BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 14

Reference No: READT 008/2022

IN THE MATTER OF	Charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	**COMPLAINTS ASSESSMENT COMMITTEE 2107**
AGAINST	**MICHAEL SHELDON** Defendant

Hearing in Auckland on 23 May 2023

Tribunal:	D J Plunkett (Chair) P N O'Connor (Member) F J Mathieson (Member)

Appearances:

Counsel for the Committee:	E Mok
Counsel for Mr Sheldon:	R B Hern

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 13 June 2023

INTRODUCTION

[1] Michael Sheldon is a licensed real estate salesperson under the Real Estate Agents Act 2008 (the Act).

[2] Mr Sheldon has been charged by Complaints Assessment Committee 2107 (the Committee) with misconduct under s 73(a) of the Act (disgraceful conduct), or alternatively with misconduct under s 73(c)(iii) (wilful or reckless breach of r 6.3 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules)).

Particulars

[3] In September 2020, after being informed by a prospective purchaser that he had withdrawn his offer on a property due to an unsatisfactory building report, Mr Sheldon:

1. Asked the prospective purchaser to say that the reason for the withdrawn offer was because of finance rather than an unsatisfactory building report.

2. Explained the reason for his request was because he would have to disclose the reason for the withdrawn offer to future potential buyers and that an offer withdrawn because of finance was less off-putting to such buyers than an offer withdrawn due to an unsatisfactory building report.

[4] Mr Sheldon admits that his conduct was unsatisfactory as defined in s 72 of the Act, but he denies misconduct.

BACKGROUND

[5] In January 2020, Mr Sheldon was working as a salesperson for Elysium Realty Ltd, trading as Harveys Te Atatu Peninsula, Auckland (the agency).

[6] Mr Sheldon was engaged as the listing agent for a certain residential property in Titirangi under an agency agreement between the agency and the vendors. The agency commenced on 15 January 2020. The disclosure statement (15 January 2020) signed by the vendors stated that the building was weathertight and identified no defects. At some point, the property was withdrawn from the market due to the COVID-19 lockdowns and it was returned to the market in early August 2020.

[7] An offer for the property from a buyer was withdrawn in late August 2020, due to a boundary issue.

[8] [The prospective purchaser] was interested in the property. He made an offer on 1 September 2020, conditional on finance and a building report. It was accepted by the vendors on 2 September 2020.

[9] The prospective purchaser engaged a licensed building practitioner, [The building inspector] (the building inspector) to carry out an inspection and provide a report. He inspected the property on 2 September 2020 and identified significant issues relating to the decks and water ingress. His report (undated) stated that there were issues with the decks and a leak in one room. Further invasive investigation and remedial work was required. The report was provided to the prospective purchaser on about 2 September 2020. A copy was provided to Mr Sheldon on about 3 September 2020.

[10] Mr Sheldon in turn disclosed to the vendors the existence of the report. The vendors did not agree with it. They obtained a quote for certain remedial work. This led to what Mr Sheldon described to the Tribunal as a massive discrepancy in the defects and remedial work between the vendors' quote (about $9,000) and the building inspector's estimate (about $90,000). Mr Sheldon duly advised the prospective purchaser of the discrepancy and suggested he obtain a second opinion.

[11] The prospective purchaser was no longer interested in the property. As a result of the building inspector's report, he decided to withdraw his offer and instructed his solicitor accordingly.

[12] On 9 September 2020, the prospective purchaser had a discussion over the phone with Mr Sheldon. He told him he was withdrawing the offer in light of the unsatisfactory report. The precise terms of the discussion are disputed.

[13] The prospective purchaser told the building inspector about his conversation with Mr Sheldon.

[14] The building inspector raised the matter with the owner and branch manager of the agency, Paul Vincent Vujnovich, in an email on 9 September 2020. The inspector informed Mr Vujnovich that the prospective purchaser decided to walk away due to serious issues raised in a building report. Mr Sheldon then asked the prospective purchaser to say that he had been declined finance rather than there being an issue with the house or the report. The inspector regarded this as a serious breach of ethical standards. Mr Vujnovich replied in an email to the inspector on 11 September 2020 stating he had investigated the matter. He said Mr Sheldon admitted an error of judgement and was very remorseful. He had been formally reprimanded.

[15] Mr Sheldon continued to market the property. He disclosed to prospective buyers that an offer had been withdrawn because of a building report. About two weeks after

the prospective purchaser withdrew the offer, the vendors removed the property from the market.

Complaint to the Authority

[16] A complaint against Mr Sheldon was made to the Real Estate Agents Authority (the Authority) by the building inspector on 4 November 2020. According to the inspector, on being informed that the prospective purchaser was walking away from the deal, Mr Sheldon asked him to say that he had been declined finance rather than there being issues with the house or the report, so the problem would not have to be disclosed to future prospective buyers.

[17] On 5 May 2021, an investigator from the Authority interviewed the prospective purchaser by telephone. On being told the building report was unsatisfactory, the prospective purchaser said Mr Sheldon's first reply was:

> Can you rather say that instead of being an unsatisfactory building report, if you can rather say that you didn't get finance.

[18] In the interview, the prospective purchaser said he was not comfortable with that, but he did not think much of it. He spoke to the building inspector about what had transpired and the latter took it a bit further. The prospective purchaser was not sure why Mr Sheldon was doing that. It may have been a sudden spur of the moment thing. In retrospect, the prospective purchaser realised that if there was a reason for the sale not going through, this had to be disclosed to subsequent buyers. He was pretty certain that Mr Sheldon did say that if he (the prospective purchaser) gave as the reason a faulty building report, that would have to be disclosed to the "vendors".

[19] Mr Sheldon sent an explanation to the Authority on 27 April 2021. He stated that the building report obtained by the prospective purchaser raised potentially serious issues. This came as a surprise to Mr Sheldon and the vendors. Since the prospective purchaser was from South Africa and had never bought a property in New Zealand before, he wanted him to understand the process. He explained to him that he would have to disclose to buyers that a contract had been withdrawn because of a builder's report and this could have an adverse impact for the vendors, especially given the discrepancy in views about the actual condition of the house. He added that if, for example, the deal failed because of finance, that was less off-putting for buyers.

[20] Mr Sheldon told the Authority he urged the prospective purchaser to obtain a second opinion, as he was not confident in the judgement of the building inspector. This was declined and the offer was withdrawn because of the report. Mr Sheldon said his intention was for the prospective purchaser to understand the process and while he may

not have explained it well, he certainly did not wish to influence him to say finance was the reason for withdrawing.

[21] The Committee decided on 4 May 2022 to lay charges in the Tribunal against Mr Sheldon.

Evidence given to the Tribunal

[22] The Committee called the following witnesses.

Ms Johnston

[23] There is an affirmation (2 August 2022) from Suzanne Johnston, the regulatory compliance manager at the Authority. Ms Johnston produces the key documents from the Committee's investigation.

The prospective purchaser

[24] There is a brief of evidence (25 July 2022) from the prospective purchaser who also gave oral evidence. Attached to his brief is his telephone interview with the Authority's investigator on 5 May 2021.

[25] In his brief, the prospective purchaser says the building inspector's report raised concerns regarding water ingress at a deck. He decided to withdraw the offer on about 9 September 2021. He let Mr Sheldon know. Mr Sheldon's immediate response was to ask whether he could say he did not get finance, instead of an unsatisfactory building report. The prospective purchaser was uncomfortable about this. He is fairly sure that Mr Sheldon also said that, if the offer was withdrawn because of the report, this would have to be disclosed to other possible buyers. By the time of the discussion, the prospective purchaser had already instructed his solicitor to withdraw the offer.

[26] The prospective purchaser told the investigator that he was not comfortable with what Mr Sheldon asked, but he did not think too much of it. He did though mention the conversation with Mr Sheldon in passing to the building inspector.

[27] There is a further brief (1 December 2022) from the prospective purchaser, replying to that of Mr Sheldon. As for the latter's explanation relating to miscommunication, the prospective purchaser notes that English is his first language. The chance that he misunderstood Mr Sheldon is very low. He received a phone call from Mr Vujnovich once the complaint to the agency was made and was given an unreserved apology. No mention was made of any misunderstanding or miscommunication.

[28] In oral evidence to the Tribunal, the prospective purchaser said it was his "impression" Mr Sheldon was requesting him to change the reason for the withdrawal. He confirmed he had told the building inspector as "an aside".

The building inspector

[29] There is a brief of evidence (1 August 2022) from the building inspector. He confirms his inspection on 2 September 2020 and subsequent report. The prospective purchaser told him on 9 September 2020 that when Mr Sheldon was informed of the withdrawal of the offer, he asked the prospective purchaser to say the withdrawal was because of finance rather than the report. The prospective purchaser was taken aback. The building inspector then made a complaint to Mr Sheldon's manager and later to the Authority.

[30] The Tribunal also heard from Mr Sheldon and his witnesses.

Mr Sheldon

[31] There is a brief of evidence (18 November 2022) from Mr Sheldon who additionally gave oral evidence to the Tribunal. He has been a registered salesperson since November 2012.

[32] Mr Sheldon said that the vendors completed a disclosure statement (15 January 2020) confirming that to their knowledge, the property was weathertight and structurally sound. The building report obtained by the prospective purchaser raised potentially serious issues. He was surprised because no problems had been identified during the listing process. The vendors were also surprised. The vendors obtained a quote for certain work which Mr Sheldon provided to the prospective purchaser.

[33] On 9 September 2020, the prospective purchaser telephoned him to say he was withdrawing the offer because of the building report. He had already instructed his lawyer to cancel the offer. Mr Sheldon then explained the process to the prospective purchaser, who had come from another country and was buying his first house in New Zealand. Mr Sheldon informed the prospective purchaser that the withdrawal of an offer due to a negative builder's report could have a significant impact on a vendor, compared to withdrawing due to finance. Withdrawing an offer because of finance was less off-putting to future buyers.

[34] Mr Sheldon urged the prospective purchaser to obtain a second opinion. There was a vast difference between the views of the building inspector and the vendors. The report rang alarm bells as it was so different from the knowledge of the vendors.

Mr Sheldon said he was upset for the prospective purchaser who liked the property. He considered a second opinion would reveal the true condition of the building to be somewhere in the middle between the views of the building inspector and the vendors and the prospective purchaser might change his mind about withdrawing the offer. His explanation of the need to disclose the issues raised in the report to future buyers was an attempt to encourage him to obtain a second opinion. He was not trying to protect his commission. Mr Sheldon states he would not have been materially impacted financially by making this sale. His income was substantial in 2020 despite COVID-19.

[35] In his brief, Mr Sheldon states that he was motivated to do a good job for the vendors. A previous offer had fallen over because of a boundary issue. After being put on notice of that issue, the disclosure form for the property was updated. He was concerned about the withdrawal of the prospective purchaser's offer when the vendors, who lived in the property and had insight into its condition, did not agree with the building inspector's assessment. He had no desire or intention to attempt to persuade the prospective purchaser to provide a false explanation for withdrawing.

[36] According to Mr Sheldon, there has been an unfortunate miscommunication, for which he takes responsibility. Although not his intention, he accepts that the prospective purchaser might have taken his comments to be suggesting a false explanation for withdrawing be provided. Two factors might have contributed to the miscommunication:

1. He is a native Londoner who speaks quite quickly.

2. He was under a significant amount of stress due to health and personal issues. At the same time, he was preparing for another complaint which went to a hearing in December 2020, a process which was extremely distressing. Mr Sheldon thinks these matters contributed to his explanation to the prospective purchaser being less coherent.[1]

[37] Since the finding of unsatisfactory conduct by the Tribunal in 2021 in another case, Mr Sheldon says he has put a lot of effort into upskilling on his professional obligations. As a result of the current complaint, he accepts the need to take further steps to upskill himself on what is best practice for giving effect to his obligations. Mr Vujnovich arranged for the entire branch to obtain training on communication and disclosure obligations from Graham Crews.

[38] Mr Sheldon sincerely and unequivocally apologises to the prospective purchaser and the Authority. It has been an experience from which he is determined to learn.

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[1] The details of Mr Sheldon's health and personal issues are immaterial.

[39] A medical certificate (21 October 2022) has been produced, along with a character reference (20 October 2022) from a church pastor.

Mr Vujnovich

[40] There is a brief of evidence (24 November 2022) from Mr Vujnovich. Mr Vujnovich has known Mr Sheldon for 10 years. He is one of the best performing members of the team. He is competent and has integrity. He is absolutely diligent and careful in his dealings with vendors and purchasers. Mr Sheldon is not dishonest and would not have had a duplicitous intention in his conversation with the prospective purchaser.

[41] Mr Vujnovich notes that in 2020, Mr Sheldon's personal life was in some turmoil and this affected his performance. He was struggling with a major health problem. He was also dealing with his first complaint to the Authority. Mr Sheldon learns from adversity and will ultimately be an even better and more competent agent.

Mr Crews

[42] There is a brief of evidence (24 November 2022) and affidavit (22 May 2023) from Graham Leslie Crews. Mr Crews provides compliance training for real estate agents. He has previously worked as a senior lecturer at Massey University in real estate. Mr Crews has recently been engaged by the agency to provide training to the branch on effective communication and disclosure obligations. Mr Sheldon was in attendance and fully engaged in the discussions.

CHARGES

Jurisdiction and principles

[43] The Committee has brought a charge of misconduct against Mr Sheldon. Misconduct is defined in the Act:

> **73 Misconduct**
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> For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—
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> (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
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> (b) constitutes seriously incompetent or seriously negligent real estate agency work; or
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> (c) consists of a wilful or reckless contravention of—

(i) this Act; or

(ii) other Acts that apply to the conduct of licensees; or

(iii) regulations or rules made under this Act; or

(d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

[44] The Tribunal may regulate its procedures as it thinks fit, though it is subject to the rules of natural justice.[2]

[45] 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.[3] Subject to that and other matters, the Evidence Act 2006 applies.[4]

[46] It is the civil standard of proof, the balance of probabilities, that is applicable.[5] However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.[6]

[47] The charge of misconduct is framed as disgraceful conduct under s 73(a) of the Act. This has been considered by the High Court in *Morton-Jones*:[7]

> [28] Charges 1, 2 and 3 alleged "disgraceful conduct". On the meaning of this expression, the Tribunal referred to a Tribunal decision in *CAC v Downtown Apartments Ltd.*[5] In that case the Tribunal said:
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> > [55] 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. But s 73(a) qualifies the ordinary meaning by reference to the reasonable regard of agents of good standing or reasonable members of the public.
> >
> > [56] The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess. See *Blake v Preliminary Proceedings Committee of the Medical Council of New Zealand,* [1997] 1 NZLR 71.
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> > [57] The 'reasonable person' is a legal fiction of common law representing an objective standard against which individual conduct can be measured but under s 73(a) that reasonable person is qualified to be an agent of good standing or a member of the public.

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[2] Real Estate Agents Act 2008, s 105.
[3] Section 109(1).
[4] Section 109(4).
[5] Section 110.
[6] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [101]–[102] and [112].
[7] *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804.

> [58] So while the reasonable person is a mythical ideal person, the Tribunal can consider, inter alia, the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the … defendant.
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> [59] So, in summary, the Tribunal must find on balance of probabilities that the conduct of the … defendant represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public.

[29] Subject to one qualification I agree with that analysis. The qualification relates to the observation in [59]. It is a restatement of what is clearly expressed in s 73(a). In my opinion the restatement does not accurately reflect the words used. 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.

[30] This is not to say that s 73(a) could not apply to work carried out by a licensee so incompetently or negligently as to amount to disgraceful conduct according to the s 73(a) tests. 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). This is a point more fully discussed below when considering the appellant's argument that the Act did not apply to his property management work.

[5] *Complaints Assessment Committee (CAC 10024) v Downtown Apartments Ltd (in Liq)* [2010] NZREADT 6.

[48] The alternative charge of misconduct is framed as wilful or reckless contravention of r 6.3 of the Rules, under s 73(c)(iii) of the Act. The wilful or reckless contravention of a rule was considered by the Tribunal in *Clark*, where it approved the principles set out in the Australian case of *Zaitman:*[8]

> [51] But in this instance Parliament has used both the words "wilful" and "reckless" in the definition of "misconduct" and so some meaning must be given to each. In those circumstances, and in view especially of what was said by Hardie, J in Hodgekiss in a not dissimilar legislative context, the word "wilful" in para(a) of the definition in s2A should surely be taken to make it an offence for a solicitor, who knows that it is a contravention of the Act (or the rules or regulations, as the case may be) for him to do or to fail to do some particular thing, intentionally to do that thing or fail or omit to do it. On the other hand, the word "reckless" should be taken as requiring no more than that the solicitor be shown to have acted, not in the knowledge just described, but with reckless indifference, not caring whether what he does, or fails or omits to do (as the case may be) is a contravention of the Act, the rules or the regulations. The solicitor must, I think, have appreciated the possibility that his conduct (whether it be act or omission) might amount to a breach of the Act, the rules or the regulations; for otherwise it

[8] *Zaitman v Law Institute of Victoria* BC9401319 (9 December 1994) (VSC) per Phillips J, approved in *Real Estate Agents Authority (CAC 20004) v Clark* [2013] NZREADT 62 at [70]–[71].

> is difficult to say that he acted with the necessary reckless indifference. To put that in another way, the solicitor must, I think, be shown to have known of the risk and to have intended to take that risk.
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> [52] It is implicit in what I have just said that, while the solicitor, who does not KNOWINGLY act in contravention, must be shown to have foreseen that what he was doing MIGHT amount to a relevant contravention, there is no need to go further and establish that the solicitor foresaw the contravention as "probable"; it is enough that he foresaw it as "possible" and then went ahead without checking. That was how the relevant concept of "recklessness" was approached by Bramwell, J in Lewis, as drawn upon by Kitto, J in Neale Edwards, and I think it must be so here too. Iannella demonstrates that the word "wilful" or "wilfully" will take its meaning from the context of the particular statute in which it falls to be considered; and it is surely the same with "reckless" or "recklessly". In the context of this legislation, and having regard to its purpose and the nature of the disciplinary offences created, and especially the professional duty which I think is cast upon solicitors to keep abreast of the rules – at the very least in a general way, which is all that has to be considered in the case of this appellant – it will be enough if the solicitor (if his conduct is not in "wilful contravention") is shown to have been aware of the possibility that what he was doing or failing to do might be a contravention and then to have proceeded with reckless indifference as to whether it was so or not. Indeed, to conclude otherwise would all too obviously put a premium on ignorance.

[49] It is also useful to consider the principles set out by the High Court in *Brown* as to the gravity of misconduct in s 73 generally:[9]

> [21] The Tribunal's finding was grounded on s 73(b). It concluded that Mrs Brown's conduct constituted "seriously negligent real estate agency work". It is worth observing that s 73 clearly focuses on actions which are at the upper end of misconduct by licensees. The four discrete subsections focus on conduct which is "disgraceful", an adjective which carries with it a high degree of opprobrium; incompetent or negligent conduct which must justify the adverb "seriously"; contravention of statutory provisions, which must be "wilful or reckless"; and an offence (clearly a criminal offence) which must reflect "adversely" on a licensee's fitness. Given s 73's spread over this range of seriousness, the Tribunal was obliged to consider whether Mrs Brown's conduct reached that level. It is also pertinent to observe that the types of misconduct specified in s 73 are qualitatively different. One would not expect an identical legal threshold to apply to all. Conduct which a reasonable member of the public would regard as disgraceful would obviously be qualitatively different from serious incompetence or wilful contravention of the Act.
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> [22] This touchstone of seriousness is reinforced when one examines the preceding section, s 72, which provides:
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> …
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> [23] A comparison with the subsections of s 73 is instructive. Conduct must fall short of the standard a reasonable member of the public might expect (no reference to agents of good standing, regarding conduct as being "disgraceful"). There must be mere contravention of the Act rather than qualifying conduct which is "wilful or reckless". The incompetence or negligence need not be serious. And subs (d) returns to one of the limbs of s 73(a) – the conduct must be regarded as unacceptable by agents of good standing, rather than disgraceful.
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> [footnotes omitted]

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[9] *Brown v The Real Estate Agents Authority* [2013] NZHC 3309.

[50] It is r 6.3 which Mr Sheldon is alleged to have wilfully or recklessly contravened. Rule 6.3 stipulates:

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

[51] This was considered by the Tribunal in *Goundar* where it found, relying on an earlier decision, that a breach of r 6.3 would be justified by conduct which:[10]

> … 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.

[52] Mr Sheldon admits that his behaviour amounts to unsatisfactory conduct as set out in s 72 of the Act:

> **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; or
>
> (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.

ASSESSMENT

[53] The critical issue for us is what was said by Mr Sheldon in his telephone discussion with the prospective purchaser on 9 September 2020. The Committee says that, on being informed that the offer was being withdrawn because of the adverse building report, Mr Sheldon expressly asked him to say that it was being withdrawn for finance-related reasons. He added that if the offer was withdrawn due to an unsatisfactory report, he would have to disclose that to future prospective buyers and a less off-putting reason would be withdrawal due to a lack of finance.

[54] Ms Mok, for the Committee, contends that suggesting the prospective purchaser provide a false reason for withdrawing the offer would be a serious breach by Mr Sheldon of his professional obligations. He was asking a consumer of real estate services to lie. Counsel notes that the Tribunal has said before that honesty is essential to achieving the purpose of the Act, particularly maintaining public confidence in the industry.

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[10] *Complaints Assessment Committee 403 v Goundar* [2017] NZREADT 52 at [83].

Mr Sheldon's conduct was a marked and serious departure from the expected standards. It was disgraceful.

[55] Mr Hern, on behalf of Mr Sheldon, says the latter's response to the prospective purchaser's news of a withdrawal due to an adverse building report, was to urge him to obtain a second opinion. As part of that discussion, he explained that a party withdrawing due to a negative report could have a significant impact on a vendor. He gave, as an example, that an offer withdrawn because of finance was less off-putting to future potential buyers. The purpose of the explanation was an attempt to encourage the prospective purchaser to obtain a second opinion, not to persuade him to provide a false explanation for his withdrawal.

[56] Mr Sheldon told the Tribunal he did not correctly convey to the prospective purchaser his message as to obtaining a second opinion. He overexplained it. There was an unfortunate miscommunication and the prospective purchaser misunderstood.[11]

[57] The prospective purchaser said to the Authority on 5 May 2021 that Mr Sheldon expressly asked him to say that the offer was withdrawn because he did not get finance, instead of there being an unsatisfactory report. The prospective purchaser was not so unequivocal in his evidence before the Tribunal. He conceded that it was only his "impression" Mr Sheldon asked him to change the reason. When asked in cross-examination whether there was any room for misunderstanding, his candid reply was he could comment only on his impression. He accepted he could not speak to Mr Sheldon's intention.

[58] As we have already noted, when first asked by the Authority's investigator on 5 May 2021 about the telephone call, the prospective purchaser was clear that he was asked by Mr Sheldon to say he did not get finance.[12] In that interview, the prospective purchaser said he "wasn't comfortable" with changing the reason, but that was because he had already instructed his solicitor. He added that he found Mr Sheldon's request "a bit strange", but again that was only because he had already instructed his solicitor. Despite the unequivocal request to change the reason (as he told the investigator), he said to the investigator he "didn't think too much of it" and "sort of just disregarded it". The prospective purchaser also told the investigator that he mentioned the conversation to the building inspector "in passing". He confirmed to the Tribunal it was "an aside" in his discussion with the inspector.

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[11] Brief of evidence of Mr Sheldon (18 November 2022) at [20].
[12] Interview of the prospective purchaser with the Authority (5 May 2021) at 12–16 of the Committee's bundle.

[59] Furthermore, we note, it was the building inspector who made the complaint and not the prospective purchaser.

[60] The prospective purchaser's evidence to the Tribunal that he was "taken aback" by what Mr Sheldon said has to be seen in the context of his conduct at the time and evidence to the investigator. He mentioned it only in passing to the building inspector and was not sufficiently taken aback to make a complaint. In fact, he did not think too much of what Mr Sheldon said.

[61] Ms Mok points out that Mr Vujnovich, in his email to the building inspector of 11 September 2020 acknowledging Mr Sheldon's error of judgement, made no mention of the explanation now given of miscommunication and misunderstanding. Yet, Mr Vujnovich says that Mr Sheldon reviewed the email and agreed with its contents. Nor did Mr Vujnovich mention this explanation when he rang the prospective purchaser and apologised shortly after the inspector had complained to Mr Vujnovich.

[62] We place little weight on the email from Mr Vujnovich. It was not authored by Mr Sheldon. Mr Vujnovich does not concede there that Mr Sheldon asked the prospective purchaser to change his mind. He does not say what the error of judgement is. It is Mr Sheldon's evidence that he told Mr Vujnovich about the miscommunication and misunderstanding. We will not speculate as to whether Mr Vujnovich overlooked Mr Sheldon's explanation or chose not to make the point in his email. Neither the email nor the phone call to the prospective purchaser are persuasive evidence as to Mr Sheldon's words, purpose or intention in his remarks to the prospective purchaser on 9 September 2020.

[63] Mr Hern correctly contends that a charge of misconduct, the most serious, requires stronger evidence to prove it.[13]

[64] Having regard in particular to the prospective purchaser's honest evidence that it was only his "impression" Mr Sheldon asked him to change the reason for the withdrawal, we are unable to find on the balance of probabilities that Mr Sheldon did request the prospective purchaser to change the reason for the withdrawal. We accordingly accept Mr Sheldon's evidence as to what he said to the purchaser, namely that he pointed out the effect of withdrawal (due to an adverse building report, as compared to finance) on the vendors (the need to disclose such a reason to future interested buyers).

[65] But what of Mr Sheldon's purpose or intent in imparting that message to the prospective purchaser?

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[13] *Z*, above n 6.

[66] The prospective purchaser rightly says he cannot speak to Mr Sheldon's intention. In the absence of an express request to change the reason, it cannot be proven that Mr Sheldon had any sinister motive in mind for his message. He says he explained the consequences of withdrawal resulting from an adverse report, as he wanted the prospective purchaser to obtain a second opinion. The prospective purchaser told the Tribunal he could not remember Mr Sheldon urging him to obtain a second opinion, but Mr Sheldon has been consistent in his evidence as to suggesting to the prospective purchaser that he obtain a second opinion. He said the same in his explanation to the Authority on 27 April 2021 when first invited to provide a response to the complaint.[14]

[67] It makes sense that Mr Sheldon would suggest a second opinion as there was plainly a considerable gap between the estimated cost of repairs indicated by the building inspector and the quote obtained by the vendors (though the latter appears to relate to only part of the remedial work envisaged by the inspector).

Conclusion

[68] It is unproven that Mr Sheldon dishonestly asked the prospective purchaser to change the reason for withdrawing the offer. We do not therefore find that agents of good standing or reasonable members of the public would regard Mr Sheldon's conduct, as found by us, to be disgraceful. Nor does his conduct contravene r 6.3, let alone wilfully or recklessly. There was no marked or serious departure from the expected professional standards.

[69] The Tribunal can, however, find a licensee against whom charges of misconduct are dismissed, to have engaged in unsatisfactory conduct.[15] Mr Sheldon admits unsatisfactory conduct on the basis that his communication with the prospective purchaser left the latter to understand that he was being asked to change the reason for the withdrawal. While we find that this was not Mr Sheldon's purpose and that he did not expressly ask the purchaser to change his mind, what he did say left the purchaser with that impression.

[70] We accept there was miscommunication and misunderstanding. It is not material for us to assess why and in particular, whether it was due to the two factors Mr Sheldon advances (he is a native Londoner who speaks quickly, and stress due to his circumstances at the time). Mr Sheldon's garbled message plainly fell short of the standard that a reasonable member of the public would be entitled to expect from a

[14] Email Mr Sheldon to the Authority (27 April 2021) at 63 of the Committee's bundle.
[15] Real Estate Agent's Act, s 110(4).

reasonably competent licensee. It amounts to unsatisfactory conduct pursuant to s 72(a) of the Act.

ORDERS

[71] The charges of misconduct (disgraceful conduct and wilful/reckless contravention of r 6.3) are dismissed.

[72] Mr Sheldon is guilty of unsatisfactory conduct.

[73] The penalty orders will be determined on the papers. The Committee's written submissions are to be filed and served by **5 July 2023**. Mr Sheldon's submissions are to be filed and served by **19 July 2023**.

[74] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, setting out the right of appeal to the High Court.

PUBLICATION

[75] Having regard to the privacy of the prospective purchaser and the building inspector, as well as the interests of the public in the transparency of the Tribunal, it is appropriate to order publication of this decision without identifying the prospective purchaser or the inspector, but naming the licensee.[16] We see no reason to prohibit the naming of the agency, its manager or the other witnesses.

D J Plunkett
Chair

P N O'Connor
Member

F J Mathieson
Member

[16] Section 108.