

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 25

Reference No: READT 025/2022

IN THE MATTER OF

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

BROUGHT BY

**COMPLAINTS ASSESSMENT
COMMITTEE 2102**

AGAINST

NICHOLAS HOOGWERF
Defendant

Hearing in Auckland on 16 August 2023

Tribunal:

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

Appearances:

Counsel for the Committee:

S Farnell

The Defendant:

No appearance

SUBJECT TO NON-PUBLICATION ORDER

DECISION

Dated 25 September 2023

INTRODUCTION

[1] Nicholas Hoogwerf (also known as Nicholas Pieter Miers-Hoogwerf), the defendant, was a licensed salesperson under the Real Estate Agents Act 2008 (the Act). It is alleged that Mr Hoogwerf forged a valuation report for a property he contracted to buy.

[2] Mr Hoogwerf has been charged by Complaints Assessment Committee 2102 (the Committee) with misconduct under s 73(a) of the Act, in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful. The particulars of the charge (as amended at the hearing) are set out in the Schedule.

[3] On 17 November 2022, the Committee referred the charge to the Tribunal.

[4] Mr Hoogwerf did not attend the hearing.

BACKGROUND

[5] At the relevant time, Mr Hoogwerf was engaged as a salesperson with City Realty Ltd, trading as Ray White Parnell (the agency). He was first licensed on 27 April 2021.

[6] On an unknown date in 2021, LQ (the listing agent), who is a licensed salesperson at another agency, listed the property.

[7] On about 24 October 2021, Mr Hoogwerf visited the property. Two days later, on 26 October 2021, the vendors signed a consent (known as form 2) for him to acquire an interest in the property. The consent form required Mr Hoogwerf to provide a valuation report from an independent registered valuer within 14 days.

[8] At the auction on the same day, 26 October 2021, Mr Hoogwerf was the highest and therefore successful bidder at a price of \$1,526,000. He paid a deposit of \$50,000.

[9] On 27 October 2021, Mr Hoogwerf sent a text to the listing agent:

...

Yes, organising the valuation now. Valuers are extremely busy. [The valuation company]¹ have told me they can do the valuation within the timeframe if I send them the property documents and photos and they will go for a physical inspection from outside, they don't need to see inside which will be quicker. I'll lock them in to do it and produce report as soon as they can.

¹ [The valuation company], trading as [the valuation company].

[10] On 9 November 2021 (at 9:03 am), Mr Hoogwerf sent a text to the listing agent:

Just heard Report will be sent over on next few hours. Sorry for the delay.

[11] On 9 November 2021 (at 10:53 am), Mr Hoogwerf emailed to the listing agent a valuation report for the property in the name of the valuation company. It was dated 8 November 2021 and signed by a registered valuer. It stated it had been prepared for Mr Hoogwerf. In his email, Mr Hoogwerf said:

Report has come in today. It has come out at \$1,465,000 so well within what I paid.

[12] The listing agent raised with Mr Hoogwerf questions about the contents of the report. Mr Hoogwerf sent a text to the listing agent on 9 November 2021 (at 10:55 am):

... They are fixing it and will have back to me in a few mins, I'll then re-send to you.

[13] On the same day (at 11:35 am), Mr Hoogwerf sent the listing agent by email a second version of the report. The listing agent again raised with him questions about the report.

[14] Later on the same day (at 12:28 pm), Mr Hoogwerf sent the listing agent by email a third version of the report. He stated:

... I have double checked it and they have got it correct this time.

[15] The listing agent yet again raised with him questions about the report. Once more on the same day (at 1:51 pm), Mr Hoogwerf sent the listing agent by email a fourth version of the report.

[16] All four versions contained errors, such as incomplete sections, references to the wrong company and/or the wrong vendors and/or to a property located elsewhere, an incorrect legal description, photographs from another property, the wrong record of title and the incorrect agency.

[17] The listing agent was suspicious and referred the reports to the agency's managers who in turn queried their authenticity with the valuation company.

[18] In a text to the listing agent on 12 November 2021, Mr Hoogwerf said:

... I know I've done something wrong, but not sure what is happening now.

[19] The listing agent informed the vendors that the valuation report was illegitimate, so they cancelled the sale and purchase agreement with Mr Hoogwerf on 3 December 2021. The property was then re-sold to one of the other bidders at \$1,500,000. In due

course, the vendors repaid to Mr Hoogwerf \$21,360.75 of the deposit of \$50,000 he had paid (the balance representing the difference between the prices and reimbursement for sundry expenses).

Complaint to the Authority

[20] On 10 December 2021, the legal counsel at the valuation company made a complaint against Mr Hoogwerf to the Real Estate Agents Authority (the Authority). He said that four valuation reports from Mr Hoogwerf relating to a property the latter wanted to purchase were illegitimate. They contained serious errors and had not been prepared by the company for the property. Mr Hoogwerf was not a former client. The reports appeared to have been altered to appear as if they were from the company.

[21] On 18 May 2022, Mr Hoogwerf sent an email to the Authority answering its questions. He admitted altering the report and provided an explanation:

4. Did the Licensee alter one of the valuation reports to appear as though it was prepared by the Complainant for the Property?

Yes

Details:

I feel deep regret and guilt for my wrongdoing which was ultimately the result of the pressure I felt in this transaction as a 21 year old, newly licensed individual.

This has already been a very expensive mistake on my part, I am suffering the consequences of this now and I show remorse for my actions.

I am very new to this industry. At the time of purchase, I have been working in the industry for less than 6 months... In hindsight, I feel that for the first time completing a form 2 supervision was needed and was not provided...

The result of this complaint stems from the fact I had 14 days to produce a registered valuation...

After being successful in winning the property I had great difficulty obtaining a registered valuation due to the fact COVID levels 3 and 4 had made it impossible for valuations to occur...

This caused an incredible backlog with all valuers... the request for the valuation I needed was not a priority with the valuers I contacted which amounts to nearly all Auckland based valuation companies I called...

... In fact, had COVID not been present, I highly doubt I would have had any issue providing a valuation at all.

During the time I was trying my best to book a valuation, the listing agent repeatedly texted, emailed and called to hurry me up and put mounting pressure on me to produce a valuation. Not one time did the listing agent suggest to me any other alternative when I expressed my concern that I may not be able to get a valuation in time.

I was very worried about this, no valuers that I contacted would accept the job due to the large backlog they were still working through from COVID.

...

I did not know what to do and as I was embarrassed that I could not perform what should have been a simple task (to get a valuation) I took it on myself to provide a valuation that may be acceptable.

...

Knowing the sole task was to prove that the price that I had paid, with great apprehension I wrongly consulted a report I had paid for previously for a property of a size and value similar to the subject property.

I feel remorse that I ultimately made the wrong decision, possibly brought on by immense pressure coupled with a lack of understanding of the matter. I felt backed into a corner and did not know any way out as well as the pressure of having my own funds at stake. I acted impulsively and this is what led me to take the actions I took. I would never contemplate doing this again.

...

... I had to quickly spend a lot of time conducting enquiries into [possible faults in the property]... It was around this time that [the listing agent] also asked me to fill out a form 2 form which was done in an incredibly rushed manner... I accept that I was extremely rushed in the process and blindly signed the forms without taking into consideration what my new obligations were...

...

I have felt self-accusation and shame since the incident and this is not anything I would ever repeat.

...

I am not content with my actions and I would like to show my remorsefulness in any way I can. This is an industry that I am proud of and aspired to be a part of since a young age and it is certainly not in my usual character to do something like this.

I hope that my determination to make amends and cover any loss suffered as a result is a sign of my sincere contriteness.

[22] According to his email to the Authority, Mr Hoogwerf had suffered extreme hardship. He had paid the \$26,000 price difference to the vendors (between what he had agreed to pay and what the property later sold for) and other expenses and losses, being a total of \$28,249.75 in direct costs. The vendors, he said, had not suffered any financial loss. He noted that he had voluntarily suspended his licence.

Evidence given to the Tribunal

[23] The Committee produced the following sworn evidence from witnesses.

Joshua Doherty

[24] There is an affirmation (11 August 2023) from Mr Doherty the head of regulatory services at the Authority. He sets out the steps followed in the Authority's investigation of the complaint and formally produces communications with the parties and certain evidence obtained.

KN

[25] There is an affirmation (10 August 2023, affirmed in Melbourne) from KN, legal counsel for the valuation company. He states that Mr Hoogwerf, who was not a client of the company, altered a registered valuation to make it appear it was prepared for the property by the company. A report from the company had been doctored. The valuation reports he provided to the listing agent were illegitimate. The company produced no report for the property. The counsel made a complaint to the Authority on 10 December 2021.

LQ

[26] There is an affirmation (14 August 2023) from LQ, the listing agent. He sets out the relevant chronology. Mr Hoogwerf sent him four versions of the valuation report, all containing errors. He informed his managers of his suspicions and was told the reports were illegitimate. When he advised the vendors, they cancelled the sale and purchase agreement.

CHARGE

Jurisdiction and principles

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

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; or
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or

- (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.

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

[29] 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

[30] 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

[31] 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:

[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.

[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

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.

person is qualified to be an agent of good standing or a member of the public.

[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.

[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.

[32] 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:⁸

[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.

⁸ *Brown v Real Estate Agents Authority* [2013] NZHC 3309.

[22] This touchstone of seriousness is reinforced when one examines the preceding section, s 72, which provides:

...

[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.

[footnotes omitted]

Procedure

[33] Mr Hoogwerf has declined to engage with the Tribunal, except to seek an adjournment by email on 15 August 2023, the day before the hearing. This was on the basis he wished to instruct a lawyer. He was informed in an email from the Authority on the same day that he must attend the hearing to make the adjournment request and if he did not, the hearing would proceed in his absence. He had been given the same information in an email from the Tribunal to the lawyers for the Committee on 9 August 2023, which was copied to him.

[34] The Tribunal is satisfied that the charge was served on Mr Hoogwerf, that the Committee’s evidence was served on him and he had notice of the hearing. It may proceed in the absence of a party.⁹

ASSESSMENT

[35] The Committee alleges Mr Hoogwerf altered what was presumably a genuine report from the valuation company in respect of a different property to appear as if it concerned the relevant property here, which had been bought by him at auction (though the transaction was ultimately cancelled by the vendors due to Mr Hoogwerf’s production of a false report). As described by Ms Farnell, he sought to pass off as legitimate and from a reputable valuation company a report in respect of his property. He did this four times, as he sought ineffectively to remedy serious errors in each version of the report.

[36] Mr Hoogwerf was unsuccessful as the listing agent was suspicious, so referred the reports to his managers who obtained confirmation from the valuation company that they were illegitimate and did not come from the company.

⁹ Real Estate Agents Act, s 109A(2)(b).

[37] Mr Hoogwerf admitted the facts underlying the charge in his explanation to the Authority on 18 May 2022. He has not defended the charge.

[38] We find the charge, as detailed in the particulars, to be proven. We reject the explanation given on 18 May 2022 that it was impossible for valuations to occur during the COVID-19 restrictions. In fact, they were occurring as he correctly sets out in his text of 27 October 2021.

[39] Mr Hoogwerf's forgery of a valuation report is dishonest. Honesty is essential to achieving the purpose of the Act and maintaining public confidence in the profession.¹⁰ It is dishonest notwithstanding that he would have received no financial benefit had he been successful, in the sense that he paid the market price at an auction in which there were other bidders, and the vendors suffered no financial loss.

Conclusion

[40] Mr Hoogwerf's conduct, in falsely producing a report four times in regard to a property in which he was seeking to acquire an interest, is a marked and serious departure from the required standard of conduct. He sought to deceive the listing agent and the vendors as to who authored the report and then as to who was responsible for the errors, wrongly blaming the valuation company.

[41] Such conduct would be regarded by agents of good standing and reasonable members of the public, as disgraceful. This amounts to misconduct under s 73(a) of the Act.

ORDERS

[42] The charge of misconduct (disgraceful conduct) is upheld.

[43] The penalty orders will be determined on the papers. In light of the gravity of the wrongdoing, the parties are invited to make submissions on whether the Tribunal should make an order under s 110(2)(e) of the Act.

[44] The Committee's written submissions on penalty orders are to be filed and served by **6 October 2023**. Mr Hoogwerf's submissions are to be filed and served by **20 October 2023**.

¹⁰ *Complaints Assessment Committee 409 v Ganesh* [2018] NZREADT 19 at [115]; *Complaints Assessment Committee 2108 v Rankin* [2022] NZREADT 15 at [65] and [107].

[45] 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

[46] Having regard to the privacy of the individuals involved, as well as the interests of the public in the transparency of the Tribunal and knowing of wrongdoing by licensees, it is appropriate to order publication of this decision without identifying the complainant (the legal counsel of the valuation company), the valuation company and the listing agent, but naming the licensee and the agency.¹¹

D J Plunkett
Chair

P N O'Connor
Member

F J Mathieson
Member

¹¹ Real Estate Agents Act, s 108.

SCHEDULE

Particulars of Charge:

1. The Defendant is licensed under the Act and holds a salespersons licence.
2. At the time of the conduct outlined below, the Defendant was a licensed salesperson at City Realty Limited t/a Ray White Parnell.
3. LQ is a licensed salesperson at J T Realty Limited t/a Ray White Mt Eden.
4. LQ listed the property at [address] (Property).
5. On or about 24 October 2021, the Defendant visited the Property after making an enquiry by text.
6. On or about 26 October 2021, the vendors of the Property signed the "client consent for licensee to acquire interest in property" (Form 2).
7. The Defendant agreed to obtain a valuation from an independent registered valuer and provide a copy of the valuation within 14 days after obtaining the vendor's consent.
8. On or about 26 October 2021, the Defendant was the successful bidder at the auction of the Property.
9. [The valuation company] a provider of independent valuations in New Zealand.
10. On 9 November 2021 at about 10.55am, the Defendant sent LQ by email a valuation report for the Property in the name of [the valuation company].
11. LQ contacted the Defendant that same day and raised some questions about the contents of, and inconsistencies in, the valuation report.
12. On 9 November 2021 at about 11.35am, the Defendant sent LQ by email a second version of the property valuation report, again in the name of [valuation company].
13. LQ again contacted the Defendant and raised some questions about the contents of the second version of the valuation report.
14. On 9 November 2021 at about 11.35am, the Defendant sent LQ by email a third version of the property valuation report, which had been amended, and which was again in the name of [valuation company].
15. LQ again contacted the Defendant and raised some questions about the contents of the third version of the valuation report.

16. On 9 November 2021 at about 1.51pm, the Defendant sent LQ by email a fourth version of the property valuation report, which had been amended, and which was again in the name of [valuation company].
17. Each of the four versions of the valuation report contained more than one error or inaccuracy.
18. These inaccuracies related to one or more of the following: incorrect photos which were not of the Property, incorrect vendor details, incorrect agency details, incorrect certificate of title, missing information, and an incorrect reference number.
19. [The valuation company] was contacted about the authenticity of the valuation reports.
20. [The valuation company] has confirmed that:
 - a. It was not engaged by the Defendant to prepare any valuation report for the Property.
 - b. It did not prepare or authorise any valuation reports for the Property.
 - c. The valuation reports are not legitimate.
21. The defendant prepared the valuation report, without authority or approval from [the valuation company].
22. The defendant also prepared the three additional versions of the valuation report, without authority or approval from [the valuation company].
23. The defendant has prepared and/or altered reports in [the valuation company]'s name and/or on [the valuation company]'s letterhead, without authority or approval from [the valuation company].
24. The defendant has done so in order to provide an independent valuation report to enable him to purchase the Property.
25. In altering documents in the name of [the valuation company] without [the valuation company]'s authority or approval, the defendant has acted dishonestly.
26. The Defendant's conduct set out above would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.