**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2021] NZREADT 08**

**READT 023/20**

| | |
|---|---|
| IN THE MATTER OF | a charge laid under s 91 of the Real Estate Agents Act 2008 |
| BROUGHT BY | COMPLAINTS ASSESSMENT COMMITTEE 2001 |
| AGAINST | MICHAEL SHELDON<br>Defendant |
| Hearing | 16 December 2020 (written closing submissions received after the hearing) |
| Tribunal: | Hon P J Andrews, Chairperson<br>Mr N O'Connor, Member<br>Ms F Mathieson, Member |
| Appearances: | Ms C Paterson, Ms Z Wisniewski, and Ms L Lim, on behalf of the Committee<br>Ms K Burkhart, on behalf of Mr Sheldon |
| Date of Decision: | 19 February 2021 |

---

**DECISION OF THE TRIBUNAL**

---

## Introduction

[1] Complaints Assessment Committee 2001 ("the Committee") has charged Mr Sheldon with misconduct under s 73(b) of the Real Estate Agents Act 2008 ("the Act"). The Committee alleges that his conduct while undertaking real estate agency work on behalf of Tara and Ryan Nel ("the complainants") constituted seriously incompetent and/or seriously negligent real estate agency work. In particular, the Committee's charge alleges that Mr Sheldon:

[a] acted contrary to the complainants' instructions by sending texts to prospective purchasers inviting expressions of interest in the complainants' property at "around $1.1 million", and in so doing misled prospective purchasers as to the complainants' price expectations, in breach of rr 9.1 and 9.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"); and

[b] misled the complainants by providing false information regarding a prospective purchaser's comments on the value of the property, in breach of r 6.4 of the Rules.

[2] Mr Sheldon admits that he sent a text to prospective purchasers inviting expressions of interest in the property "in excess of $1.1 million", and that he did not have instructions from the complainants to do so, but denies that he is guilty of misconduct. Mr Sheldon also admits that he gave incorrect feedback of a prospective purchaser's comments as to the value of the property, but says he made an honest and inadvertent mistake and is not guilty of misconduct.

[3] At the hearing of the charge, the Tribunal heard evidence from both complainants, and Mr Sheldon. The Tribunal also heard evidence from the prospective purchaser, Ms Williams.[1] All witnesses were cross-examined.

[4] The Tribunal notes the provisions of s 110(1) and (4) of the Act:

---

[1] Ms Williams was referred to in the material before the Committee as "the Mt Eden buyer". Her identity was not disclosed until evidence was filed in the Tribunal.

> **110 Determination of charges and orders that may be made if charge proved**
>
> (1) If the Disciplinary Tribunal, after hearing any charge against a licensee, is satisfied that it has been proved on the balance of probabilities that the licensee has been guilty of misconduct, it may, if it thinks fit, make 1 or more of the orders specified in subsection (2).
>
> …
>
> (4) If the Disciplinary Tribunal, after hearing any charge against a licensee, is satisfied that the licensee, although not guilty of misconduct, has engaged in unsatisfactory conduct, the Tribunal may make any of the orders that a Complaints Assessment Committee may make under s 93.

## Background

[5] At the relevant time, Mr Sheldon was a licensed salesperson, engaged by Elysium Realty Ltd, trading as Harveys Te Atatu Peninsula ("the Agency"). At the time of the complaint he had been a real estate salesperson for seven years.

[6] The complainants were the vendors of a property at Laingholm, Auckland. They met with Mr Sheldon in December 2018 to discuss listing the property for sale. The complainants' evidence was that Mr Sheldon gave them an initial oral appraisal of the property of between $1.3 million and $1.45 million, and said that it would likely sell for $1.3 million.

[7] Mr Sheldon denied that he had given the complainants an oral appraisal of the property. In a written comparative market analysis ("CMA") emailed to the complainants on 4 March 2019, he appraised the sale value of the property at $1.15 million to $1.3 million. Mr Sheldon says that he also provided this appraisal to the complainants around the time they entered into the agency agreement. Mr Sheldon is not charged with any breach in respect of the provision of a written appraisal, and the dispute as to when he provided it is not relevant to determination of the charge against him.

[8] On 7 February 2019, the complainants signed an agency agreement with the Agency, to list the property for sale by way of tender. Mr Sheldon was the listing agent. The agency agreement recorded the appraised value of the property as $1.35 million and the commission set out in the agreement was based on that figure. The

Agency's advertising text and property profile, dated 7 February 2019, recorded the price range for the property as $1.2 million to $1.4 million, with an "initial enquiries over" figure of $1.2 million.

[9] The tender period ended on 4 March 2019, with no offers having been received. Mr Sheldon advised the complainants that feedback from prospective purchasers was in the range of $1.1 million to $1.2 million. He suggested the property be put on the market at a fixed price. The complainants declined to market the property at a fixed price, and told Mr Sheldon they would not sell the property for less than $1.2 million. The property was marketed for sale by negotiation, but no offers were received.

[10] On 20 March 2019, Mr Sheldon sent a text message to interested parties:

> Hi
>
> [The complainants' property] is still available. Interest is expected in excess of $1.1m.
>
> Please contact me if you have interest.

[11] Mr Sheldon did not advise the complainants or seek instructions from them before he sent the text message, and he did not provide them with a copy of it. He advised them he had sent the texts on or about 24 March 2019. The complainants sent an email to Mr Sheldon on 25 March 2019 which included the following:

> … I was concerned yesterday when you said that you text all the previous buyers to say now the house is interest over $1.1M. As far as I am aware we haven't had any discussions around dropping the expectations by another $100K and I feel this is something that should have been discussed. …
>
> I do understand that you are wanting to get something on paper and if this ends up in a multiple offer situation this could work out. However, if this doesn't, you have shaved another $100K of our property without discussing this with us. …

[12] It appears from Mr Sheldon's statement to the Committee that two offers, or expressions of interest, were received after Mr Sheldon's text:

[a] an oral offer, conveyed to the complainants on or about 5 April 2019, of $1,050 million, conditional on the sale of the offeror's property, which the complainants considered not acceptable and did not wish to counter-offer; and

[b] a written offer on 15 April 2019, of $1,060 million, again conditional on the sale of the offeror's property, which was not acceptable to the complainants and was not counter-offered.

[13] The complainants arranged for a friend, Ms Williams, to attend an open home at the property on 31 March 2019, for the purpose of testing Mr Sheldon's feedback to them. Her evidence was that Mr Sheldon told her the property was worth between $1.1 million and $1.2 million. Mr Sheldon disputed this, and said that while he could not recall every detail of Ms Williams' attendance, he would have told her what he told other attendees, which was that buyer feedback had been around $1.2 million.

[14] Ms Williams also told the Tribunal that in a short telephone conversation on 2 April 2019, she told Mr Sheldon that she was surprised at his value range for the property, and had expected it to be "at least $1.25 million". She later told Mr Sheldon that she was not interested in the property. When Mr Sheldon reported to the complainants he said (in response to a question from them) that she had seen the value of the property at $1 million to $1.1 million.

[15] Mr Sheldon denied that Ms Williams had said she expected the property to be "at least $1.25 million": he said that if she had said that he would have remembered it (as it would have been the highest value put on the property), and would have told the complainants immediately. He accepted he told the complainants she had put the property at $1 million to $1.1 million, but said he had made an honest mistake and confused her with another prospective purchaser.

**"Seriously incompetent or seriously negligent real estate agency work"**

[16] Section 73(b) of the Act provides:

> For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct–
>
> …
>
> (b) constitutes seriously incompetent or seriously negligent real estate agency work

[17] In *Complaints Assessment Committee 2003 v Jhagroo*, her Honour Justice Thomas said that:[2]

> 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.

[18] Section 73(b) can be contrasted with s 72(c), which provides that a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that is:

> incompetent or negligent

[19] In *Zhagroo*, Thomas J referred to the comments of his Honour Justice Woodhouse in *Wyatt v Real Estate Agents Authority*, in relation to s 72(c):[3]

> … Substantially less will be required to establish unsatisfactory conduct than will be required to establish misconduct. Beyond that, the words in s 72 should not … be over-refined by testing the words in s 72 on the basis that they have some technical meaning or by seeking synonyms for words which have natural meanings.

[20] The Committee alleges that Mr Sheldon's conduct constituted seriously incompetent or seriously negligent real estate agency work by being in breach of rr 9.1 and 9.4 (in relation to his text to prospective purchasers) and in breach of r 6.4 (in relation to reporting Ms Williams' feedback to the complainants). These provide:

> **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.
>
> **9.4** A licensee must not mislead customers as to the price expectations of the client.
>
> **6.4** A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

---

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

3 *Wyatt v Real Estate Agents Authority* [2012] NZHC 2550, at [47].

**Mr Sheldon's text to prospective purchasers**

[21] As recorded earlier, Mr Sheldon accepted that he did not inform the complainants that he was sending the texts, and he did not obtain their consent. His evidence was that he did not consider he had to do so, and that he was acting in the complainants' best interests in order to obtain an offer for the property, which could then be negotiated upwards to achieve an acceptable selling price.

[22] In his evidence at the hearing before the Tribunal, Mr Sheldon accepted that he was obliged to act on the complainants' instructions, and that the agency agreement did not give him a blank slate to market their property however he liked. However, he maintained that a certain degree of licence was needed, it was a marketing strategy, and the complainants were fully aware that that was how he sold. He denied that the texts were inconsistent with the complainants' instructions. He said that this was how he got offers, and how he worked.

*Submissions*

[23] Ms Lim submitted for the Committee that it is clear that licensees should act in the best interests of their client and in accordance with client instructions, and that the requirement to act in the best interests of a client does not override the requirement to act in accordance with the client's instructions. She submitted that Mr Sheldon's texts to prospective purchasers breached his duties under rr 9.1 and 9.4.

[24] She submitted that Mr Sheldon knew the complainants' bottom line sale price was $1.2 million, as they had made this clear to him in a text saying that "our bottom dollar walk away money is $1.2 million". She submitted that it was open to any customers who received the texts to take steps on the basis that an offer of $1,000,001 would be considered, when the complainants had been clear that this was not the case.

[25] Ms Lim submitted that Mr Sheldon had shown a clear and serious misunderstanding of his obligations as a licensee acting as his clients' agent. She submitted that the texts were in breach of both r 9.4, by misleading customers, and r 9.1, by being contrary to the complainants' instructions, and contrary to their best

interests, as the complainants determined them to be. She further submitted that it is irrelevant that Mr Sheldon intended to negotiate upwards any offers prompted by the texts. She submitted that r 9.1 is not concerned with intention, and if Mr Sheldon wanted to employ a particular marketing strategy, then his obligations required him to bring his clients along with him.

[26] Ms Burkhart submitted for Mr Sheldon that the purpose of the texts was to encourage interested parties to make written offers that could form the basis of negotiations on price, and they did in fact elicit two offers. She submitted that Mr Sheldon did not believe he needed to obtain specific instructions from the complainants for what is a common marketing strategy. She further submitted that the texts had not invited interest at "around $1 million" (as stated in the particulars of the charge) and that the invitation for offers "in excess of $1.1 million" did not advertise the property at below the complainants' stated bottom line.

[27] Ms Burkhart also submitted that Mr Sheldon had not hidden his actions from the complainants, but had been open and honest with them and told them he had sent the texts. She submitted that the context of the case is that Mr Sheldon had worked hard to market the property, but it had features that made it more difficult to sell, and these features affected interested parties' opinions as to its value. She submitted that most of the price feedback was at between $1.1 million and $1.2 million, and despite ongoing interest, at the time of the texts, no written offers had been received,

[28] Ms Burkhart submitted that, at most, Mr Sheldon might be said to have unintentionally misled prospective purchasers as to the complainants' price expectations.

*Discussion*

[29] We refer, first, to the submissions on the wording of the particulars of the charge. The statement that the texts invited "expressions of interest at around $1.1 million" is incorrect: the texts stated "interest is expected in excess of $1.1 million". We accept Ms Lim's submission that the wording of the particulars reflected the complainants' understanding of the texts, as they had not seen the texts. It appears from the material

before the Tribunal that while Mr Sheldon told the complainants about the texts after he had sent them, he did not forward them a copy. Further, it appears that the texts were not provided to the Committee: a copy was annexed as an exhibit to Mr Sheldon's statement of evidence to the Tribunal.

[30] We accept Ms Lim's submission that the difference in the wording of the particulars is not material to whether or not the charge is proved. The issue for determination is whether the Committee has established that Mr Sheldon's admitted conduct – his having sent the texts saying that "interest is expected in excess of $1.1 million" – amounts to misconduct, as being seriously incompetent or seriously negligent real estate agency work, or (if the Tribunal is minded to exercise its power under s 110(4)) unsatisfactory conduct.

[31] Under reg 13 of the Real Estate Agents (Complaints and Discipline) Regulations 2009), the Tribunal has the power to amend a charge of its own motion, if it considers it appropriate to do so. In the present case, the Tribunal considers it appropriate that the particulars of the charge in relation to the texts are amended so as to reflect the actual wording of the texts.

[32] We find that Mr Sheldon breached r 9.1 when he sent the texts, because he did not have the complainants' instructions to send them, and the statement that interest was expected "in excess of $1.1 million" was contrary to their interests in that it was contrary to their expressed bottom line of $1.2 million.

[33] Mr Sheldon also breached r 9.4 in that the texts misled customers as to what price the complainants would consider. As Ms Lim submitted, it was open to any prospective purchaser to take steps on the basis that an offer of $1,100,001 would be considered, which was not the case. As the Tribunal found in *Mabruk v Real Estate Agents Authority (CAC 409)*, it is misleading to refer to a price (in that case a "buyer enquiry over" figure) which is below the vendor's expectation, and there is no prospect of an offer being accepted at the indicated level.[4]

---

4 *Mabruk v Real Estate Agents Authority (CAC 409)*, [2018] NZREADT 74, at [34]–[36].

[34] We accept that in sending the texts Mr Sheldon intended to generate offers from which he could negotiate with the offerors in order to achieve an acceptable sale price. We also accept that in the circumstances, this is may have been a reasonable marketing strategy. However, we accept Ms Lim's submission that if he wanted to employ that strategy, Mr Sheldon should have ensured that the complainants were aware of, and agreed to, the strategy. He did not do so.

[35] We note Ms Burkhart's submission that the texts generated two offers. However, the first of these (said by Mr Sheldon to have been in "early April" 2019) was an oral indication of an offer of $1,050 million, so below the "interest expected" level of $1.1 million, and the second was a written offer made on 15 April 2019, at $1,060 million, also below the "interest expected" level. Neither was acceptable to the complainants, even to the extent of counter-offering. The fact that these offers were made after the texts were sent does not absolve Mr Sheldon of liability.

[36] We find that Mr Sheldon breached both rr 9.1 and 9.4 when he sent the texts.

**Mr Sheldon's reporting of Ms Williams' price feedback**

[37] As recorded earlier, Mr Sheldon admitted that he had advised the complainants that Ms Williams' feedback as to the property was that it was worth "between $1 million and $1.1 million". Mr Sheldon denied that Ms Williams had said that she had expected the value of the property to be "at least $1.25 million", but did not dispute that she had not given feedback at $1 million to $1.1 million. He said it was most likely that he had mixed up the price indication given by another party when he responded to the complainants.

*Submissions*

[38] Ms Lim submitted that the key issue for the Tribunal is a factual determination as to whether Ms Williams told Mr Sheldon that the property was worth "at least $1.25 million". She submitted that Ms Williams was a credible and reliable witness. She submitted that Ms Williams had gone to the open home on 31 March 2019, and had a subsequent short telephone conversation with Mr Sheldon on 2 April 2019, for the sole

purpose of reporting to the complainants on her interaction with Mr Sheldon, to assist them to understand how he was working for them.

[39] Ms Lim submitted that Mr Sheldon's cellphone records showed two calls to Ms Williams' number on 2 April. She submitted that the earlier call, at 4.21 pm (charged at one minute) was sufficient time for the brief conversation referred to by Ms Williams. She submitted that it was never suggested to Ms Williams in cross-examination that this telephone conversation never occurred.

[40] She submitted that Ms Williams' evidence should be preferred over Mr Sheldon's. She submitted that it is clear on the documentary evidence that Ms Williams (referred to as "the Mr Eden buyer") was a person of interest from the open home, as he identified her as a "buyer" in a report to the complainants after the open home. She submitted that it was unlikely that Mr Sheldon would have confused her feedback when he had highlighted her as a prospective purchaser.

[41] Ms Lim submitted that Ms Williams' evidence, together with the evidence of Mr Sheldon's communications with the complainants, established a clear and serious breach of r 6.4, in that:

[a] he failed to pass on Ms Williams' feedback the property was worth "at least $1.25 million", thus withholding information that by law or in fairness he should have provided to the complainants; and

[b] (more seriously) he provided false information to the complainants as to Ms Williams feedback, by stating that it was "$1 million to $1.1 million", when she had actually said "at least $1.25 million".

[42] Ms Lim submitted that irrespective of whether the Tribunal found that the breaches were deliberate (which she submitted is the only available inference, given the time and specificity of the customer being discussed), the breach of r 6.4 is established.

[43] Ms Burkhart submitted that Mr Sheldon remembered meeting Ms Williams at the open home but accepts that, given the passage of time, he cannot recall every detail. His evidence was that he told her buyer feedback had been "around the $1.2 million mark". Mr Sheldon sent Ms Williams further information after the open home, then made further calls to her, including two calls on 2 April, the second of which was not answered.

[44] Ms Burkhart submitted that Mr Sheldon cannot specifically recall a conversation with Ms Williams on 2 April, but is certain she did not say the property was worth "at least $1.25 million". She referred to Mr Sheldon's explanation that $1.25 million would have been the highest feedback of the campaign, and would have shown that his marketing strategy was working. She also referred to Mr Sheldon's admission that he told the complainants that Ms Williams' price feedback was "$1 million to $1.1 million", most likely as a result of mixing up the price indication from a different party, or inadvertently providing a feedback range.

[45] Ms Burkhart submitted that there are issues with Ms Williams' credibility and reliability, and her recollection of key events. She submitted that Ms Williams' involvement had an ulterior motive: she was not a prospective purchaser, but rather attended an open home with the sole purpose of trying to "catch Mr Sheldon out". She submitted there were inaccuracies in Ms Williams' evidence, as to Mr Sheldon's attempt to telephone her on the day of the open home, and she did not recall that there had been two telephone calls from Mr Sheldon on 2 April in either her initial statement to the Authority or in her written statement of evidence.

[46] Ms Burkhart further submitted that Ms Williams had accepted in cross-examination that she had lied to Mr Sheldon, in saying that she was interested in purchasing the property, she was a cash buyer, and the reason for not proceeding to make an offer was that her husband wanted sea views. She submitted that the Tribunal ought to exercise caution when assessing the probity of Ms Williams' evidence.

[47] Ms Burkhart submitted that the evidence does not establish that Ms Williams told Mr Sheldon that the property was worth "at least $1.25 million", and that if she

had done so, there was no reason why he would not have passed that feedback on to the complainants, as it would have been in his interests to do so.

[48] She submitted that Mr Sheldon accepted he told the complainants that Ms Williams' feedback was "$1 million to $1.1 million", when he had not received that feedback. She submitted that there was no wilful attempt to mislead the complainants, simply an unintentional mistake which does not amount to seriously incompetent or seriously negligent real estate agency work.

*Discussion*

[49] In the light of the evidence of Mr Sheldon's reporting of viewers' feedback to the complainants – consistently between $1.1 million and $1.2 million – we accept that feedback from Ms Williams at "at least $1.25 million" would have been the highest feedback received, and a positive development. It would have been reasonable, and in his interests, for him to have reported it promptly to the complainants. Yet Mr Sheldon did not mention any feedback from Ms Williams until after he had reported that she would not be making an offer, and he was asked what her feedback had been.

[50] We are unable to determine this issue one way or the other. Ms Williams may have given the feedback, and Mr Sheldon did not hear it, or she may not have given it. We are not satisfied on the balance of probabilities that Ms Williams told Mr Sheldon that she had expected the property to be worth "at least $1.25 million". We therefore do not find it proved that Mr Sheldon failed to pass on to the complainants that Ms Williams had given feedback on the value of the property at "at least $1.25 million". We are not satisfied that he breached r 6.4 in this manner.

[51] However, in the light of Mr Sheldon's admission that he told the complainants Ms Williams had given feedback at "$1 million to $1.1 million", and that she had not given him that feedback, we find it proved that Mr Sheldon misled the complainants. We find that he breached r 6.4 by saying that she had given that feedback.

**Should Mr Sheldon be found guilty of misconduct under s 73(b)?**

*Submissions*

[52] Ms Lim referred to the Tribunal's decision in *Complaints Assessment Committee 408 v Reed*,[5] where a licensee was found to have breached r 9.1 by advising prospective purchasers that a property was not expected to sell for a price greater than its government valuation, thus significantly reducing the possibility that the property would sell for the price his vendor clients wished to achieve. Mr Reed was found guilty of misconduct following that finding, and having admitted breaches of other Rules and provisions of the Act.

[53] Ms Lim also referred to *Commerce Commission v Whitehead*,[6] in which her Honour Justice Mallon held that a licensee who had stated a "buyer enquiry over" price for a property at $380,000, when the vendor client had instructed him that she would not sell for less than $400,000 (net of commission) had engaged in misleading advertising.

[54] In opening submissions for the Committee, Ms Paterson also referred to the Tribunal's decision in *Complaints Assessment Committee 403 v Robb*.[7] In *Robb*, the Tribunal found a licensee, who did not tell his client vendors of a telephone call from a prospective purchaser confirming interest in making an offer on the vendors' property but advised his clients that there was no such interest, guilty of misconduct.

[55] Ms Lim submitted that viewed as a whole, Mr Sheldon's conduct showed a disregard for the complainants' views. She submitted that on the evidence, his conduct amounted to an attempt to lower their price expectations by misleading means. In relation to the texts, Ms Lim submitted that Mr Sheldon's conduct reflected a fundamental failure to understand his obligations both to his clients and to prospective purchasers, as he considered that his conduct was acceptable as part of his marketing strategy, and that he did not need instructions to follow his strategy.

---

5 *Complaints Assessment Committee 408 v Reed* [2007] NZREADT 6, at [43]–[50].
6 *Commerce Commission v Whitehead* (2007) 11 TCR 923.
7 *Complaints Assessment Committee 403 v Robb* [2017] NZREADT 39.

[56] In relation to Ms Williams' feedback, Ms Lim submitted that Mr Sheldon's conduct was consistent with his employing his own "strategy" in selling the property. She submitted that, being aware the property had been on the market for nearly two months, Mr Sheldon attempted to mislead his clients as to the feedback in order to lower their price expectations. She submitted that this can only be viewed as seriously incompetent or seriously negligent conduct. She submitted that at a minimum, on Mr Sheldon's own version of events, he relayed incorrect information to the complainants.

[57] Ms Lim submitted that the two aspects of Mr Sheldon's conduct, viewed both separately and in totality, reflect a serious departure from expected standards and amount to misconduct under s 73(b) of the Act. She submitted that it cannot be seen as merely unsatisfactory conduct.

[58] Ms Burkhart submitted that at the very worst, the evidence shows that Mr Sheldon made two small mistakes in an otherwise effective marketing campaign, seeking written offers, and aimed at achieving the best outcome for the complainants.

[59] Ms Burkhart also referred to the Tribunal's decision in *Mabruk*. She submitted that the finding of unsatisfactory conduct in that case, and the decisions in *Reed* and *Robb*, was in respect of conduct that was more serious than that of Mr Sheldon. She submitted that the decisions of Complaints Assessment Committees finding unsatisfactory conduct in the following cases were more directly comparable:

[a] *Smith* (licensee misled purchasers and his vendor client, and acted contrary to instructions);[8]

[b] *Nielan* (licensee disclosed his vendor clients' lowest acceptable price to a prospective purchaser);[9]

[c] *Franklin*[10] (licensee failed to market a property after receiving an indication of an offer, put unfair pressure on the vendors to sell the property to the purchaser who had made a cash offer, failed to exercise

---

8 Complaint C31322, Brett William Smith, 26 November 2019.
9 Complaint C26010, Paul Nielan, 8 March 2019.
10 Complaint C19293, Jillian Franklin, 3 July 2018.

skill, care, competence, and diligence in dealing with the purchaser's non-payment of the deposit, and demonstrated a high level of negligence and incompetence in dealing drafting an agreement for sale and purchase; and

[d] *Ng*[11] (licensee was responsible for website advertising of a property at more than $100,000 below the vendors' price expectation.

[60] Ms Burkhart submitted that the cases cited for the Committee are distinguishable, because they involved conduct which was wilful, aimed specifically at misleading purchasers and client vendors for the licensee's personal gain. She further submitted that the Complaints Assessment Committees' decisions referred to above also involved wilful conduct and clear aspects of misleading both purchasers and client vendors. She submitted that, in contrast, the conduct alleged against Mr Sheldon did not reach that threshold.

*Discussion*

[61] We have found that Mr Sheldon:

[a] breached r 9.1 of the Rules by sending the texts to prospective purchasers, saying that interest was "expected in excess of $1.1 million" when he did not have instructions to do so, and when that was contrary to their interests;

[b] breached r 9.4 by misleading prospective purchasers in the texts, by saying that interest was "expected in excess of $1.1 million" when that figure was below the complainants' bottom line; and

[c] breached r 6.4 by providing false information to the complainants as to Ms Williams' feedback as to the value of the property.

[62] As was made clear by her Honour Justice Thomas in *Zhagroo*,[12] whether serious negligence or serious incompetence has occurred is a question to be assessed in the

---

11 Complaint C29353, Stephen Ng, 13 September 2019.

12 *Complaints Assessment Committee 20003 v Zhagroo*, fn 2, above.

circumstances of each case. The enquiry is fact-specific. Findings in each case must be made on the basis of the Tribunal's findings in the particular case. Findings in other cases, in particular those where the assessment as to whether a licensee should be found guilty of misconduct is made on the basis of more than one breach of a Rule or a provision of the Act, are not necessarily comparable or helpful.

[63] Both counsel referred in submissions to the Tribunal's decision in *Mabruk*. The judgment in *Commerce Commission v Whitehead* was adopted by the Tribunal in its decision in *Mabruk*, in which the Tribunal upheld a Complaints Assessment Committee's finding of unsatisfactory conduct.[13] The licensee, Mr Mabruk, had advertised the property with a "buyer budget up from" indication of $595,000, when the vendor's bottom line was $700,000. The Committee's finding of unsatisfactory conduct was also founded on other breaches of the Rules.

[64] In the present case, we are satisfied that Mr Sheldon's breaches require a disciplinary response. We accept Ms Lim's submission that in his response to the charge of breaches of rr 9.1 and 9.4 Mr Sheldon displayed a fundamental lack of understanding as to his obligations as a licensee acting as agent for the complainants. While as a marketing strategy it may have been reasonable to send texts, he should have known that in doing so he was breaching the rules.

[65] Mr Sheldon's breaches cannot be viewed in the same light as those of Mr Mabruk. At the time of his breaches, Mr Mabruk had held a salesperson's licence for only six months. The Tribunal agreed with the Complaints Assessment Committee's finding that the Agency "completely and utterly" failed to supervise him.[14] In contrast to Mr Mabruk's inexperience, Mr Sheldon had seven years' experience as a salesperson. He should have known what his obligations were, and that he did not have the "licence" he claimed he had.

[66] We have concluded that the breaches of rr 9.1 and 9.4 cannot be taken lightly, but we are not satisfied that they reach the level at which a finding of misconduct on the grounds of seriously incompetent or seriously negligent real estate agency work is

---

13 *Mabruk v Real Estate Agents Authority (CAC 409)*, fn 4, above.
14 *Mabruk*, at [40]–[41].

justified. Nor are we satisfied that when considered together with the breach of r 6.4, such a finding is justified.

[67] We have concluded that it is appropriate to exercise the Tribunal's power under s 110(4) of the Act, to find that Mr Sheldon has engaged in unsatisfactory conduct. We assess his breaches as being at a moderate level of seriousness within the range of unsatisfactory conduct.

**Orders**

[68] As a result of his breaches of rr 9.1, 9.4, and 6.4 of the Rules, we find Mr Sheldon guilty of unsatisfactory conduct under s 72 of the Act.

[69] The Tribunal will receive submissions as to penalty: those for the Committee are to be filed and served within 15 working days after the date of this decision, and those for Mr Sheldon are to be filed and served within a further 15 working days. The Tribunal will determine penalty on the papers, unless the parties advise the Tribunal that an oral hearing is sought.

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

_____
Hon P J Andrews
Chairperson

_____
Mr N O'Connor
Member

_____
Ms F Mathieson
Member