BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 58

READT 006/17

IN THE MATTER OF	Charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 414
AGAINST	DEEPAK GOYAL Defendant
Hearing:	8 – 10 August, and 29 August 2017, at Auckland
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms N Dangen, Member
Appearances:	Mr M Hodge and Mr J Simpson, on behalf of the Committee Mr T Rea, on behalf of the defendant
Date of Decision:	4 October 2017

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Goyal faces charges under the Real Estate Agents Act 2008 ("the Act"), brought by Complaints Assessment Committee 414 ("the Committee"). The charges arise out of the sale and purchase of two neighbouring properties at Pakuranga, Auckland. The two properties will be referred to as "Number 11" and "Number 13", respectively, and together as "the properties".

[2] There are three charges for each property. In respect of each property, Mr Goyal is charged first under s 73(c)(i) and (iii) (wilful and reckless contravention of provisions of the Act or the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules")). In the alternative, the Committee charges Mr Goyal under s 73(b) of the Act (seriously incompetent or seriously negligent real estate agency work). In the further alternative, the Committee charges Mr Goyal under s 72 of the Act (unsatisfactory conduct).

[3] Mr Goyal accepts that he has engaged in unsatisfactory conduct, but denies the charges of misconduct.

Background facts

[4] Mr Goyal is a licensed salesperson, and at all relevant times was employed as a salesperson by Barfoot & Thompson Ltd ("the Agency"), at its Papatoetoe office. He was first licensed from March 2014. This was approximately 10 months before the relevant events.

[5] There was no dispute as to the factual background to the charges. The following summary is drawn from the opening submissions on behalf of the Committee.

[a] On 21 October 2014, the owner of Number 11 signed an agency agreement with Ms Gao, a licensed salesperson at the Agency's Pakuranga branch. The agency agreement provided for Number 11 to be sold by auction.

[b] Mr Goyal showed Number 11 to Mr M S Grewal in November 2014. Given its large section, it was seen as having potential for development. Mr Grewal had previously done business with Mr Goyal, having bought and sold a number of properties since mid-2014, where Mr Goyal acted as real estate agent.

[c] Mr Grewal successfully bid for Number 11 at auction on 29 November 2014, at a purchase price of $1.160 million. Mr Grewal signed the sale and purchase agreement on behalf of his property development company, HP & MP Properties Limited ("HP & MP"). The deposit of $58,000 was paid the same day by a cheque drawn on HP & MP's bank account. Two days later, on 1 December 2014, Mr Goyal deposited $40,000 into HP & MP's bank account.

[d] Mr Goyal received a 40 percent share of the commission on the sale of Number 11, as selling salesperson.

[e] Number 13, a tenanted rental property, was also seen as having development potential. In December 2014, Mr Goyal approached the owner of Number 13 and told her that a client, who had recently bought Number 11, was interested in also buying Number 13. She signed an agency agreement on 16 December 2014, with Mr Goyal recorded as the listing salesperson.

[f] On 18 December 2014, Mr Grewal (on behalf of HP & MP) signed a sale and purchase agreement for Number 13 for $1,348 million (after some negotiation as to the price). Mr Goyal is recorded as having acted on the sale. The deposit was agreed (again after some negotiation) at $80,000. The deposit was paid on or about 23 December 2014, by way of two cheques, each for $40,000, drawn on HP & MP's bank account.

[g] Between 23 and 29 December 2014, Mr Goyal made six deposits into HP & MP's bank account, totalling $60,000.

[h] The sale of Number 13 went unconditional on 13 January 2015. The Agency deducted commission ($36,951) from the deposit.

[i] Mr Ragunathan, of EMACS Group Limited ("EMACS") was engaged to plan the development of the properties ("the development").

[j] On 16 February 2915, Mr Goyal deposited $20,000 (in two payments) into Mr Grewal's bank account, and on 17 February 2015, he deposited a further $10,000.

[k] On 13 March 2015, Mr Grewal signed a document in which he confirmed that Mr Goyal had paid $130,000 into his bank account as a loan, and promised to return it as and when demanded.

[l] We note that Mr Goyal made further deposits into Mr Grewal's bank account: $28,000 on 30 March 2015, and $20,000 (in two payments) on 7 April 2015.

[m] On 23 March 2015, Mr Goyal incorporated a company, VAD Properties Limited ("VAD") with Mr A Goel. On 24 March 2015, Mr Grewal (on behalf of HP & MP) and Mr Goyal and Mr Goel (on behalf of VAD) signed a deed of nomination for each of Number 11 and Number 13. The deeds for each property had identical terms:

[i] Mr Grewal/HP & MP would nominate VAD to complete the purchase;

[ii] as consideration, VAD would meet all outstanding obligations on the transaction; and

[iii] Mr Grewal/HP & MP would complete the purchase in the event that VAD defaulted.

[n] VAD settled the purchase of Number 11 on 27 March 2015. VAD settled the purchase of Number 13 on 25 June 2015.

[o] Mr Goyal did not inform either of his vendor clients that his company, VAD, had become the nominated purchaser. Neither vendor was provided with an independent valuation, or signed a consent form for Mr Goyal to buy their property. No commission was repaid. The owner of Number 13 became aware that Mr Goyal's company, VAD, had bought the property when Mr Grewal informed her in early 2016. The owner of Number 11 became aware when she was contacted by the investigator for the Real Estate Agents Authority.

[p] Mr Goyal subsequently completed the development by subdividing the two properties into eight separate lots, on which houses have been built.

[q] The Tribunal was advised at the hearing that the Agency had refunded that commissions paid by both vendors.

The charges

[6] In Charges 1 (concerning Number 11) and 4 (concerning Number 13) (the charges of wilful or reckless contravention of the Act and Rules), the Committee alleges that Mr Goyal breached:

[a] Section 134 of the Act (acquiring a client's property without obtaining their informed consent in the proper form);[1]

[b] Section 135 (acquiring a client's property without providing an independent valuation);

[c] Rule 6.1 of the Rules (failing to comply with his fiduciary obligations to his client);

[d] Rule 6.3 (engaging in conduct likely to bring the industry into disrepute);

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1 As relevant to this case, s 134 of the Act provides that a licensee must not "acquire" a client's land, or an interest in a client's land, without obtaining the client's consent in writing in the prescribed form, and providing the client with an independent valuation (pursuant to s 135). Mr Rea accepted that the licensee's obligations under ss 134 and 135 continue until a purchase is settled: see *MacLennan Realty Ltd v Court* (2004) 10 TCLR 977.

[e] Rule 6.4 (misleading or withholding information that should in fairness be provided); and

[f] Rule 9.1 (failing to act in a client's best interests).

[7] In addition, in Charges 2 and 3 (Number 11) and 5 and 6 (Number 13) (the charges of serious incompetence or negligence; and unsatisfactory conduct) the Committee alleges, in addition to the breaches set out above, that Mr Goyal breached Rule 5.1 of the Rules, which requires a licensee to exercise skill, care, and diligence at all times when carrying out real estate agency work.

[8] Except in relation to the allegation that he breached r 6.3 (engaging in conduct likely to bring the industry into disrepute) Mr Goyal has admitted Charges 3 and 6: that is, for each of Number 11 and Number 13, he breached the provisions referred to (except for the alleged breach of r 6.3), and has engaged in unsatisfactory conduct. He has denied the charges of misconduct (Charges 1 and 2, and 4 and 5).

What were Mr Goyal's intentions?

[9] There was a dispute as to the parties' intentions regarding the two transactions.

[10] The Committee's case was that Mr Goyal, from the outset, wanted to develop the properties and sought Mr Grewal's assistance, and that it was never intended that Mr Grewal would complete the development. On the Committee's case, Mr Goyal's deposits into Mr Grewal's bank account were an investment in the development, because it was always intended that he would have a joint interest in it, or a sole interest if Mr Grewal pulled out.

[11] Mr Goyal said that the deposits were loans, to help Mr Grewal. He said that he drew up the document signed by Mr Grewal on 13 March 2015 when he became concerned that Mr Grewal might be becoming financially over-extended with financial commitments, in particular with another development. He further said that it was only shortly before entering into the deeds of nomination that he became

interested in acquiring the properties. Mr Goyal said he took over the transactions and completed settlement because Mr Grewal was not able to arrange finance.

[12] Mr Goyal said that a personal, unsecured, loan under an informal agreement, with no agreed repayment arrangement, is common in Indian culture. He said he had made similar informal loans to other people. He said that he lent money to Mr Grewal, notwithstanding that he had only known him for some four to five months, because Mr Grewal asked for it, and he was able to lend it. He said he was not sure what Mr Goyal wanted the money for, and did not ask. He further said that it was important for him to assist Mr Grewal as at that time, approximately 50 percent of his commission income was generated by Mr Grewal, buying and selling properties.

[13] It would not be appropriate for this Tribunal to discuss whether there is a common Indian cultural practice of making personal, informal, unsecured loans, and in any event, we do not have a sufficient evidential basis to do so. However, we note that Mr Grewal acknowledged in cross-examination that such loans are "not unusual". In the light of that acknowledgement, we accept that Mr Goyal may have lent Mr Grewal in total $130,000 between December 2014 and February 2015 on that basis, and that the loans were not documented until March 2015.

[14] However, we do not accept Mr Goyal's evidence that he did not know, or was not sure, what Mr Grewal wanted to use the money for. The timing of the payments, closely aligned to the payment of the deposits on the two properties (in transactions where he was acting as salesperson), leads us to infer that Mr Goyal knew that the payments were going towards the deposits to buy the properties, and that they were being bought for the development.

[15] As noted above, the Committee's case was that Mr Grewal's role was simply to purchase the properties, and that Mr Goyal always intended to do the development, either with or without Mr Grewal. Mr Grewal's evidence was that he was just a "front" for Mr Goyal, and simply did what Mr Goyal told him to.

[16] We do not accept Mr Grewal's evidence that his role was limited to that extent. He accepted in cross-examination that he had a more active involvement in the

development. He and Mr Goyal attended meetings with Mr Ragunathan, and he frequently telephoned Mr Ragunathan to discuss the development. Further, he signed the applications for resource consent.

[17] Nor do we accept Mr Goyal's evidence that he had no interest in the development until shortly before the sale of Number 11 was about to be settled. He lent money to Mr Grewal so that he could pay the deposits on the properties. He too attended the meetings and discussed the development with Mr Ragunathan. While EMACS invoices were sent directly to HP & MP, other dealings with EMACS concerning the development were with Mr Goyal, only. We do not accept that Mr Goyal's involvement to this extent was purely to assist his valued client, Mr Grewal.

[18] Mr Ragunathan's evidence was that Mr Grewal had engaged EMACS previously, for other developments, as indeed had Mr Goyal. We do not accept that Mr Grewal would have needed Mr Goyal solely for the purpose of shepherding him through the process.

[19] We find that Mr Goyal had at least some financial interest in the development, from the outset.

Determination of the charges

[20] The Tribunal is required, first, to determine whether Mr Goyal breached r 6.3, and secondly to determine whether the breaches as admitted or found amount to misconduct under either s 73(c)(i) and (iii) or s 73(b) (as the Committee alleges), or unsatisfactory conduct (as admitted by Mr Goyal).

The alleged breach of r 6.3

[21] Rule 6.3 provides that:

> A licensee must not engage in conduct that is likely to bring the industry into disrepute.

Submissions

[22] Mr Hodge submitted that when Mr Goyal's admitted breaches of the Rules are examined in their entirety, a breach of r 6.3 is established. He submitted that Mr Goyal's conduct falls into two categories: first, his breaches of ss 134 and 135 of the Act, and (beyond the breaches of ss 134 and 135), Mr Goyal's breaches of his fiduciary obligation to his vendor clients (r 6.1), his duty not to mislead or withhold information (r 6.4), and his duty to act in his clients' best interests (r 9.1).

[23] The second category relates to Mr Goyal's provision of funds to Mr Grewal, whereby Mr Goyal again breached rr 6.1, 6.4, and 9.1 by taking no steps to draw this to the vendors' attention, and to obtain their informed consent to proceeding with the transactions.

[24] Mr Hodge submitted that Mr Grewal's conduct, taken as a whole, was so inconsistent with a licensee's fundamental obligations to their clients that it should be recognised as conduct likely to bring the industry into disrepute, in breach of r 6.3. He submitted that licensees should not be in the business of buying properties from their vendor clients except in the most transparent and informed way possible, and that had not occurred in this case.

[25] Mr Rea submitted that r 6.3 envisages a more serious nature than conduct that may constitute a breach of other Rules. He submitted that there was no device in the transactions so as to avoid compliance with any obligations under the Act.

[26] Mr Rea acknowledged that the fact that Mr Goyal lent money to Mr Grewal indicates that Mr Goyal may be closer to Mr Grewal than would be appropriate for a licensee, but he submitted that Mr Goyal did not appear to be affected by this when dealing with the vendors, as he had told each of them that the purchaser wanted to develop their property.

[27] Mr Rea submitted that in the circumstances, Mr Goyal's conduct does not bring the industry into disrepute. Rather, it highlights the need for better training of salespeople to ensure that they understand their fiduciary duties to vendors, and that

their obligations under ss 134 and 135 of the Act continue after a contract is unconditional.

Discussion

[28] Rule 6.3 was discussed briefly by the Tribunal in its decision in *Jackman v CAC 10100*,[2] where the Tribunal approved of a Complaints Assessment Committee's discussion of r 6.3 in *Re Raos*.[3] In that case the Committee described conduct that would justify a finding of a breach of r 6.3 as conduct that:

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

[29] It is useful to refer to the following consideration of a similar provision in the context of law practitioners. In *Committee of the Canterbury District Law Society v W*, a Full Court held:[4]

> The use of the epithet reprehensible is appropriate in the case of professional misconduct, but is not a useful description to assist in deciding the degree of negligence that warrants a disciplinary finding measured by whether it reflects on fitness to practice or tends to bring the profession into disrepute. This means a "tendency" to distract from, or lower, the reputation of the legal profession in New Zealand. Professional misconduct will have this effect, but behaviour which does not necessarily amount to professional misconduct may be a separate category of offending in terms of s 106(3)(c) [of the Law Practitioners Act 1982]. Reliance on epithets is not helpful in this context. No gloss should be placed in the statutory test.
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> …
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> We do think it is relevant to consider whether the conduct falls below what is expected of the legal profession and whether the public would think less of the profession if the particular conduct was viewed as acceptable.

[30] Section 106(3)(c) of the Law Practitioners Act 1982, cited above, refers to a law practitioner who has:

> … been guilty of negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree as to reflect on

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2 *Jackman v CAC 10100* [2011] NZREADT 31, at [65].

3 *Re Raos* Complaint No. CA4315602, 9 June 2011, at 4.39 (in that case, the Committee concluded that the relevant conduct did not breach r 6.3).

4 *Committee of the Canterbury District Law Society v W* HC Wellington CIV 2007-485-2648, 13 October 2008, at [81]–[82].

> his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

[31] Commenting on this section her Honour Duffy J said in her judgment in *Auckland Standards Committee 3 of the New Zealand Law Society v W*, following a review of relevant authorities:[5]

> I draw the following general points from these authorities: first "No gloss should be placed on the statutory test … Secondly, the use of epithets such as "reprehensible" are not helpful. Thirdly, and of particular importance here, the outcome or consequences of the subject conduct are irrelevant.

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

[33] We adopt the comments accepted by the Tribunal in *Jackman* and, as the Tribunal recently did in *Complaints Assessment Committee 403 v Goundar*,[6] consider whether Mr Goyal's conduct was such that if known by the public generally, was more likely than not to lead members of the public to think that licensees should not condone it or find it to be acceptable. The authorities set out above do not support a proposition that r 6.3 envisages conduct that is of a significantly more serious nature than conduct that may constitute a breach of other rules.

[34] We have concluded that Mr Goyal breached r 6.3. We find that Mr Goyal's admitted breaches of the Act and Rules (in particular his failure to disclose his personal interest in the transactions to either vendor, his personal financial dealings with Mr Grewal, and his failure to disclose his concern as to Mr Grewal's ability to settle the purchases) constituted 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 to be acceptable.

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5 *Auckland Standards Committee 3 of the New Zealand Law Society v W* 2011 NZHC 659, 2011 3 NZLR 117, at [39].

6 *Complaints Assessment Committee 403 v Goundar* [2017] NZREADT 52, at [83]–[84].

Is Mr Goyal guilty of misconduct under s 73?

Submissions

[35] Mr Hodge referred to the Tribunal's commonly cited discussion of "wilfulness" and "recklessness" in *Real Estate Agents Authority (CAC 20004) v Clark*.[7] He submitted that in order to establish a wilful or reckless breach, it is not necessary to prove that a licensee had a dishonest intention to act in contravention of the applicable provisions. He submitted that wilfulness requires the Tribunal to be satisfied that the contravention was deliberate, and recklessness requires the Tribunal to be satisfied that the licensee foresaw the possibility that conduct might breach professional standards and proceeded regardless of that possibility.

[36] Mr Hodge submitted that licensees can be expected to be aware of their fundamental obligations. He pointed to Mr Goyal's academic qualifications (he has a Bachelor of Arts degree (majoring in economics and political science) and a National Diploma in Business) and business experience (he worked as a sales executive for some four years before starting in real estate, and he had completed other developments). He submitted that as an intelligent and successful business person, who had recently completed his qualifications as a real estate licensee, Mr Goyal can be expected to have a good level of awareness of his obligations. He submitted that the Tribunal should reject Mr Goyal's claim that he did not have the appreciation of his obligations that a licensee with more years of experience would have.

[37] He submitted that the Tribunal should also reject Mr Goyal's claim that he was not clear as to the application of s 134 of the Act. He noted that s 134 refers specifically to acquiring an interest in land as a nominee, and submitted that the deeds of nomination in this case were clear in transferring all of Mr Grewal's rights and obligations under each sale and purchase agreement to Mr Goyal (through VAD). He also submitted that the Tribunal should reject Mr Goyal's claim that he thought this was a private sale between himself and Mr Grewal. At the very least, he submitted, Mr Goyal was aware that he was acting in a conflict of interest position

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7 *Real Estate Agents Authority (CAC 20004) v Clark* [2013] NZREADT 62, at [70]–[74].

[38] Mr Hodge submitted that Mr Goyal wilfully or recklessly breached his obligations: he was aware of his obligations and he chose to conceal his involvement from his client vendors and proceeded with the transactions notwithstanding his awareness that in doing so he would breach of those obligations, or that there was a possibility that he would breach his obligations.

[39] He submitted that Mr Goyal did nothing whatsoever to bring his purchase of the properties to the vendors' attention, or to identify and explain his conflicted position. Mr Goyal took the vendor clients' option to cancel their respective sale agreements, and to a refund of commission,[8] away from them by his lack of disclosure. Further, Mr Goyal did not inform the vendors of his concerns that Mr Grewal did not have the financial ability to settle the purchases.

[40] Mr Hodge submitted that Mr Goyal's conduct was a reckless breach of the Act and Rules, even on his own account as to his wish to protect his investment. He submitted that Mr Goyal was aware of, at least, the risk of a conflict of interest arising out of his loans to Mr Grewal, and his concern as to Mr Grewal's inability to settle, but as he wanted to protect his investment, he went ahead anyway.

[41] On the basis of those submissions, Mr Hodge submitted that the Tribunal should find Mr Goyal guilty of misconduct under s 73(c)(i) and (iii) (wilful or reckless contravention of provisions of the Act and Rules)

[42] In the alternative, Mr Hodge submitted that Mr Goyal should be found guilty of misconduct under s 73(b) (seriously incompetent or seriously negligent real estate agency work), on the basis of his total failure to recognise or take any steps towards fulfilling his professional obligations. He submitted that over the course of the two transactions, on Mr Goyal's own evidence, and notwithstanding his training as to the provisions of the Act and Rules, he never checked his position, he never asked any questions, or sought advice from his manager.

[43] Mr Hodge submitted that a licensee's acquisition of a client's property is the most obvious area of conflict in real estate transactions, and this conflict is one that

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8 Pursuant to s 134(4) and (5) of the Act.

even an inexperienced licensee should recognise. He further submitted that Mr Goyal had put himself in a position of conflict of interest from the outset, by virtue of his loans to Mr Grewal.

[44] He further submitted that Mr Goyal's failure to take any steps to comply with his professional obligations in relation to issues that are at heart of relationship of trust and confidence required between licensees and their clients, constituted seriously incompetent or seriously negligent real estate agency work.

[45] Mr Rea submitted that the Tribunal should not find Mr Goyal guilty of misconduct under s 73(c)(i) and (iii), because Mr Goyal believed that his obligations to his client vendors ceased when the sale agreements became unconditional, and therefore did not appreciate that what he was doing was a breach of his obligations and therefore could not have acted wilfully or recklessly.

[46] He further submitted that Mr Goyal could not be found guilty of misconduct under s 73(b), because he was not in a position to appreciate a risk of non-compliance. In this respect, he referred to Mr Goyal's lack of experience and training in the area of a licensee buying a client's property after a sale agreement has become unconditional. He noted the submission for the Committee that Mr Goyal "could be expected to be aware" of his obligations, and the reference to the Tribunal's discussion in *Real Estate Agents Authority CAC 20004) v Clark*,[9] but noted that that case related to a "very experienced" licensee. He submitted that licensees with such experience should of course be expected to know what their obligations were, but that was not the case with an inexperienced licensee

[47] Mr Rea further submitted that the two transactions were unusual, in that there was uncertainty as to whether s 134 was engaged. He submitted that this was not a "classic" s 134 case because Mr Goyal's "interest in the transaction" (the nomination to his company) occurred after the sale agreements became unconditional, at which time, he submitted, there was no conflict of interest. He submitted that the issue as to whether ss 134 and 135 of the Act continued to apply after a sale and purchase agreement had gone unconditional was not simple, particularly for a person qualified

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9 *Real Estate Agents Authority (CAC 20004) v Clark*, above n 7.

for less than one year. He submitted that this was not a straightforward case of a clear conflict: while with the benefit of hindsight Mr Goyal might have recognised risk, that was not the case then.

[48] He also submitted that Mr Goyal had dealt with lawyers when dealing with the nomination, and later (with different lawyers) when settling the purchase of Number 13, and while both sets of lawyers were aware of Mr Goyal's involvement in the transactions as a salesperson, neither raised any query or issue regarding disclosure or compliance obligations.

[49] Mr Rea submitted that the threshold for a finding under s 73(b) is high: the conduct must be established to be "seriously" incompetent, or "seriously" negligent. He submitted that Mr Goyal's conduct did not reach that level.

[50] Mr Rea referred to the judgment of her Honour Thomas J in *Complaints Assessment committee 20003 v Jhagroo*.[10] That case concerned a licensee who negotiated a purchase price that was not sufficient for settlement to occur, and took his commission by deduction contrary to instructions from the solicitors for both the vendor and purchasers. Her Honour upheld the Tribunal's decision that Mr Jhagroo's conduct was incompetent or negligent, but not seriously so. Mr Rea submitted that Mr Goyal's conduct was no more serious than Mr Zhagroo's.

[51] Mr Rea also referred to the Tribunal's decision in *Real Estate Agents Authority (CAC 20006) v Stevenson*.[11] This case concerned a licensee charged under s 73(b) with forging signatures and initials on documents, failing to disclose to a purchaser that the vendor was a licensee, failing to include a provision in a sale and purchase agreement expressly making it condition on another agreement being cancelled, failures to communicate with the vendors, and a failure to keep adequate records. The Tribunal found that the first three matters were established, but the failures to communicate and to keep adequate records, while established, did not constitute misconduct.

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10 *Complaints Assessment committee 20003 v Jhagroo* [2014] NZHC 2077.
11 *Real Estate Agents Authority (CAC 20006) v Stevenson* [2013] NZHC 56.

[52] After referring to the High Court judgment in *Preliminary Proceedings Committee of the Medical Council v Duncan*,[12] the Tribunal observed in *Stevenson* that it could consider each particular and make a finding on each particular, but could also consider the cumulative particulars to see whether cumulatively they amounted to misconduct.

[53] Mr Rea submitted that both *Stevenson* and *Duncan* were concerned with a series of unrelated conduct which, taken as a whole, could amount to misconduct. In contrast, he submitted, the present case could be distilled to a discrete point, being that Mr Goyal did not appreciate the existence of a conflict of interest, or the need to comply with s 134. He submitted that Mr Goyal's conduct could not be seen as an ongoing course of breaches which could cumulatively amount to seriously incompetent or seriously negligent real estate agency work.

[54] Mr Rea further submitted that, in any event, Mr Goyal's conduct did not constitute misconduct. Rather, it was unsatisfactory conduct, as he had admitted.

[55] Mr Rea submitted that Mr Goyal disclosed to the vendor of Number 11 that the purchaser, Mr Grewal, was an investor who wished to develop the property, and he disclosed to the vendor of Number 13 that Mr Grewal had already bought Number 11 and wished to develop both sections together. He submitted that this was information that clearly gave the vendors increased leverage in their negotiations. Mr Rea referred to the negotiations for the purchase of Number 13, where the offer was negotiated up from $1.2 million with a deposit of $40,000 to $1,348 million with a deposit of $80,000.[13]

[56] Finally, Mr Rea submitted that there was no evidence that the vendors suffered any loss; that is, no evidence that either property was sold at undervalue. Further, he submitted, Mr Goyal's conduct was innocent: there was no evidence of tainting from the outset, Mr Goyal believed that it was in everyone's interest to see the transactions settled, and the commissions have been refunded.

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12 *Preliminary Proceedings Committee of the Medical Council v Duncan* [1986] 1 NZLR 513.

13 The Tribunal notes, however, the evidence of the vendor of Number 13, as to her questioning why Mr Goyal was not working for her, to get a 10 percent deposit, and that a deposit of $80,000 was, in fact $50,000 less than 10 percent.

Discussion

[57] We cannot accept that Mr Goyal was not, and could not be expected to be, aware of his obligations under the Act and Rules. While not wishing to minimise the importance of other obligations under other provisions of the Act and Rules, s 134 of the Act, and rr 5.1, 6.1, 6.3, 6.4 and 9.1 set out obligations that are fundamental to the purpose of the Act, as set out in s 3 of the Act:

> (i) The 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.
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> (ii) The Act achieves its purpose by–
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> (a) Regulating agents, branch managers, and salespersons:
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> (b) Raising industry standards:
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> (c) Providing accountability through a disciplinary process that is independent, transparent, and effective.

[58] We note that NZQA Unit Standard 23141, completion of which is mandatory for the issue of a salesperson's certificate, is entitled "Demonstrate understanding of legal matters affecting licensees", and NZQA Unit Standard 26149 (also mandatory) is entitled "Demonstrate knowledge of licensing and code of professional conduct under the Real Estate Agents Act 2008". Mr Goyal's recent completion of these Unit Standards will have made him aware of his fundamental obligations.

[59] Further, Mr Goyal's evidence of "inexperience" is considerably diminished by his evidence as to the number of his sales, and his significant success over a fairly short period of time.

[60] We do not accept Mr Goyal's claim as to there being "uncertainty" as to the application of s 134. The section expressly refers to an interest being acquired as nominee, and the High Court judgment in *MacLennan Realty Ltd v Court*,[14] which confirmed that s 134 applies after a sale and purchase has become unconditional, was reported in 2004. Even if Mr Goyal could not have been expected to know of the High Court judgment he was, or should have been, aware of the terms of s 134. If he

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[14] *MacLennan Realty Ltd v Court*, referred to at n 1, above.

had any uncertainty as to whether, as a nominee, s 134 should apply to him, he should have raised the matter with his manager.

[61] Contrary to the submission for Mr Goyal, the terms of the deeds of nomination were not unusual, or complex. Nominations occur frequently in real estate transactions. The only aspect that may have been "unusual" in this case was that Mr Goyal himself (through his company) was the nominee. But that aspect was sufficient to require him to query whether he was doing everything properly.

[62] We also reject the submission that Mr Goyal may in any way be absolved from a breach of his professional obligations by the fact that another person (in this case, solicitors) may not have alerted him to a possible breach. His obligations as a licensee are his, alone, and it is for him to ensure that he complies with them.

[63] As noted earlier, Mr Rea referred to the High Court judgment in *Zhagroo*. We bear in mind her Honour's observation in that case, 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 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.

[64] We have considered the facts of *Zhagroo*, and we cannot accept Mr Rea's submission that Mr Goyal's conduct is no more serious than Mr Zhagroo's. We can only assess Mr Goyal's conduct on the facts before us. As recorded earlier, we have concluded that his breaches of the Act and Rules relate to breaches of fundamental obligations. They can only be regarded as serious.

[65] With respect to Mr Rea's reference to *Complaints Assessment Committee v Stevenson*,[16] we note only that we are not relying, in our decision as to what finding we should make, on this being an ongoing course of dealings involving conceptually different breaches. In this case, we are dealing with breaches of fundamental obligations, occurring over two interrelated, but nonetheless distinct, transactions.

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15 *Complaints Assessment Committee 20003 v Jhagroo*, above n 11, at [49]

16 *Complaints Assessment Committee v Stevenson*, above n 12.

[66] We are satisfied that a finding of misconduct must be made. We reject Mr Rea's submissions in support of a finding of unsatisfactory conduct rather than misconduct. In some respects, they may be relevant to the question of penalty.

[67] We are not persuaded that Mr Goyal's conduct was a wilful or reckless breach of the Act and Rules. We are not satisfied that he deliberately breached the Act and Rules, nor are we satisfied that he foresaw the possibility that his conduct might breach professional standards and proceeded regardless of that possibility.

[68] On the evidence, it is apparent that Mr Goyal did not turn his mind to his professional obligations. His failure to do so, his failure to check his position or recognise the need to seek advice and to see such advice, and his consequent breaches of ss 134 and 135 of the Act, and rr 5.1, 6.1, 6.3, 6.4, and 9.1 of the Rules can only be described as seriously incompetent or seriously negligent real estate agency work

Outcome

[69] We find Mr Goyal guilty of misconduct on Charges 2 and 4, under s 73(b) of the Act.

[70] Counsel are to confer and advise the Tribunal if an oral hearing is required as to penalty, or if the matter may be determined on the papers. A telephone conference will be scheduled to make appropriate timetable orders.

[71] 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 N Dangen Member