

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2023] NZREADT 11

Reference No: READT 003/2022

**IN THE MATTER OF**

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

**BROUGHT BY**

**COMPLAINTS ASSESSMENT  
COMMITTEE 2103**

**AGAINST**

**TANYA LIEVEN**  
Defendant

Hearing in Wellington on 31 March 2023

Tribunal:

C A Sandelin (Deputy Chairperson)  
P N O'Connor (Member)  
F J Mathieson (Member)

Appearances:

Counsel for the Committee:

Ms Nazim

The Defendant:

Mr Hayes

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**DECISION**  
**Dated 15 May 2023**

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## **INTRODUCTION**

[1] Tanya Lieven, the defendant, is a licensed salesperson under the Real Estate Agents Act 2008 (the Act).

[2] Complaints Assessment Committee 2103 (the Committee) has brought charges of misconduct or in the alternative, unsatisfactory conduct (the charges) against Ms Lieven, under ss 72 and 73 of the Real Estate agents Act 2008 (the Act).

[3] Ms Lieven denies the charges.

[4] A summary of facts has been agreed between the Committee and Ms Lieven.

## **BACKGROUND**

[5] The following narrative is taken largely from the agreed summary of facts.

[6] As at 26 July 2019, Ms Lieven was the sole director and an employee of Sell New Zealand Real Estate Limited (the agency).

[7] HH and Ms Lieven were the landlords of various properties in Roseneath, Wellington, all of which were owned by a Trust with the sole trustee being HH. Ms Lieven had a beneficial interest in the Trust but was not a trustee.

[8] One of the properties (the property) was tenanted by SC (the complainant) and three other tenants (the tenants). The tenancy agreement for the property was dated 12 February 2018.

[9] On 25 July 2019, HH signed a real estate agency agreement with the agency appointing the agency as selling agent. The agency agreement named the selling client as HH and Ms Lieven.

[10] On 26 July 2019, Ms Lieven emailed the tenants from the agency's email address informing them that the property was being put on the market, as required by s 47 of the Residential Tenancies Act 1989 (the RTA).

[11] On or about 28 July 2019, Ms Lieven advised the tenants that she had been engaged as the selling agent for the property and asked them "to co-operate with the agents viewing hours of Monday – Friday 10-5 pm (excluding public holidays)".

[12] The complainant responded to Ms Lieven, requesting 48 hours' notice of any visitors or works being carried out on the property.

[13] Ms Lieven refused and sent emails stating [sic]:

You have been provided notice effective immediately with times and days. That's notice.

...

Read the email

That constitutes notice.

...

Just to be clear

We don't need your permission

The property is for sale. You are required under the residential tenancies Act to comply. You have received notice and buyers will be through from tomorrow.

[14] The complainant responded stating that the tenants would consent to buyers being shown throughout the house subject to the following conditions:

That [the tenants be] given at least 24 hours' notice whenever a potential buyer is planning to look at the house;

That [the tenants be] told the day and approximate time you are planning to show each visitor; and

That viewings are only carried out during work hours, with weekends agreed to on a case by case basis with [the tenants] in advance.

[15] Ms Lieven responded as follows:

You have had notice

This week [redacted] are viewing the property along with their purchase delegation, their security staff, their Ambassador and diplomatic security squad.

You have been given notice.

[16] The complainant repeated his request for conditions and Ms Lieven responded:

I am a licensed real estate agent having given you notice that the property is for sale

Such notice is valid and binding.

There will be no further communication on that.

You have been advised of the days & times the property is required for viewing & will be those until further notice.

Tanya Lieven

Sell NZ Real Estate Ltd

Wellington

[17] After further emails from the complainant, Ms Lieven continued to state that she had provided adequate notice. She stated that she was not acting as a landlord but as a real estate agent.

[18] The complainant sent further emails setting out the law and requesting more information about when buyers would be viewing the house. He said he had security concerns about the house being viewed in his absence due to the nature of his employment. The complainant also stated that he was happy to work with Ms Lieven to come up with a solution.

[19] After further emails were exchanged, with Ms Lieven continuing to state that the tenants' consent was not required, the complainant issued Ms Lieven with a trespass notice, warning her to stay out of the house until they could come to an agreement. He noted that if she wished to show potential buyers through the property, conditions could be discussed through the Tenancy Services' mediation service or the Tenancy Tribunal (the TT).

[20] Ms Lieven responded as follows

Then I'll sue you for each & every loss

The purchase price is \$8m

[21] The complainant sent two further emails to Ms Lieven asking if she would accept mediation and asking her to confirm that she would not be accessing the house. Ms Lieven did not respond and did not enter the property.

[22] The complainant made a complaint about Ms Lieven to the TT. The TT found that:

- (a) Ms Lieven had confused the landlord's requirement to give written notice to the tenants of the property that the property had been put on the market (s 47 of the RTA) with the landlord's requirement to obtain the tenants' consent before entering the premises to show the premises to prospective purchasers or a real estate agent (s 48(3)(b) and (d) of the RTA.
- (b) Ms Lieven had not breached s 48(3)(b) of the RTA as no viewings of the property had taken place.
- (c) Ms Lieven's conduct breached s 38(2) of the RTA in that she interfered with the tenants' reasonable peace, comfort or privacy.

- (d) The tenants had acted reasonably to seek basic conditions for entry under s 48(3A) of the RTA.
- (e) Ms Lieven's response to the tenants after the complainant issued a trespass notice – "Then I'll sue you for each & every loss. The purchase price is \$8m" was intended to harass the tenants and was a direct threat.

[23] The TT ordered the landlords, being Ms Lieven and HH, to pay the tenants \$1,520.44. This consisted of \$500 compensation, \$1,000 in exemplary damages, and a filing fee.

[24] Ms Lieven and HH appealed the TT decision to the [court] which dismissed the appeal and found that:<sup>1</sup>

- (a) the Tenancy Adjudicator was correct to find that Ms Lieven breached her obligations under s 38(1) of the RTA by not giving notice of specific times of any viewings and that the tenants acted reasonably in seeking 24 hours' notice of viewings; and
- (b) the Adjudicator was entitled to find on the evidence that Ms Lieven engaged in intentional harassment of the tenants

[25] On 19 March 2020, the complainant submitted a complaint to the Real Estate Agents Authority (the Authority) about various aspects of Ms Lieven's conduct.

[26] The Committee inquired into the allegations, investigated and determined to lay the charges against Ms Lieven in accordance with s 91 of the Act.

## **THE CHARGES**

[27] The charges laid by the Committee are as follows:

- (a) Charge 1: misconduct under s 73(a) and/or s 73(c)(iii) of the Real Estate Agents Act 2008 (the Act), namely conduct that:
  - (i) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; and/or

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<sup>1</sup> [Redacted].

- (ii) consists of a wilful or reckless contravention of r 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules).
- (b) Charge 2 (as an alternative to charge 1): unsatisfactory conduct under s 72(a) and/or s 72(b) and/or s 72(d) of the Act, namely conduct that:
- (i) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; and/or
  - (ii) contravenes r 6.3 of the Rules; and/or
  - (iii) would reasonably be regarded by agents of good standing as being unacceptable.
- (c) Charge 3: misconduct under s 73(b) of the Act, namely conduct that constitutes seriously incompetent or seriously negligent real estate agency work.
- (d) Charge 4 (as an alternative to charge 3): unsatisfactory conduct under s 72(a) and/or s 72(b) of the Act, namely conduct that:
- (i) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; and/or
  - (ii) contravenes r 5.2 of the Rules; and/or
  - (iii) contravenes r 9.1 of the Rules.

[28] Ms Lieven is defending the charges.

## **THE EVIDENCE**

[29] Ms Lieven filed a statement of evidence dated 3 March 2023. She also gave evidence at the hearing on 31 March 2023.

## **RELEVANT STATUTORY PROVISIONS**

[30] Section 3 of the Act provides:

### **3 Purpose of Act**

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

[31] Section 72 of the Act provides:

**72 Unsatisfactory conduct**

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

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

[32] Sections 73(a), (b) and (c)(iii) of the Act provide:

**73 Misconduct**

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful;
- (b) constitutes seriously incompetent or seriously negligent real estate agency work;
- (c) consists of a wilful or reckless contravention of—
  - ...
  - (iii) regulations or rules made under this Act; or ...

[33] The Committee submits that Ms Lieven breached rr 5.2, 6.3 and 9.1 of the Rules. These provide as follows:

**5 Standards of professional competence**

...

- 5.2 A licensee must have a sound knowledge of the Act, regulations, rules issued by the Authority (including these rules), and other legislation relevant to real estate agency work.

...

**6 Standards of professional conduct**

...

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

...

## 9 Client and customer care

### General

- 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.

[34] The Committee is required to prove the charges against Ms Lieven on the balance of probabilities.<sup>2</sup>

[35] We turn now to consider two preliminary issues which have bearing on our consideration of the charges.

### ***Are the decisions of the TT and the [court] admissible in the Tribunal?***

#### *Submissions*

[36] Section 50 of the Evidence Act 2006 provides:

#### **50 Civil judgment as evidence in civil or criminal proceedings**

- (1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.
- (1A) Evidence of a decision or a finding of fact by a tribunal is not admissible in any proceeding to prove the existence of a fact that was in issue in the matter before the tribunal.
- (2) This section does not affect the operation of—
- (a) a judgment in rem; or
  - (b) the law relating to res judicata or issue estoppel; or
  - (c) the law relating to an action on, or the enforcement of, a judgment.

[37] Counsel for Ms Lieven, Mr Hayes, submitted that the Committee's reliance on the findings of the TT and the [court] were ill-advised and prejudiced the fair hearing of the proceeding. He submitted that the Committee sought to rely upon the evidence of the decisions as a basis for their charges and that this placed the Tribunal in a position of compromise. Mr Hayes submitted that the charges should be dismissed on the grounds of natural justice. He further submitted that the TT and [court] decisions are hearsay.

[38] Ms Nizam for the Committee submitted that the Committee did not seek to admit the decisions in order to prove the existence of any fact in issue in the proceedings in

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<sup>2</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [118].



which those decisions were given, but rather that the decisions were relevant to Ms Lieven's knowledge of the RTA and to the orders made against her client.

### *Discussion*

[39] The Tribunal may regulate its procedures as it thinks fit, though it is subject to the rules of natural justice.<sup>3</sup>

[40] The Tribunal may receive any document or information that may, in its opinion, assist it, whether or not that document or information would be admissible in a court.<sup>4</sup> Subject to that and other matters, the Evidence Act 2006 applies.<sup>5</sup>

[41] Section 109 of the Act provides:

#### **109 Evidence**

(1) Subject to section 105, the Disciplinary Tribunal may receive as evidence any statement, document, information, or thing that may, in its opinion, assist it to deal effectively with the matters before it, whether or not that statement, document, information, or thing would be admissible in a court of law.

...

(4) Subject to subsections (1) to (3), the Evidence Act 2006 applies to the Disciplinary Tribunal in the same manner as if the Disciplinary Tribunal were a court within the meaning of that Act.

[42] In her judgment in *Deliu v National Standards Committee* her Honour Justice Thomas considered the similar provision contained in s 239 of the Law Practitioners Act 1982.<sup>6</sup> Her Honour said:

[88] A similar challenge was made in [*Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal*], where the Court, noting that s 239 was overlooked in *Dorbu*, held:

"[80] We consider subs (1) [of s 239] governs s 50 of the Evidence Act 2006. The judgments may be accepted by the Disciplinary Tribunal as evidence. It then simply becomes a question of weight to be given to the conclusions contained therein. This assessment will inevitably be case specific and turn very much on the particular proposition for which the judgment is being relied on. We therefore reject this challenge to the extent it is an admissibility challenge. Whether the Disciplinary Tribunal has accorded the wrong weight to any conclusions contained in any judgments is a matter able to be addressed when the appeal is considered, although we do not find it necessary to do so in this case."

<sup>3</sup> Section 105 of the Act.

<sup>4</sup> Section 109(1).

<sup>5</sup> Section 109(4); *Complaints Assessment Committee 2108 v Rankin* [2022] NZREADT 15 at [49].

<sup>6</sup> *Deliu v National Standards Committee* [2014] NZHC 2739.

<sup>7</sup> *Orlov v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987.

[89] I agree that pursuant to s 239(1) of the Act the issue is not a question of admissibility of the documents rather the weight which should be attributed to them. That is a matter for the Tribunal.

[43] We find that pursuant to s 109 of the Act, the Tribunal is entitled to receive the TT and [court] decisions as admissible evidence as they will assist us to deal with the matters before us. It is then for us to consider the weight to be placed on the conclusions within.

***“Disputed Facts”***

[44] Mr Hayes further submitted that whilst there were many agreed facts, the complainant was not present at the hearing to discount what he referred to as Ms Lieven’s “undisputed evidence” in her statement of evidence.

[45] Ms Nizam submitted that it is not relevant that the complainant was not present at the hearing to dispute Ms Lieven’s evidence. She submitted that an agreed statement of facts was filed by the parties and the complainant was therefore not required to be present at the hearing.

*Discussion*

[46] We agree with Ms Nizam’s submission. An agreed statement of facts was filed and the only “disputed fact” appears to be whether Ms Lieven “intended” to harass or threaten the tenants. The appearance of the complainant at the hearing would have been of no further assistance to the Tribunal.

**Charge 1: Did Ms Lieven breach s 73(a) and/or s 73(c)(iii) of the Act?**

*Submissions*

[47] Ms Nizam submitted that Ms Lieven’s emails to the complainant were “short, abrupt, impolite, condescending, legally unsound, and threatening, whereas the complainant’s emails were polite and considered”. She also submitted that the complainant had endeavoured to meet with Ms Lieven to mediate the issues but received no response from Ms Lieven.

[48] Ms Nizam submitted that the affidavit filed by Ms Lieven did not assist her in her defence to the misconduct charges. Ms Lieven stated in her affidavit that:

SC’s partner Ms M was hardly a shrinking violet who would feel threatened. He was representing them both when earlier threatening legal action if they were not let out of their fixed term 1 yr renewed lease. Similarly, his partner Ms M was a

lawyer [redacted] so with their background I don't see how they could have had any adverse concerns.

[49] It was submitted by Ms Nizam that Ms Lieven's affidavit evidenced a continued misunderstanding of the standard of communication that was appropriate between her and the tenants. She referred to a further paragraph of Ms Lieven's affidavit, where Ms Lieven stated:

In addition we had previously been in the Tenancy Tribunal where he tried to get out of paying the rent for a garage and his concubine Ms M when she left the premises. I believe that his actions were somewhat motivated by revenge.

[50] Ms Nizam submitted that the language used by Ms Lieven in her affidavit, and the reference to the complainant's partner as a "concubine", was consistent with the type of conduct that formed the basis of Charge 1.

[51] It was submitted by Ms Nizam that on the agreed facts, and looking at the email correspondence between the complainant and Ms Lieven, the only appropriate interpretation of Ms Lieven's behaviour is that she was threatening the tenants with an intent to harass them so as to change their minds on the exercise of their statutory rights.

[52] Ms Nizam referred to the finding by the TT that Ms Lieven's communication to the complainant was intended to harass the tenants and was a direct threat to make them change their minds and accept a breach of their rights. She also referred to the decision of the [court] which upheld the finding of the TT.

[53] As a result, Ms Nizam submitted that Ms Lieven's conduct towards the tenants would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful pursuant to s 73(a) of the Act.

[54] She further submitted that Ms Lieven's conduct could amount to misconduct under s 73(c)(iii) on the basis that the conduct consists of a wilful or reckless contravention of r 6.3 of the Rules. She submitted that it was unacceptable for a real estate agent to harass and intimidate the tenants in the manner in which she did, such that it can be said that she recklessly contravened r 6.3.

[55] For Ms Lieven, Mr Hayes submitted that s 73(a) of the Act cannot apply as it only applies to non-real estate work and that here Ms Lieven was involved in real estate agency work.

[56] He submitted that the charge under s 73(c)(iii) cannot be made out as there was no harassment and nor was there evidence that Ms Lieven's conduct was a wilful or reckless contravention of the Rules. Mr Hayes referred to a District Court case of *Birch*

*v Otautahi Community Housing Trust* where the definition of harassment was discussed in the context of the RTA:<sup>8</sup>

[44] Section 38(3) provides that contravention of a tenant's quiet enjoyment of the premises is an unlawful act if it amounts to harassment of the tenant. This may attract exemplary damages of up to \$2,000.

[45] Harassment is not defined in the Act. In *Macdonald v Dodds*, Judge Harland considered that the dictionary definition of "harassment" was appropriate in the context of s 38(3). In the *Concise Oxford Dictionary*, "harass" is defined as torment by subjecting to constant interference or intimidation". In *Black's Law Dictionary* "harassment" is defined as:

Words, conduct or action (usu. Repeated or persistent) that, being directed at a specific person, annoys, alarms or causes substantial emotional distress in that person and serves no legitimate purpose.

[46] While a single act of interference with a tenant's quiet enjoyment is unlikely to amount to harassment, the Adjudicator in *Whatiura v Shoulder* noted that "although the term usually refers to repeated acts of some kind, I take the view that it can extend to a single act on one occasion of sufficient seriousness".

[57] Mr Hayes submitted that the Tribunal should apply the definitions in *Birch* when considering whether there was harassment by Ms Lieven. He submitted that the initial emails between the complainant and Ms Lieven regarding s 48 of the RTA were simply a dispute over the application of s 48 of the RTA, or a reaction by Ms Lieven to a trespass notice and were not intended to harass. He said this was a one-off instance and did not fit neatly with the definition of harassment.

[58] Mr Hayes also submitted that lawyers often write to parties warning them of litigation consequences and that such threats by lawyers never land a lawyer with disciplinary action even though the threat of litigation is intended to "frighten persons into taking actions whether legally justified or not". Mr Hayes submitted that the reason lawyers are not accused of harassment is because it is a one-off event and not part of a course of conduct.

[59] Mr Hayes further submitted that s 73(c)(iii) of the Act cannot apply as Ms Lieven had obtained legal advice with regards to ss 47 and 48 of the RTA and that therefore there can be no wilful or reckless contravention of the Rules. Mr Hayes referred to paragraph 3 of Ms Lieven's affidavit where she stated:

With regard to the section 47 and 48 of the Residential Tenancies Act issue in taking the actions I did I was acting on legal advice that I'm entitled to rely upon and I had complied with said legal advice as confirmed in the letter dated 21 September 2020. ... As such I understood I was and have acted correctly.

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<sup>8</sup> *Birch v Otautahi Community Housing Trust* [2020] NZDC 17667.

[60] Mr Hayes submitted that Ms Lieven was not challenged as to whether she had taken legal advice.

### *Discussion*

[61] As the Tribunal said in *Complaints Assessment Committee 10024 v Downtown Apartments Ltd (In Liq)*:<sup>9</sup>

The word disgraceful is in no sense a term of art. In accordance with the usual rules it is to be given its natural and popular meaning in the ordinary sense of the word.

[62] In considering the charge against Ms Lieven, we refer to the discussion of disgraceful conduct under s 73(a) of the Act by his Honour Justice Woodhouse in *Morton-Jones v Real Estate Agents Authority*, where his Honour said:<sup>10</sup>

[29] ... If the charge is under s 73(a) the critical enquiry is whether the conduct is “disgraceful”. Conduct which involves a marked and serious departure from the requisite standards must be assessed as “disgraceful”, rather than some other form of misconduct which may also involve a marked and serious departure from the standards. The point is more than one of semantics because s 73 refers to more than one type of misconduct. In particular, s 73(b) refers to “seriously incompetent or seriously negligent real estate agency work”. Work of that nature would also involve a marked and serious departure from particular standards; the standards to which s 73(b) is directed are those relating to competence and care in conducting real estate agency work.

His Honour went on to say that:<sup>11</sup>

If the work was not real estate agency work, but the person doing the work was a licensee, the appropriate provision for a charge would be s 73(a).

[63] Thus, conduct charged against a licensee under s 73(a) may be found to be disgraceful (whether or not it is in the course of, or related to, real estate agency work) if it meets the ordinary meaning of “disgraceful”, that is whether the licensee’s conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful. When making this determination, the Tribunal takes into consideration the standards that an agent of good standing should aspire to, including any special knowledge, skill, training or experience such person may have. The standard of proof required before the Tribunal can find a charge under s 73(a) proved is the balance of probabilities.<sup>12</sup>

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<sup>9</sup> *Complaints Assessment Committee (CAC 10024) v Downtown Apartments Ltd (In Liq)* [2010] NZREADT 6 at [55].

<sup>10</sup> *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804 at [29].

<sup>11</sup> At [30].

<sup>12</sup> Pursuant to s 110(1) of the Act.

[64] Accordingly, s 73(a) can apply to this proceeding if we find Ms Lieven's conduct to be disgraceful (whether or not it is in the course of, or related to, real estate agency work) if it meets the ordinary meaning of the word "disgraceful" as referred to in *Morton-Jones*.

[65] Paragraph 18 of the Committee's Charge 1 states as follows:

18. In stating "I am a licensed real estate agent having given you notice that the property is for sale" and in threatening to sue the tenants, the Licensee intended to harass the tenants and to threaten them to make them change their minds.

[66] As referred to by Mr Hayes, in *Birch* above,<sup>13</sup> one of the definitions of "harassment" recorded in the *Concise Oxford Dictionary* is "torment by subjecting to constant interference or intimidation". We also note the *Black's Law Dictionary* definition given was "[w]ords, conduct or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms or causes substantial emotional distress in that person and serves no legitimate purpose". The online edition of the *Oxford Dictionary* also defines harassment as: "Unwarranted (and now esp. unlawful) speech or behaviour causing annoyance, alarm, distress, or intimidation, usually occurring persistently over a period of time. Frequently with modifying word specifying the type of harassment involved".<sup>14</sup>

[67] Mr Hayes submitted that under s 109(3) of the RTA the conduct complained of (in this case harassment) has to be intentional. However, we are not bound by the RTA and its rules in coming to our decision. We are concerned with Ms Lieven's behaviour in a disciplinary forum under the Act.

[68] Mr Hayes also submitted that to be harassment the behaviour has to comprise a course of conduct over a period of time, or if sufficiently serious, could extend perhaps to one instance.

[69] We find that Ms Lieven's behaviour in her series of communications with the tenants was intended to harass the tenants and make them change their minds as to their legal rights under the RTA. This behaviour was not a one-off event but continued over a number of days. We reject Mr Hayes' submission that Ms Lieven's behaviour is analogous to a lawyer writing to a party warning them of litigation consequences. That situation is specific to legal practice, and is not relevant to this situation.

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<sup>13</sup> *Birch v Otautahi Community Housing Trust*, above n 8.

<sup>14</sup> As at 1 May 2023.

[70] The question for the Tribunal is whether Ms Lieven's behaviour in harassing the tenants with her threatening and rude email communications was such that it would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[71] In considering the charge against Ms Lieven pursuant to s 73(a) of the Act, the critical enquiry is whether the conduct in question is such as to not only justify a finding of misconduct, but so serious as to be regarded as "disgraceful" in its ordinary sense of the word.<sup>15</sup> This is a high threshold. We are not satisfied that the high threshold referred to in *Morton-Jones* to prove disgraceful conduct has been met. We do not consider Ms Lieven's conduct in her communications with the tenants is such that it amounts to disgraceful conduct under s 73(a) of the Act.

[72] We now consider whether Ms Lieven's conduct amounts to misconduct under s 73(c)(iii) of the Act.

[73] In relation to s 73(c) of the Act, it is not the conduct that breaches the Rules that must be wilful or reckless, but the actual contravention of the Rules.<sup>16</sup>

[74] The Tribunal in *Real Estate Agents Authority v Clark (CAC 20004)* said that:<sup>17</sup>

... "reckless indifference to whether or not conduct might breach rules of professional conduct can amount to misconduct ..."

[75] In *Complaints Assessment Committee 412 v Grewal*, the Tribunal referred to *Clark* and stated that in order to establish misconduct under s 73(c) of the Act, the Complaints Assessment Committee is required to establish on the balance of probabilities that a licensee foresaw the possibility that his or her conduct might breach the Act, but proceeded regardless.<sup>18</sup>

[76] Ms Lieven is alleged to have wilfully or recklessly breached r 6.3 of the Rules. This Rule was considered by the Tribunal in *Jackman v Complaints Assessment Committee 10100* where it accepted that a breach of r 6.3 would be justified by conduct which:<sup>19</sup>

...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.

<sup>15</sup> See the discussion of *Morton-Jones v Real Estate Agents Authority*, at [62] above.

<sup>16</sup> See *Complaints Assessment Committee 1907 v Lindsay* [2021] NZREADT 36 at [39].

<sup>17</sup> *Real Estate Agents Authority (CAC 20004) v Clark* [2013] NZREADT 62 at [71].

<sup>18</sup> *Complaints Assessment Committee 412 v Grewal* [2019] NZREADT 52 at [30].

<sup>19</sup> *Jackman v Complaints Assessment Committee (CAC 10100)* [2011] NZREADT 31 at [65], and *Complaints Assessment Committee 403 v Goundar* [2017] NZREADT 52 at [83].

[77] Mr Hayes submitted that Ms Lieven, in her communications with the tenants, had been acting on legal advice. As a result, Mr Hayes submitted, Ms Lieven's actions could not be found to be a wilful or reckless contravention of s 73(c)(iii).

[78] However, the Tribunal was not provided with any evidence of legal advice having been provided to Ms Lieven prior to the behaviour which is the subject of this proceeding. Whilst Ms Lieven stated in her evidence that she "was acting on legal advice that I'm entitled to rely upon", Ms Lieven did not point to any evidence of when such advice was obtained. She relied on a letter from her then lawyers which simply stated that "Ms Lieven and the company are entitled to rely on their own legal advice". No evidence as to when legal advice was provided to Ms Lieven, or by whom, was provided to the Tribunal.

[79] In dealing with a charge under s 73(c)(iii) in *Complaints Assessment Committee 403 v Goyal*, the Tribunal was not persuaded that the licensee's conduct was a wilful or reckless breach of the Act and Rules. The Tribunal stated:<sup>20</sup>

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.

[80] Similarly, taking all the circumstances of Ms Lieven's behaviour into account, we are not persuaded that Ms Lieven in her communications with the tenants foresaw that her conduct would be a breach of r 6.3 and proceeded regardless in a reckless manner. A "wilful or reckless" contravention requires that Ms Lieven intended to contravene r 6.3, or that she knew that her conduct may have the effect of bringing the industry into disrepute, but proceeded with that conduct regardless of the risk. There has been no direct evidence of that, or any evidence that would allow us to make an inference to that effect.

[81] Accordingly, we are not persuaded on the balance of probabilities that Ms Lieven's conduct amounted to a breach of s 73(c)(iii).

## **Charge 2 (alternative to charge 1): Did Ms Lieven breach s 72 of the Act?**

### *Submissions*

[82] The Committee has submitted that if the Tribunal does not find Ms Lieven guilty of misconduct under s 73 of the Act, then Ms Lieven is guilty pursuant to s 72(a), s 72(b) and/or s 72(d) of the Act.

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<sup>20</sup> *Complaints Assessment Committee 414 v Goyal* [2017] NZREADT 58 at [67].



[83] In order for us to find Ms Lieven guilty of unsatisfactory conduct, Ms Lieven must have been carrying out “real estate agency work’ as defined in s 4 of the Act as follows:

**real estate agency work or agency work—**

- (a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and
- (b) includes any work done by a branch manager or salesperson under the direction of, or on behalf of an agent to enable the agent to do the work or provide the services described in paragraph (a); but
- (c) does not include—
  - (i) the provision of general advice or materials to assist owners to locate and negotiate with potential buyers; or
  - (ii) the publication of newspapers, journals, magazines, or websites that include advertisements for the sale or other disposal of any land or business; or
  - (iii) the broadcasting of television or radio programmes that include advertisements for the sale or other disposal of any land or business; or
  - (iv) the lending of money on mortgage or otherwise; or
  - (v) the provision of investment advice; or
  - (vi) the provision of conveyancing services within the meaning of the Lawyers and Conveyancers Act 2006.

[84] “Transaction”, is defined as follows:

**transaction** means any 1 or more of the following:

- (a) the sale, purchase, or other disposal or acquisition of a freehold estate or interest in land:
- (b) the grant, sale, purchase, or other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies):
- (c) the grant, sale, purchase, or other disposal or acquisition of a licence that is registrable under the Land Transfer Act 2017:
- (d) the grant, sale, purchase, or other disposal or acquisition of an occupation right agreement within the meaning of the Retirement Villages Act 2003:
- (e) the sale, purchase, or other disposal or acquisition of any business (either with or without any interest in land).

[85] Ms Nizam submitted that Ms Lieven was engaged in real estate agency work as the property was subject to a real estate agency agreement which stated that HH and Ms Lieven appointed the agency as the real estate agent for the sale of the property.

Commission would be payable to the agency. Ms Lieven was therefore engaged to do work and provide services on behalf of HH for the purpose of bringing about a transaction, namely the sale of the property.

[86] Ms Nizam submitted that Ms Lieven was doing real estate agency work as she was communicating with the tenants for the purposes of organising a viewing of the property by prospective purchasers. The purpose of the viewing was ultimately to facilitate a transaction.

[87] Mr Hayes submitted that the agency was not an agent of the landlord, but an agent of the owner of the property, HH. Mr Hayes submitted that Ms Lieven wore two “hats” in her dealings with the tenants, one as the landlord and one as a real estate agent. He submitted that so far as her obligations under the RTA were concerned, Ms Lieven was communicating with the complainant as the landlord, not as a real estate agent. We observe that this submission is inconsistent with Mr Hayes’ submission (recorded at paragraph [55] above) that Ms Lieven was involved in real estate agency work), and Ms Lieven’s statements to the complainant (recorded at paragraph [17]) that she was communicating with the tenants as a real estate agent, not the landlord).

#### *Discussion*

[88] We accept Ms Nizam’s submission that Ms Lieven was acting as a real estate agent. As referred to in paragraph [67] above, we are not concerned with Ms Lieven’s obligations under the RTA. We are considering her conduct as a real estate agent and whether that conduct was in breach of the Act or the Rules.

[89] In *House v Real Estate Agents Authority (CAC 20003)*, his Honour Justice Cooper stated that a narrow and literal approach to the definition of “real estate agency work” would be inappropriate given that the main object of the Act is the promotion and protection of the interests of consumers in respect of real estate agency work. His Honour stated that the definition of “real estate agency work” applies to the overall task the agency is required to perform.<sup>21</sup> He said:<sup>22</sup>

... once the relationship of principal and agent has been established anything (be it an act or omission) that is related directly or indirectly to that work is liable to be within the definition.

[90] In *Re Li Wang*, a Complaints Assessment Committee considered the licensee’s conduct to be unsatisfactory conduct.<sup>23</sup> The licensee was a licensed salesperson under

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<sup>21</sup> *House v Real Estate Agents Authority (CAC 20003)* [2013] NZHC 1619.

<sup>22</sup> At [50].

<sup>23</sup> *Re Li Wang* REAA Complaint No: C26114 (6 June 2019).

the Act, and was engaged by an agency to sell the complainant's property. The complainant alleged that she received threats from the licensee by phone and text messages threatening to kill the complainant and her family. The licensee admitted making the threats but said they were empty threats and made in a personal capacity.

[91] The Complaints Assessment Committee did not accept the threats were made in a personal capacity and found that the licensee was carrying out real estate agency work for the complainant at the time the threats were made. It considered the threats would reasonably be regarded by agents of good standing as unacceptable and likely to bring the industry into disrepute. It found that the conduct was unsatisfactory conduct but did not meet the threshold for misconduct.

[92] We find that Ms Lieven's conduct in harassing the tenants in the manner that she did and in threatening to sue the tenants, is a breach of r 6.3 and meets the requirements for a finding of unsatisfactory conduct pursuant to s 72(a), s 72(b) and s 72(d). Ms Lieven's conduct respectively:

- (a) fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee;
- (b) contravened r 6.3 of the Rules in that her conduct was likely to bring the industry into disrepute; and
- (c) was real estate agency work that would reasonably be regarded by agents of good standing as being unacceptable.

[93] Accordingly, we find on the balance of probabilities that the evidence supports the Committee's charge that Ms Lieven breached her obligations under s 72(a), s 72(b), s 72(d) and r 6.3 of the Rules. We find Ms Lieven guilty on Charge 2.

### **Charge 3: Did Ms Lieven breach s 73(b) of the Act?**

#### *Submissions*

[94] The Committee alleges that Ms Lieven failed to have a sound knowledge of the RTA contrary to r 5.2 which requires a licensee to have sound knowledge of legislation relevant to real estate agency work. The Committee also alleges that, against the best interests of her client, Ms Lieven's actions caused the tenants of the property to file a claim in the TT which resulted in an order for her client to pay the tenants compensation and exemplary damages. The Committee alleges that, as such, Ms Lieven breached r 9.1 of the Rules which requires a licensee to act in the best interests of a client.

[95] Ms Nizam submitted that Ms Lieven generated litigation for her client HH by failing to have a sound knowledge of the RTA and by harassing the tenants to such an extent that the complainant filed a complaint about Ms Lieven to the TT. She submitted that Ms Lieven's interpretations of ss 47 and 48 of the RTA were fundamentally incorrect. She submits that Ms Lieven's lack of knowledge meant that she breached her obligations under s 38(1) of the RTA to allow the tenants quiet enjoyment. As such, a complaint was made by the complainant to the TT. The TT found in favour of the complainant and on appeal to the [court], the TT's decision was confirmed.

[96] It was submitted by Ms Nizam that Ms Lieven's statement of evidence confirmed her lack of understanding of the RTA and that her evidence relied on opinion and hearsay.

[97] Mr Hayes submitted that this charge relies upon the findings of the TT and [court] and that reliance on those decisions is inappropriate. He submitted that even if the decisions are admissible, the charge should be dismissed on the basis that harassment requires a course of conduct and here there was only one act which could be harassment, which was Ms Lieven's threat to sue the tenants.

[98] He submitted that the Committee had identified the wrong party as being disadvantaged as it was the landlords who were before the TT, not the owner as Ms Lieven's client. He submitted that therefore there was no litigation generated against Ms Lieven's client, HH, and the basis of the charge cannot be made out.

### *Discussion*

[99] We reject Mr Hayes' submission that the decisions of the TT and [court] are not admissible for the reasons set out at paragraph [43], above.

[100] [The Judge] said in dismissing Ms Lieven's appeal:<sup>24</sup>

Ms Lieven submitted that s 48, which governs the landlord's right of entry, did not apply in this situation because she was showing the property to an international delegation as a real estate agent. She is wrong. She remained a landlord of the property she was showing, notwithstanding that she purported to wear her other hat as a real estate agent. Her status as a real estate agent cannot exempt her from her obligations as a landlord, nor should she have used her status as a real estate agent to pressure the tenants to accept a breach of their statutory rights. Although not the subject of this appeal, to my mind Ms Lieven's conduct raises ethical and conflict of interest issues under the Real Estate Agents Act 2008.

[101] We agree that Ms Lieven appears to be seeking to avoid liability on the charges by claiming to wear different "hats" at various times. However, she cannot avoid the fact

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<sup>24</sup> [Redacted].

that while she was also a landlord, she was acting as a real estate agent, marketing the property, when she dealt with the tenants. When giving evidence to the Tribunal, Ms Lieven demonstrated an unsound knowledge of the RTA, and she attempted to gloss over the correct interpretation of the legislation.

[102] However, we are not persuaded that Ms Lieven's actions in harassing and threatening the tenants, and her lack of knowledge and understanding of the RTA "caused" the tenants to file the claim in the TT and "resulted" in the order against HH, as alleged in Charge 3. There has been no direct evidence to support this, or any evidence that would allow us to make an inference to that effect.

[103] Further, the Committee is also required to establish that Ms Lieven's unsound knowledge of the RTA constituted "seriously incompetent or seriously negligent real estate agency work". In *Complaints Assessment Committee 20003 v Jhagroo*, Thomas J upheld the Tribunal's decision that the licensee's conduct was incompetent or negligent, but not seriously so.<sup>25</sup> Her Honour observed as follows:<sup>26</sup>

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.

[104] On the balance of probabilities we are not satisfied that Ms Lieven's conduct amounted to seriously incompetent or seriously negligent real estate agency work pursuant to s 73(b) of the Act.

#### **Charge 4 (alternative to charge 3): Did Ms Lieven breach s 72(a) and/or s 72(b) of the Act?**

##### *Submissions*

[105] Ms Nizam submitted that there is sufficient evidence to find Ms Lieven guilty of unsatisfactory conduct on the basis that she breached r 5.2 which required her to have sound knowledge of the RTA as set out in [33] above. Ms Nizam submitted that it has been demonstrated that Ms Lieven's lack of understanding of the RTA appears, from her evidence given at the hearing, to be a continued state of affairs.

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<sup>25</sup> *Complaints Assessment Committee 20003 v Jhagroo* [2014] NZHC 2077.

<sup>26</sup> At [49].

[106] Ms Nizam also submitted that Ms Lieven's conduct fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee, and/or that she breached r 9.1, which required her to act in the best interests of the client.

[107] Mr Hayes submitted again that this charge relies on the findings of the TT and [court] being admissible and therefore, as he submitted for charge 3, should be dismissed.

[108] Mr Hayes submitted that r 9.1 was not breached as the client (HH) suffered no adverse result in his capacity as owner of the property. It was the landlords who were before the TT.

### *Discussion*

[109] As referred to above, at paragraph [101], we have concluded that Ms Lieven lacked a sound knowledge of the RTA. In her capacity as a real estate agent, selling a tenanted property, Ms Lieven should have ensured that her knowledge was such that her dealings with the tenants complied with the RTA. Both the TT and the [court] found that Ms Lieven breached her requirements as to notice. These decisions confirm our own view, when looking at the evidence overall, that Ms Lieven's knowledge fell short of her obligations under r 5.2.

[110] In failing to comply with her legal obligations to the tenants during the sale of the property, and in harassing and threatening the tenants in the manner she did, we find that Ms Lieven's conduct fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee.

[111] We have some difficulty with respect to the charge that Ms Lieven breached r 9.1 of the Rules – that is, that she failed to act in the best interests of her client. This difficulty arises from the fact that Ms Lieven was one of the landlords of the property, and a beneficiary of the Trust that owned it. HH is the other landlord, and is the sole trustee of the Trust. The charge required the Tribunal to consider whether Ms Lieven acted in HH's best interests (as to which there was no evidence of any concern on his part).

[112] We are not persuaded that the charge of breach of r 9.1 adds anything to the overall assessment of Ms Lieven's conduct, such that it is not necessary to consider this further.

[113] We are satisfied on the balance of probabilities that Ms Lieven is guilty of unsatisfactory conduct under charge 4, for breaches of s 72(a) and s 72(b) of the Act.

**OUTCOME**

[114] As set out in paragraphs [93] and [113], the Tribunal finds Ms Lieven guilty of unsatisfactory conduct under Charges 2 and 4 (with the exception of the charge alleging a breach of r 9.1) pursuant to s 72 of the Act.

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

[116] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in Part 20 of the High Court Rules 2016.

**PUBLICATION**

[117] In light of the outcome of this charge and having regard to the interests of the parties and of the public, it is proper to order publication of the decision of the Tribunal without identifying any of the parties other than Ms Lieven.

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C A Sandelin  
Deputy Chairperson

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P N O'Connor  
Member

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F J Mathieson  
Member