BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 59

READT 062/16

IN THE MATTER OF	Charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 409
AGAINST	ANDREW RANKIN Defendant
Hearing:	9 June 2017, at Palmerston North 27 June 2017, at Auckland
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Appearances:	Mr S Waalkens, on behalf of the Committee Mr M Dennett, on behalf of Mr Rankin
Date of Decision:	6 October 2017

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Rankin faces two charges laid by Complaints Assessment Committee 409 ("the Committee"):

[a] **Charge 1**

[i] Misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008 ("the Act") (wilful or reckless contravention of Rules 6.4 and 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"));

[ii] (in the alternative), misconduct under s 73(b) of the Act (seriously incompetent or seriously negligent real estate agency work).

[b] **Charge 2**

[i] A further charge of misconduct under s 73(b) of the Act.

[2] In the further alternative to Charges 1 and 2, and if the Tribunal is not satisfied that Mr Rankin is guilty of misconduct, the Committee seeks a finding that Mr Rankin has engaged in unsatisfactory conduct under s 72(c) of the Act, in accordance with s 110(4).

[3] The charges arise out of a complaint made by Mr and Mrs Brogden[1] following their purchase of a residential property at Pahiatua ("the property"). Their complaint related to Mr Rankin's conduct as salesperson. The charges set out an alleged failure by Mr Rankin to disclose to the Brogdens that the property had tested positive for methamphetamine contamination. Charge 1 alleged that Mr Rankin's conduct constituted a wilful or reckless contravention of Rules 6.4 and 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules")

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[1] Mr and Mrs Brogden will, for convenience, be referred to as "the Brogdens", except where it is appropriate to refer to them individually. Their daughter will be referred to as Ms Brogden, or Zoe Brogden.

[4] Charge 2 repeats the particulars for Charge 1 and alleges that Mr Rankin's conduct constituted seriously incompetent or seriously negligent real estate agency work, in that despite a warning given in the methamphetamine test report as to the necessity for anyone visiting the property to wear appropriate personal protective equipment, he allowed the Brogdens and their family members to access the property, without making any enquiries, or seeking advice as to whether it was safe to do so.

[5] Mr Rankin has acknowledged that he did not provide the Brogdens with a copy of the initial report, and has admitted Charge 2. However, he submits that the Tribunal should find that he engaged in unsatisfactory conduct rather than that he is guilty of misconduct.

[6] The Tribunal heard evidence over two days. At the completion of the evidence the Tribunal directed (at counsel's request) that a transcript of the evidence be prepared. Written closing submissions were then filed on behalf of the Committee and Mr Rankin. Final submissions were received by the Tribunal on 11 August 2017.

Principles as to burden and standard of proof

[7] As for any charge laid under s 110 of the Act, the Tribunal must be satisfied that the charges against Mr Rankin are proved on the balance of probabilities. The Committee has the onus of proving the charges. The Tribunal accepts that all charges that come before it are serious, particularly so from the point of view of the licensee facing charges. In determining whether the Committee has proved the charges in this case, the Tribunal must focus on the particular facts.[2]

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[2] See the discussion of the standard of proof in professional disciplinary proceedings in the judgment of the majority of the Supreme Court in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [96]–[118], and the Tribunal's decision in *Real Estate Agents Authority (CAC 301) v Murphy* [2015] NZREADT 42 at [79]–[81].

Background facts (not in dispute)

[8] Mr Rankin is a licensed salesperson and works for Coast to Coast Limited, trading as Bayleys Pahiatua ("the Agency"). He marketed the property in early 2015, on behalf of the owner, Darren Field. A potential purchaser, Ms Taylor, viewed the property early that year and submitted an offer, conditional on the property being tested for methamphetamine contamination. Drug Testing Services ("DTS") carried out a preliminary site investigation of the property on 5 February 2015, and provided a report dated 11 February 2015 ("the initial report", also referred to at the hearing as "the failed drug test").

[9] The initial report recorded methamphetamine contamination at above DTS's threshold of 0.10 micrograms per 500 m^2. It recommended a detailed site investigation to determine the levels and source of methamphetamine contamination (to assist in determining the extent of cleaning necessary), and that as the property was contaminated, appropriate personal protective equipment should be worn by all authorised persons entering the site. The initial report was provided to Mr Rankin and, through him, to Ms Taylor. Ms Taylor decided not to proceed with her offer, and did not follow up on the recommendation of a detailed site investigation.

[10] In March 2015, Mr and Mrs Brogden were looking for a property to buy for their daughter Zoe and her two young children (aged, at the relevant time, 20 months and four months) to live in. Mr Brogden rang the Agency and arranged for Mr Rankin to show them a number of properties. There was a visit to the property in mid-March 2015. There is a dispute as to when this visit was, and who attended, but it is not disputed that Mr Rankin did not provide the Brogdens with a copy of the initial report, nor that Mr Rankin did not give the Brogdens any written advice concerning the failed drug test, or methamphetamine contamination.

[11] Mr and Mrs Brogden signed a sale and purchase agreement on 26 March 2015. The agreement was subject to conditions as to arranging finance, a satisfactory LIM, a satisfactory builder's report, removal of the vendor's belongings, and the vendor having the interior of the property cleaned to a satisfactory manner prior to the pre-settlement inspection. In this respect, we record that there was no dispute that when

the Brogdens viewed it, the property was cluttered, very untidy, and not clean. The agreement was settled late in April 2015 and Ms Brogden and her children moved in.

[12] In December 2015, Ms Brogden found an anonymous letter in her mailbox. The letter stated that a "drug test" had been done on the property, and that it had tested positive for methamphetamine contamination. The letter referred to Ms Taylor. Ms Brogden contacted Ms Taylor, who provided her with a copy of the initial report.

[13] Ms Brogden and her children moved out of the property. DTS carried out a detailed site investigation on 17 December 2015, and provided a detailed report dated 7 January 2016 ("the detailed report"). The detailed report recorded an overall moderate level of methamphetamine contamination. Six test locations inside the property had contamination levels above Ministry of Health guidelines.

[14] The Brogdens had the property decontaminated, then further tested. Ms Brogden and her children moved back in once the property was deemed to be safe for occupation.

The issues

[15] Charge 1 sets out 13 particulars. The issues requiring determination by the Tribunal are particulars (6) and (7) which allege that:

> (6) [Mr and Mrs Brogden] and their daughter Zoe Brogden viewed the property with [Mr Rankin] on two occasions in March 2015.
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> (7) [Mr Rankin] did not not inform either of [Mr and Mrs Brogden] on either occasion, or at any other time, of the initial test and that the property had tested positive for methamphetamine contamination.

Disputed evidence

[16] The Tribunal's findings on the disputed evidence are critical for the key issue for the charges, which is what Mr Rankin said to Mr Brogden (if anything) about the property having been tested for methamphetamine contamination, and the results of the initial report.

[17] We record that written statements of evidence of all witnesses were taken as read at the hearings. After any supplementary questions in evidence in chief, witnesses were cross-examined. The evidence of Mr Lewer, on behalf of DTS, was accepted and he was not required to attend for cross-examination.

The Brogdens' evidence

[18] The Brogdens said that the first viewing was on a weekend and that Mr Brogden and his wife arrived together, and Zoe Brogden followed in a separate vehicle, with her children. They said they went through the property again later, before making their offer to buy it. They said that they would never have viewed a property separately. As Mrs Brogden put it in her evidence, "it was all of us together and my husband wouldn't have viewed a property without me, I mean I was part of it as well."

[19] Mr Brogden said that he never had a separate conversation with Mr Rankin; that is, when his wife and/or daughter were not present. He said that Mr Rankin never told him anything about the property having been tested for methamphetamine contamination, or that the property had tested positive for methamphetamine contamination. He also said that Mr Rankin never told him that the property had had an "acid wash".

[20] Mr Brogden said in cross-examination that if Mr Rankin had mentioned a "drug test" or "acid wash":

> … it would have been a totally different ball game as far as I'd have been concerned … because I wouldn't have wanted to be involved with a drug contaminated house. But I would've also discussed that with my wife and daughter as well. … he never, ever, mentioned [that it had been cleaned with an acid wash] to me.
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> … it would have shocked me…I would've [expressed that to Mr Rankin].
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> [If told that the property had had an acid wash] I would've questioned as to why it had the acid wash and what is an acid wash … if Mr Rankin had said to me "well, the house is methamphetamine contaminated" I would've asked questions like, how did it get contaminated, where's the evidence of it being contaminated, you'd have asked all sorts of questions.

[21] Mr Brogden accepted that he knew of the vendor, Mr Field, and that Mr Field had a certain reputation in the district. Mr Brogden accepted that he and Mr Rankin had spoken about Mr Field at the viewing. He said that they "just sort of laughed about him as most people sort of did".

Mr Rankin's evidence

[22] Mr Rankin accepted that he had read the initial report, and that he should have provided it to the Brogdens, but did not. He also accepted that he did not advise the Brogdens, in writing, about the initial report or that the property had been tested for methamphetamine contamination.

[23] He said that Mr Field was given a copy of the initial report, and that he was "highly shocked" and "outraged" to find that the property had "failed the drug test component". Mr Rankin said that he told Mr Field that he should get on to having the house cleaned, that it was an unsafe environment to be in, and suggested that Mr Field contact the author of the initial report, Mr Lewer.

[24] Mr Rankin said that Mr Field told him later that the property had been "cleaned with an acid wash", and he himself saw people outside the property in white "hazmat" clothing. Mr Rankin said he told Mr Field that he needed to provide a cleaning report when the work was finished, but accepted that he did not follow this up. He presumed that the property had been cleaned and was no longer contaminated.

[25] Mr Rankin said that the property was taken off the market when the initial report was received, but was put back on the market after he understood the property to have been cleaned.

[26] Mr Rankin's first contact with Mr Brogden was by telephone, after the property "went live" again. He said Mr Brogden asked for a few details about the property, and he arranged the viewing. Mr Rankin did not say anything about the property having had a "positive drug test" during this conversation.

[27] Mr Rankin's evidence was that the first viewing was on Thursday 12 March, and that Mr Brogden arrived at the property first, on his own, that Zoe Brogden arrived shortly thereafter, and that only Mr Brogden and Zoe Brogden attended the first viewing. He said that he did a "drive by" of the property during the following weekend with the Brogdens (while showing them some other properties), and that he showed Mr and Mrs Brogden and Zoe Brogden through the property the following week.

[28] Mr Rankin's account as to what occurred at the first viewing was that he met Mr Brogden and introduced himself. He said they talked about the property, at which time he told Mr Brogden that the property had "failed a drug test". He accepted that he did not tell Mr Brogden that the property had failed a "methamphetamine test", as opposed to a "drugs test". He said Mr Brogden then asked who the vendor was. He said they both knew Mr Field, and Mr Field's reputation. Mr Rankin said that in the course of this conversation he also told Mr Brogden that Mr Field had told him that the property had been cleaned with an acid wash.

[29] In his written statement of evidence Mr Rankin said that Mr Brogden "did not seem to be surprised that the property was contaminated with drugs", and that he, himself, was relieved that Mr Brogden knew about Mr Field's reputation as he may then not be surprised by the previous drug contamination. At the hearing, Mr Rankin said that Mr Brogden was "very casual the whole time", "it was like it didn't affect him", and Mr Brogden "never reiterated too much more about the drug test".

[30] Mr Rankin referred to a diary note which he said he made immediately after this viewing ("the diary note"), as follows:

> Victoria Street Glen new client rang cell – Looking for his Daughter. Met Glen/Daughter told Glen failed Drug test. Worked with Darren, knew him well. Told him Darren got Kitchen washed with acid. Viewed thought too much work for solo mum.

[31] In supplementary oral evidence at the hearing, Mr Rankin said, with respect to making the diary note, that he was "quite conscious that this was the first time that he had ever had a house that had failed a drug test".

[32] Mr Rankin produced only a photocopy of the page of his 2015 diary on which the diary note appeared. He said that the diary had been picked up by "the girls" in the office and put into a recycling bin, together with old travel brochures,[3] when his office was being prepared for another licensee.

[33] Mr Rankin referred to discussions he had with his manager, Mr Morison, when the Brogdens' complaint was received. In answer to questions put to him in cross-examination, Mr Rankin further said that at the time he received the initial report he spoke to Mr Morison about what to do next. He said he told Mr Morison "what I had seen, people there cleaning the house", and that Mr Morison "seemed pretty happy with what I was doing".

[34] Mr Rankin further said (in answer to questions from the Tribunal) that he was "99 percent sure" Mr Morison had seen the report and had asked Mr Rankin what he had done about it, and that he told Mr Morison that the property had been taken of the market. Mr Rankin said he spoke to Mr Morison again before putting the property back on the market.

Written questions put to Mr Morison

[35] After the hearing, the Tribunal directed Mr Morison to answer written questions. Mr Morison said he saw the initial report in December 2015, when the complaint was lodged, but could not remember if he saw it at any other time. However, he said Mr Rankin told him about the report at the time the sale to Ms Taylor fell through. He said he and Mr Rankin would have discussed that the property had failed the "methamphetamine test" and that levels exceeded recommended guidelines, and they would have discussed taking it off the market while the vendor had it cleaned. In answer to a question put by Mr Waalkens, Mr Morison said he did not remember whether he gave any specific advice about providing prospective purchasers a copy of the initial report.

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[3] The Tribunal notes that Mr Rankin operates a travel agency, as well as his real estate agency, from the same premises.

[36] Mr Morison remembered Mr Rankin telling him that the property had been cleaned, and said he would not have advised that the property could be remarketed until the vendor advised that the property had been cleaned. He considered that Mr Rankin would have been obligated to tell all prospective purchasers that the property had been subject to a failed drug test, and that they should seek their own independent advice.

Preliminary observation

[37] We observe that Mr Dennett's closing submissions included detailed submissions concerning Ms Taylor's evidence, called by the Committee. We have not summarised those submissions as, except insofar as any question as to her credibility reflects on the credibility of evidence given by the Brogdens, her evidence is not relevant to the crucial issue. Quite simply, there has been no suggestion that she was present at any viewing by the Brogdens, or had any involvement with them until several months after they bought the property.

The diary note

Submissions

[38] The diary note is critical to our decision whether to accept Mr Brogden's evidence as to the first viewing, and in particular his evidence that Mr Rankin did not tell him that the property had "failed a drug test", or that it had been tested for methamphetamine contamination, with a positive result.

[39] Mr Waalkens submitted that there were a number of specific inconsistencies relating to the diary note, which pointed to it being inaccurate and unreliable. He pointed to Mr Rankin's diary note record that he told Mr Brogden that the "kitchen" had been cleaned with acid wash, but noted that in his original response to the complaint, Mr Rankin said that Mr Field told him he had had "the entire house" cleaned with acid wash; and in his evidence to the Tribunal, Mr Rankin said that he told Mr Brogden that Mr Field had told him he had had "the property" cleaned with

acid wash. Mr Waalkens submitted that Mr Rankin was not able to give an adequate explanation of the inconsistencies.

[40] Mr Waalkens also submitted that Mr Rankin's evidence about his practice in taking notes was vague, inconsistent, and unreliable, in that while his evidence was that he made notes on "big matters", that he made notes on properties "for proper clients", and that he recorded about 75 percent of telephone calls, the diary note itself did not support that evidence. Among other things, he submitted that the diary note as to the first viewing was in far greater detail than any other, and that while Mr Rankin's evidence was that he and Mr Brogden had "talked quite intensely" about another property, the diary had only three words recording it. Mr Waalkens further noted that while Mr Rankin gave evidence that he had spoken to another prospective purchaser about the property and advised the purchaser about the failed drug test (a "big matter"), he appeared not to have made any record of that conversation.

[41] Mr Waalkens submitted that Mr Rankin's record of events (even on the single page produced to the Tribunal) were scattered, and often not recorded on the correct day. He submitted that this was hardly surprising, given that the spaces allowed for weekend days were very small, with no room for notes. He submitted that Mr Rankin's initial unwillingness to acknowledge that some events were not recorded on the correct day indicated that his evidence was not credible.

[42] Finally, Mr Waalkens referred to Mr Rankin's evidence that he believed his diary had been thrown out accidentally, by a colleague. He submitted that Mr Rankin could have called evidence about this, but had not done so. Mr Waalkens submitted that in all the circumstances, where Mr Rankin sought to place weight on the diary note, but did not provide it to the Committee or the Tribunal, the Tribunal should not place any weight on evidence based on it.

[43] Mr Dennett submitted that the diary note supported Mr Rankin's evidence. He submitted that the reason for the note being in more detail than other entries on the same page was because it was a "big matter".

[44] He further submitted that the factors relied on by the Committee as being inconsistencies were not in fact inconsistencies. He submitted that the detail of the diary note concerning the first visit was consistent with Mr Rankin's evidence that the failed drug test was a "big matter". He also referred to entries concerning several other property viewings. He submitted that those entries, albeit in limited detail, still recorded issues with those properties.

Discussion

[45] We are concerned that we have not seen the original 2015 diary, and that we have seen only a photocopy of one page from it. We have referred above to Mr Waalkens' submission regarding Mr Rankin's evidence (in cross-examination) that he had shown the property to another prospective purchaser, and spoken about the failed drugs test. We note that Mr Rankin did not produce any diary note relating to that occasion.

[46] Mr Rankin's evidence was that he photocopied the page after a discussion with Mr Morison in December 2015, after the Brogdens' complaint was received, and Mr Morison asked him if he "would have made a diary note". He said that Mr Morison told him to photocopy the note.

[47] Mr Morison could not be expected to know if Mr Rankin had told any other prospective purchasers about the failed drug test. The Tribunal would have expected that Mr Rankin would have been concerned to show (at the time he photocopied the page relating to the Brogdens) that he had recorded telling not only Mr Brogden about the drug test, but had also told another prospective purchaser about the drugs test, even if Mr Morison did not tell him to.

[48] Mr Rankin made no reference (either in his response to the Brogdens' complaint or in his statement of evidence) to any discussions with Mr Morison as to what he should do about the initial report, until his examination in chief on the second day of the hearing. The Tribunal would have expected Mr Rankin to have mentioned the advice he sought from his manager, as that would have been of particular interest to the Committee.

[49] We are also concerned that when he received the Brogdens' complaint, Mr Rankin did not take steps to safeguard the entire 2015 diary. We find it unusual that Mr Rankin would photocopy and save one page, but not any other relevant pages (such as records of advising other prospective purchasers of the failed drug test) or, in fact, save the entire diary. As a licensee, Mr Rankin must be aware of his obligation to co-operate in the investigation of any complaint, and such co-operation would include preserving all information that may be relevant for that investigation.

[50] In the circumstances, the Tribunal is somewhat hampered in its consideration of the diary note. However, we have concluded that we should not reject the diary note in its entirety. But in the light of our concerns, we cannot accept it as conclusive evidence as to what he told Mr Brogden. We must consider all of the evidence, and reach our decision on the balance of probabilities.

When was the first viewing, and who attended?

[51] As noted earlier, there is a clear dispute between the evidence given by Mr Brogden, Mrs Brogden, and Zoe Brogden, for the Committee, and that given by Mr Rankin, as to when the first viewing was, and who attended it. Mr Waalkens and Mr Dennett made detailed submissions on the two points.

[52] We have concluded that except insofar as it may have an impact on our consideration of the credibility and reliability of the evidence given by the Brogdens and Mr Rankin, respectively, on the core issue of the test for methamphetamine contamination, it is not necessary for us to determine whether the first viewing was on a Thursday or a weekend day. We note that both Mr Brogden and Zoe Brogden accepted, when cross-examined, that the first viewing may have been on a Thursday.

[53] On the issue whether Mr and Mrs Brogden and Zoe Brogden, or only Mr Brogden and Zoe Brogden attended the first viewing, we prefer the evidence given by the Brogdens, that they were all present at the first viewing. We accept the Brogdens' evidence that they were a "tight family unit", and would not have viewed any property except when they were all together. Mr and Mrs Brogden were looking to buy a property for Ms Brogden and her children to live in. Clearly, they all had a

keen interest in viewing any potential property. We accept Mrs Brogden's evidence that Mr Brogden would not have gone to view any property without her being with him.

[54] We also accept Zoe Brogden's evidence that she would have been with her parents at any viewing, and that she would have travelled separately, with her children in her vehicle. We note Mrs Brogden's evidence that the reason why Zoe travelled separately was that she had child car seats. In accepting Ms Brogden's evidence, we reject the submission made on behalf of Mr Rankin that her evidence that she would not have left her children behind when she viewed a property was "surprising".

[55] We find, on the balance of probabilities, that Mr Brogden, Mrs Brogden, and Zoe Brogden (with her children) attended the first viewing, and that the Committee has established particular (6) of Charge 1. We accept their evidence that finding a suitable house for Ms Brogden and her children was a matter of particular concern to them all, making it more likely than not that they would have attended all viewings together. On this point, we have concluded on the balance of probabilities that Mr Rankin's diary note is not correct.

What (if anything) did Mr Rankin tell Mr Brogden about the test for methamphetamine contamination?

[56] We turn to consider the parties' submissions as to the evidence given by Mr Brogden and Mr Rankin in respect of the Committee's allegation that Mr Rankin did not advise Mr Brogden that the property had tested positive for methamphetamine contamination.

Submissions

[57] Mr Waalkens referred to Mr Rankin's acceptance that he did not make it clear to Mr Brogden that the property had failed a "methamphetamine test", as opposed to a "drugs test". He submitted that the Tribunal should accept Mr Brogden's evidence that Mr Rankin did not say anything to him about a "failed drug test" or that the property had been cleaned with an "acid wash". He submitted that is "almost

inconceivable" that Mr Brogden would have shown no interest or reaction if Mr Rankin had told him that the property he was about to view had "failed a drug test", and been cleaned with an "acid wash", or asked any questions, or informed his family. He submitted that Mr Rankin's version of events required the Tribunal to conclude that Mr Brogden was unconcerned with the potential health risks to his daughter and grandchildren of living in a house that had been contaminated.

[58] Mr Waalkens further submitted that the Brogdens' subsequent conduct was inconsistent with their being unconcerned about contamination. He first referred to the sale and purchase agreement signed by Mr and Mrs Brogden, which contained conditions beyond those normally included – as to removal of Mr Field's belongings and the interior of the house being cleaned. Again, he submitted, it seemed inconceivable that if they had known of a "failed drug test", the Brogdens would not have included a condition to do with obtaining confirmation that the property had been successfully decontaminated.

[59] Mr Waalkens also referred to the Brogdens' actions on learning that the property was contaminated: they reacted swiftly and strongly and within days had arranged for a detailed site investigation, then for the property to be decontaminated.

[60] Mr Dennett submitted that the evidence given by Mr Brogden, Mrs Brogden, and Zoe Brogden was not credible, and was unreliable, and that on the balance of probabilities, it is more likely than not that Mr Rankin advised Mr Brogden that the property had failed a drugs test.

[61] He submitted that the Brogdens had "got it wrong" when they stated that "at no stage did Mr Rankin talk to Glenn Brogden alone or out of anyone else's earshot during either of the two visits they say they attended at the property", and that they were "all saying the same thing in a clearly rehearsed manner". He also submitted that "the Brogdens were mostly too emphatic and scripted in their denials in their evidence and Zoe Brogden's evidence in particular was unreliable, inconsistent and too extreme". He further submitted that "there were several major inconsistencies between the initial statements made to the Committee by [the Brogdens], the written briefs of evidence and the viva voce evidence".

[62] Mr Dennett submitted that it is clear from Mr Rankin's evidence that he had no intention to mislead or deceive the Brogdens, and that he says and believes that he openly informed Mr Brogden of the failed drug test at the first viewing. He submitted that Mr Rankin provided credible evidence, and any of the inconsistencies alleged in the submissions for the Committee had been misconstrued.

[63] Mr Dennett further submitted that Mr Rankin's evidence that Mr Brogden "did not say very much" was consistent with his evidence that after the mention of the "failed drug test", Mr Brogden asked only who the vendor was, and they then had a discussion about Mr Field.

Discussion

[64] We do not accept Mr Dennett's submission that the Brogdens' evidence, prepared by the Committee, was given in a "clearly rehearsed manner". Each of Mr Brogden, Mrs Brogden, Zoe Brogden, and Ms Taylor were available to be, and were, cross-examined on their evidence. The Tribunal is able to assess the credibility and reliability of their evidence, in the same manner as we are able to assess Mr Rankin's.

[65] We take no adverse inference from the fact that the Brogdens' statements of evidence appear to have been prepared, and were presented, by the solicitors for the Committee. That is the normal course for evidence given in Court and Tribunal hearings. We note that Mr Rankin's evidence also appears to have been prepared, and was presented, by his solicitors.

[66] Mr Rankin's evidence as to what he said to Mr Brogden varied. The file note records that he "told Glenn failed drug test". In his statement of evidence Mr Rankin said that he could not recall whether he had specifically told Mr Brogden that the property had failed a "methamphetamine test". In cross-examination he first said that he could not stay that he was "positive that he used the words methamphetamine or P", and later accepted that he did not make it clear to Mr Brogden that it was a methamphetamine test that the property had failed, as opposed to a drug test. Mr Rankin went on to say "obviously I kept saying it was the drug test".

[67] In response to questions from the Tribunal, Mr Rankin accepted that as there was no reference to a "methamphetamine test" in the diary note, that suggested that he did not use those words. Mr Rankin also accepted that nothing Mr Brogden or anyone else said at the time that led him to believe that he or they knew or understood that he was referring to methamphetamine.

[68] Mr Rankin further accepted that once he was aware of methamphetamine contamination he was obliged to disclose it, and he accepted that he should have emphasised the fact that the property had tested positive for methamphetamine contamination.

[69] We find that Mr Rankin did not tell Mr Brogden, or Mrs Brogden, in so many words, that the property had been tested for methamphetamine, with a positive result. However, because it was submitted that Mr Brogden would, or should, have understood that the property had tested positive for methamphetamine, we must give further consideration to the evidence.

[70] We accept Mr Brogden's evidence (set out at paragraph [20], above) as to what his reaction would have been if Mr Rankin had told him that the property had failed a drug test. In our view, it is most unlikely that Mr Brogden would have been casual as to any drug contamination, such that he was sanguine about the prospect of his daughter and grandchildren living in the property, without any further enquiry being made, and would have dismissed it as an issue. Mr Brogden's evidence as to what his reaction would have been is entirely consistent with a prospective purchaser's concern to buy a property for his daughter and grandchildren that was safe for them to live in.

[71] We also accept Mr Waalkens' submission that the conditions inserted into the sale and purchase agreement at the Brogdens' request support their evidence that they were not aware of the failed drug test or, indeed, any possibility of methamphetamine contamination. First, as noted above, we have accepted Mr Brogden's evidence that he and his wife would not have wanted to proceed with the purchase. Secondly, the conditions requiring Mr Field to remove his personal belongings, and clean the interior, are consistent with a concern about a cluttered,

very untidy, and unclean house, but not one which had previously failed a drug test, and been found to be contaminated by methamphetamine.

[72] With respect to Mr Rankin's evidence, we are concerned that although he first said that he did not read the DTS report in detail when he received, he later acknowledged that he had read the statements as to "methamphetamine contamination above the composite threshold", "detailed site examination recommended", and "appropriate personal protective equipment should be worn by all authorised persons entering the site". We find that notwithstanding his continued references to a "failed drug test", Mr Rankin was well aware that the issue was "methamphetamine contamination" not one of an unspecified "drug contamination".

[73] We are also concerned that Mr Rankin made no mention in his response to the complaint or his statement of evidence that he had made telephone calls to the author of the DTS report (Mr Lewer), yet in answers to questions in cross-examination he said he had done so two or three times. Mr Lewer's evidence was received by consent and he was not required to attend for cross-examination. Except to set out what he would have said if Mr Rankin had rung him, Mr Lewer did not say that he had received any calls from Mr Rankin. As Mr Lewer's evidence was not challenged, we can give Mr Rankin's evidence as to the alleged calls little or no weight.

[74] It is also of concern that notwithstanding his evidence that he was "quite conscious" that this was the first time he had marketed a property that had "failed a drug test", Mr Rankin later said, in answer to a question from the Tribunal as to why he did not consider getting a further report done to check that the property was safe before putting it back on the market, that "maybe we were just a little blasé about it".

[75] Although we do not regard it as bearing on the credibility of his evidence, the Tribunal is concerned that Mr Rankin did not say in his response to the complaint or his statement of evidence that he spoke to Mr Morison about the initial report, when he received it. We note that in his supplementary examination in chief Mr Rankin said he spoke to Mr Morison after the complaint, and gave a detailed account of their discussion. It was not until he was cross-examined that Mr Rankin said that he also spoke to Mr Morison when he received the initial report.

[76] Mr Rankin accepted in cross-examination that the issue of methamphetamine contamination was significant, and that he had said to Ms Taylor that it would be "unusual" to make a purchase offer conditional on a test for methamphetamine contamination. In the light of the "unusual" condition, we doubt that Mr Rankin would have forgotten about his discussions with Mr Morison, and the Tribunal is concerned that he left it until his oral evidence to refer to any discussions with his manager.

[77] We do not accept Mr Dennett's submission that even if Mr Rankin did not specifically say that the failed drug test was as to methamphetamine contamination, and that there was no other known "drug test" in relation to the property, any reasonable person would presume that a "drug test" related to "methamphetamine or P". Mr Brogden's evidence was that he had read and heard about "P labs" in Auckland, but he had not heard or read about P labs or methamphetamine contamination in Pahiatua. We infer from that evidence that Mr Brogden could not reasonably have been expected to presume that a reference to the property having failed a failed drugs test was a reference to it having tested positive for methamphetamine contamination.

[78] We find that the Committee has established paragraph (7) of the particulars of Charge 1 to the required standard.

[79] For completeness, we note that Mr Rankin admitted paragraph (8) of the particulars of Charge 1: that he did not provide either Mr or Mrs Brogden with a copy of the initial report. We find that particular has been established. Further, he admitted Charge 2, that he allowed the Brogdens to access the property, and did not make enquiries or take advice as to whether it was safe to allow them or other members of the public to access the property.

The charges

Breaches of the Rules

[80] As a result of the above findings and admissions, we are satisfied that Mr Rankin breached rr 6.4 and 10.7:

[a] With respect to r 6.4, we find that he withheld information that should in fairness have been provided to Mr and Mrs Brogden (that is, the fact that the property had been tested for methamphetamine contamination, and had been found to be contaminated).

[b] With respect to r 10.7, we find that Mr Rankin failed to disclose a "known defect" (that is, the fact that the property had tested positive for methamphetamine contamination) to Mr and Mrs Brogden. Further, we find that he allowed the Brogdens to access the property, despite a warning in the initial report, and failed to make enquiries or take advice as to whether it was safe to access the property.

Misconduct or unsatisfactory conduct?

[81] We are now required to decide whether Mr Rankin should be found guilty of misconduct under s 73(c)(iii) of the Act (wilful or reckless contravention of the Rules), or under s s 73(2) (seriously incompetent or seriously negligent contravention of the Rules). If we are not satisfied that he is guilty of misconduct under either provision, we must decide if he has engaged in unsatisfactory conduct.

[82] Counsel agreed that in order to find that Mr Rankin's breach of rr 6.4 and 10.7 constituted misconduct under s 73(c)(iii), we have to be satisfied that he knew that his conduct would breach the Rules, or that he aware of the risk that his conduct may breach the Rules, but proceeded with the conduct regardless of that risk.[4]

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[4] See *Real Estate Agents Authority (CAC 10070) v Adams* [2012] NZREADT 5, at [49]; *CAC 20005 v Cui* [2015] NZREADT 1, at [44]–[47]; and *Complaints Assessment Committee 404 v Hawkins* [2017] NZREADT 16, at [64].

Submissions

[83] Mr Waalkens submitted that Mr Rankin was well aware of his obligations under the Rules, but showed a high level of disregard for those obligations: he had the initial report, which referred specifically to methamphetamine contamination, but he took no steps to provide it to the Brogdens. He was "quite conscious" that this was the first time he had marketed a property that had failed a drug test, but he was blasé about obtaining a report to check that the property was safe; and, on his own admission he did not refer specifically to methamphetamine when speaking to Mr Brogden.

[84] He submitted that while it is for the Tribunal to assess where Mr Rankin's conduct sits on the spectrum, a finding of at least seriously incompetent or seriously negligent conduct (under s 73((b) of the Act) is appropriate.

[85] Mr Dennett submitted that in the event that the Tribunal accepted the Committee's evidence,[5] any failure by Mr Rankin did not amount to wilful or reckless conduct. He noted that Mr Rankin admitted that he failed to provide a copy of the initial report and that he could, in hindsight, have provided more information.

[86] Mr Dennett submitted that given Mr Rankin's knowledge of methamphetamine at the time, and his attempts to provide the relevant information, there was no element of any intention by Mr Rankin to avoid his obligations under the Rules, so any failing on his part would amount to seriously negligent or seriously incompetent real estate work rather than wilful or reckless misconduct.

Discussion

[87] It is clear to the Tribunal that Mr Rankin was well aware of his obligations under the Rules, and that a test that showed that the property had methamphetamine contamination should be disclosed to the Brogdens. He had received training from Bayleys as to methamphetamine being an issue (albeit described by him as "small").

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5 In the light of our findings on the evidence, we are not required to consider Mr Dennett's submissions premised on Mr Rankin's evidence as to disclosure of the positive methamphetamine test.

He would not have wanted his family to be in a home contaminated by methamphetamine.

[88] However, we are not persuaded that Mr Rankin's failure to provide the initial report to them, to tell them that the property had tested positive for methamphetamine contamination, and to allow them access to the property despite the warning in the initial report was wilful or reckless. That is, it did not have the requisite elements of deliberate or intentional conduct, or risk-taking. Accordingly, we do not find Mr Rankin guilty of misconduct under s 73(c)(iii) of the Act.

[89] The factors set out above satisfy us that Mr Rankin's conduct on this occasion can only be described as seriously incompetent or seriously negligent.

[90] Mr Rankin's knowledge of the findings in the initial report sets his case apart from others. Mr Dennett referred to the Tribunal's decision in *Complaints Assessment Committee 302 v Crockett*.[6] However, in that case the licensee was found to have been aware of, but not disclosed, the potential risk of weathertightness issues in a property. In this case, Mr Rankin knew about the actual methamphetamine contamination.

[91] The circumstances of this case are also different from those discussed in the decision of the Tribunal (not referred to by counsel) in *Real Estate Agents Authority (CAC 301) v Murphy*,[7] which also concerned a test for methamphetamine contamination. In that case a test for methamphetamine contamination was carried out, but the licensees did not know the result of the test when they conducted an open home. When the test report (with a positive finding) was provided to them, they provided a copy of it to a prospective purchaser who subsequently viewed the property. Again, the distinction is that Mr Rankin had actual knowledge of the methamphetamine contamination, and did not provide the Brogdens with a copy of the initial report.

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6 *Complaints Assessment Committee 302 v Crockett* [2017] NZREADT 5.
7 *Real Estate Agents Authority (CAC 301) v Murphy* [2015 NZREADT 42.

[92] Accordingly, we find Mr Rankin guilty of misconduct under s 73(b) of the Act on both Charge 1 and Charge 2. Given that finding, it is not necessary to consider an alternative finding of unsatisfactory conduct.

Outcome

[93] The Tribunal finds Mr Rankin guilty of misconduct under s 73(b) of the Act on both Charge 1 and Charge 2.

[94] Counsel are to confer as to whether the matter of penalty requires a further oral hearing, or may be determined on the papers. Counsel are to advise the Tribunal within ten working days of the outcome of those discussions. A directions conference will then be scheduled to make any necessary timetable orders.

[95] 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