct out of the realm of unsatisfactory conduct under s 72 of the Act. As his Honour Woolford J held in the

High Court, “Mr Robb acted in breach of his duty of loyalty in a manner that went beyond mere carelessness on his part”.

[48] As we said earlier, the obligations under rr 9.1 and 6.4 are core obligations in the Rules. Mr Robb’s contravention of those Rules cannot be regarded as anything other than misconduct.

[49] Accordingly, we find Mr Robb failed to act in the best interests of Maketu and, therefore, contravened rr 9.1. We also find that he misled the Stevensons, provided false information to them, and withheld information from them that he should have provided and, therefore, contravened r 6.4. In each case, we are satisfied that those breaches resulted from a conscious decision made by Mr Robb, in the knowledge of the nature and extent of his obligations under the Rules. Accordingly, we find him guilty of a wilful breach of the Rules, and guilty of misconduct under s 73(3)(iii) of the Act on the second charge.

Penalty

Penalty principles

[50] The principles on which penalty decisions are made are well known. The principal purpose of the Act is to “promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.”¹⁵ Penalties for misconduct and unsatisfactory conduct must reflect that purpose.

[51] Penalties for misconduct and unsatisfactory conduct are determined bearing in mind the need to maintain a high standard of conduct in the industry, the need for consumer protection, and the maintenance of confidence in the industry, and the need for deterrence. A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The Tribunal should

¹⁵ Real Estate Agents Act 2008, s 3(1).

impose the least punitive penalty that is appropriate in the circumstances, and while there is an element of punishment, rehabilitation is an important consideration.¹⁶

[52] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As relevant to the present case the Tribunal may make any of the orders that a Complaints Assessment Committee may impose under s 93 of the Act (these include censuring or reprimanding the licensee, and ordering the licensee to undergo training or education), impose a fine of up to \$15,000, order cancellation or suspension of the licensee's licence and/or order the licensee to pay compensation of up to \$100,000.

[53] We accept Ms Lawson-Bradshaw's submission that, given that both charges relate to Mr Robb's conduct in respect of one transaction, taking place over a few days, it is appropriate to adopt a global approach to penalty, to reflect the gravity of Mr Robb's overall conduct during the course of the transaction.

Submissions

[54] We received written submissions as to penalty from Mr Brittain, on behalf of Maketu. He submitted that Mr Robb's breaches of the Rules are at the high end of the scale for charges involving duties in respect of information, as they were not an inadvertent failure to pass on information, or failure to appreciate the significance of the information; they were a series of deliberate and calculated lies. These were Mr Robb's deliberate fabrication of his statements to Mr Lemon, his deliberate decision not to tell Mr Lemon about the "handshake agreement", and his deliberate decision to make a false response to the Stevensons, at a critical point in the negotiations with Mr Jones, as to whether there were any other interested parties.

[55] Mr Brittain submitted that the only inference the Tribunal could draw is that Mr Robb embarked on this course of lies for his own personal gain (to secure a commission). He further submitted that Mr Robb's conduct had significant financial and personal implications for Maketu and the Stevensons, beyond the direct financial

¹⁶ See *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30, *Morton-Jones v The Real Estate Agents Authority* [2016] NZHC 1804 at [128], and *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97].

loss for which they were awarded damages in the High Court. He submitted that the damages award would never compensate for the lost opportunities that would have been available to the Stevensons if rival bids from competing packhouses had been presented.

[56] Finally, Mr Brittain submitted that the penalties imposed on Mr Robb should reflect his deliberate deception of Mr Lemon and the Stevensons, and should include loss of licence.

[57] Both Ms Lawson-Bradshaw and Mr Caradus referred us to penalties imposed in earlier cases which might be said to have some similarity, in some respects, to the present case. We are conscious of the need to endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. But a penalty must be imposed on the particular facts and circumstances of the conduct concerned. It is rare for two cases to have sufficient similarity as to the background facts, the seriousness of the licensee's conduct, and other factors which inform the penalty decision, such that they can be considered to be on all fours with each other.

[58] Ms Lawson-Bradshaw acknowledged that Mr Robb has no previous disciplinary history, and that no further concerns have been raised regarding his professional work since the original complaint was made. She accepted that those factors, together with personal factors, could lead to a reduction in the penalty imposed.

[59] Mr Caradus submitted that Mr Robb's conduct was at the lower end of the spectrum of seriousness. He referred to his Honour Woolford J's characterisation of Mr Robb's actions as being a "regrettable lapse in judgment" from a man of "good character", arising out of a lack of appreciation of Mr Lemon's interest.¹⁷

[60] Mr Caradus also submitted that Mr Robb was not motivated by a desire to harm anyone, but was trying to avoid "upsetting the apple cart" in respect of the negotiations with Mr Jones. Mr Caradus described Mr Robb as "stringing Mr Lemon along with his requests for information, which could have jeopardised the existing

¹⁷ Citing *Maketu Estates Ltd v Robb* at [60] (above fn 2) (set out at paragraph [40] above).

agreement, in circumstances where Mr Lemon (on Mr Robb's understanding) was not a genuine buyer". He submitted that Mr Robb believed that it was in everyone's best interests that he "let Mr Lemon down gently". He further submitted that Mr Robb had not sought to gain a profit from his actions, that he would not otherwise have gained.

[61] Mr Caradus submitted that Mr Robb had already been sufficiently punished through the High Court proceedings and the findings and orders made against him which, he submitted, had been widely publicised.

[62] Mr Caradus also referred to the circumstances in which Maketu's orchard was marketed. He submitted that following the outbreak of PSA, and its devastating effect, selling the orchard was going to be particularly difficult. Further, Mr Robb was hampered and frustrated by the difficulties arising from the manner in which information was released by Maketu, which put in jeopardy a transaction that he had spent some two months putting together.

[63] Mr Caradus submitted that Mr Robb is a salesperson employed by a nationwide estate agency which takes compliance with the Act and Rules very seriously. He told the Tribunal that since the complaints had been made against him, Mr Robb has worked with Wrightsons' Principal Officer, Training and Recruitment. Letters demonstrating significant support for Mr Robb were provided to the Tribunal by senior management people in Wrightsons, people in the kiwifruit industry, and others with whom Mr Robb has had dealings. It is evident that Mr Robb is held in high regard.

Discussion

[64] Although the focus of the hearing was on the second charge, we are required to determine what the appropriate penalty is on the basis of two findings of misconduct. That is, while considering the charges on a global basis, Mr Robb has admitted misconduct in relation to his conduct towards Mr Lemon, and we have found misconduct in relation to his conduct towards Maketu.

[65] As regards Mr Lemon, Mr Robb has admitted the charge of misconduct under s 73(3)(iii) of the Act, that he wilfully breached rr 6.2 and 6.4 of the Rules. Rule 6.2 required him to act in good faith and deal fairly with all parties to the transaction, and r 6.4 required that he not mislead a customer, nor provide false information, nor withhold information that he should have provided. Mr Robb admitted that he had breached both of those Rules. Mr Caradus's submission (set out at paragraph [60], above) that he was "stringing Mr Lemon along" does not ameliorate the seriousness of his conduct towards Mr Lemon, the subject of the first charge.

[66] As regards Maketu, Mr Robb has also been found guilty of misconduct under s 73(c)(iii) of the Act, in that he wilfully or recklessly failed to act in Maketu's best interests, misled them, provided false information to them, and withheld information from them by not telling them about Mr Lemon's telephone call, and withholding from them information about Mr Lemon's interest.

[67] While those breaches may not be at the most serious end of misconduct, they cannot be regarded as being at the lower end, as Mr Caradus submitted.

[68] Although he was not concerned with whether Mr Robb had breached his professional obligations, his Honour Woolford J's comments are informative:

However, that opinion [that Mr Jones was the only bidder] was expressed as a statement of fact by Mr Robb when he told the Stevenson brothers that Mr Jones was the only buyer at the meeting on 14 November. Ultimately it was not open to Mr Robb to mislead Mr Lemon and fail to disclose his interest in order to avoid upsetting the deal with Mr Jones. His failure to do so misled the Stevenson brothers into believing that Mr Jones was the only buyer of the orchard.¹⁸

...

... I am satisfied that Mr Robb breached his duty of loyalty as [Maketu's] agent. ... Mr Robb actively misled Mr Lemon for little reason. To my mind that is probative evidence that Mr Robb had an undue preference for Mr Jones that did not align with his client's interests. Although it was not an overt conflict I consider Mr Robb's partiality is sufficient to find that Mr Robb acted in breach of his duty of loyalty in a manner than went beyond mere carelessness on his part.¹⁹

¹⁸ *Maketu Estates Ltd v Robb*, above n 2 at [62].

¹⁹ At [67].

[69] Notwithstanding the Judge's comments that Mr Robb is a man of good character, and that his conduct was a regrettable lapse of judgment, it cannot be taken from the above comments that he did not regard Mr Robb's conduct as anything other than serious. The character references provided to us support the Judge's comments, and we take those references into account, however, we must start from the findings of misconduct that are nearer to the "serious" end of the scale, rather than the "lower end".

[70] We accept that there are strong mitigating factors in Mr Robb's long and unblemished career as a salesperson, the support he has from Wrightsons and the training he has completed after the complaints, and the many favourable character references submitted on his behalf. We can also take into account the very difficult circumstances in which he was acting at the time. While those circumstances do not ameliorate the seriousness of Mr Robb's conduct, they can be considered as a mitigating factor in assessing penalty.

[71] We do not accept Mr Brittain's submission that the seriousness of Mr Robb's conduct requires a penalty which includes cancellation of his licence. Nor do we accept his submission that we should order Mr Robb to pay compensation. However, we have concluded that but for the mitigating factors, his conduct would have justified a period of suspension of his licence, together with a fine. We have concluded that in this case, suspension is not necessary, nor is it necessary to make any order for further training.

[72] Having taken all of the factors set out above into account, we have concluded that the appropriate penalty is for Mr Robb to be censured, and ordered to pay a fine of \$8,000.

Outcome

[73] Mr Robb admitted misconduct under s 73(c)(iii) of the Rules on first charge. He has been found guilty of misconduct under s 73(c)(iii) of the Rules on the second charge.

[74] Mr Robb is censured and ordered to pay a fine of \$8,000. The fine must be paid to the Authority within 20 working days of the date of this decision.

[75] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member