

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 7

Reference No: READT 016/2021

IN THE MATTER OF

A charge laid under s 91 of the Real Estate Agents Act 2008

BROUGHT BY

**COMPLAINTS ASSESSMENT
COMMITTEE 2002**

AGAINST

YAMING (JESSICA) SUN
Defendant

Hearing via audio-visual link on 7, 8, 9, 10 and 13, 14, 15 February 2023

Tribunal:

C A Sandelin (Deputy Chairperson)
G J Denley (Member)
P N O'Connor (Member)

Appearances:

Counsel for the Committee:

E Mok

The Defendant:

Self-represented

DECISION
Dated 06 April 2023

INTRODUCTION

[1] Yaming (Jessica) Sun, the defendant, was a licensed salesperson under the Real Estate Agents Act 2008 (the Act). Ms Sun has voluntarily surrendered her licence and is currently residing overseas.

[2] Complaints Assessment Committee 2002 (the Committee) has brought a charge of misconduct (the charge) against Ms Sun, under s 73(b) of the Real Estate Agents Act 2008 (the Act) on the basis that Ms Sun engaged in seriously negligent or seriously incompetent real estate agency work.

[3] Ms Sun denies the charge.

[4] The charge relates to the sale by Ms Sun of various lots in a subdivision in Mission Bay, Auckland in 2016.

BACKGROUND

[5] At the time of the conduct, Ms Sun was working as a salesperson at Barfoot and Thompson Ltd's Torbay branch (Barfoots). The charge relates to the sale of a property owned by PE Ltd located in Auckland (the property). In 2014 PE Ltd applied to Auckland Council (the council) to subdivide the property into 15 lots (the subdivision). Each of the lots, to which this proceeding relates, were subject to rights of way which affected the net available building areas of the various lots (the easements).

[6] BR, a property developer, was (and remains) the sole director of PE Ltd.

[7] The subdivision was approved by the council in April 2016 and BR engaged Ms Sun to list and sell various vacant lots in the subdivision. Ms Sun had previously been involved in various other attempts to sell lots in the subdivision, but the subdivision plans had not at that time been approved by the council.

[8] On various occasions between January 2016 and June 2016, Ms Sun met with several prospective purchasers (the purchasers) at the subdivision in order to show them the proposed lots. During these visits it is alleged that Ms Sun marketed the subdivision, including by discussing the availability of lots for purchase with the purchasers and their associates.

[9] In or around May or June of 2016, Ms Sun met with BR and an associate of two prospective purchasers, WZ, at the subdivision. The two prospective purchasers were IM and DI. During that meeting it is alleged by the Committee that Ms Sun and/or BR informed WZ that Lots 1 and 2 of the subdivision each had a net area of 603 m², and that

the purchasers would be able to build a large property of 400 m², and a swimming pool on each lot due to their size.

[10] During another visit to the subdivision in or around May 2016, Ms Sun informed a prospective purchaser of Lot 3, SE, that Lot 3 had a total net area of 601 m². Ms Sun told SE that she would be able to build a large property of 400 m² on the lot, as well as a swimming pool.

[11] In early May 2016 BR provided contour plans for the subdivision to Ms Sun and on or about 8 June 2016, BR sent Ms Sun two plans of the subdivision outlining the easements which applied to the proposed lots in the subdivision, including to Lots 1, 2 and 3. BR provided a template Agreement for Sale and Purchase (ASP) for several of the lots.

[12] Listing agreements were not signed for any of the lots in the subdivision until 8 and 15 June 2016.

[13] On or about 26 June 2016, IM entered into an ASP in respect of Lot 1, and DI entered into ASPs in respect of Lots 2 and 13. The ASPs for Lots 1 and 2 each recorded their net size as 603 m².

[14] On or about 26 June 2016, SE entered into an ASP in respect of Lot 3. Before signing the agreement, Ms Sun confirmed to SE that the net area of Lot 3 was 601 m². This was recorded in the ASP.

[15] On or about 26 June 2016, NX entered into an ASP in respect of Lot 15.

[16] In June 2016 BR signed the ASPs in respect of Lots 1, 2, 3, 13 and 15. Schedule 2 of each of the ASPs was not completed at the time BR signed the ASPs except to record that PE Ltd/PE Ltd was registered for GST and its GST number was recorded.

[17] On 27 June 2016, Ms Sun took the signed versions of the ASPs to Barfoots. That same day an office administrator scanned the ASPs into Barfoots' system. The GST information in Schedule 2 of the ASPs for Lots 1, 2 and 15 was not completed.

[18] At some stage after the ASPs had been taken back to Barfoots and scanned by the office administrator, and despite the ASPs having already been signed by the parties, Schedule 2 of the scanned versions of the ASPs for Lots 1, 2 and 15 was filled in to record that each of the purchasers was registered for GST.

[19] Deposits were paid in respect of the ASPs in July 2016. Titles were issued for Lots 1, 2, and 3 in November 2017. The net sizes of Lots 1, 2, and 3 were less than had

been represented to the purchasers and/or their associates as a result of the effect of the easements which applied to the lots. Specifically:

- (a) The net size of Lot 1 was 374 m², not 603 m²;
- (b) The net size of Lot 2 was 389 m², not 603 m²;
- (c) The net size of Lot 3 was 456 m², not 601 m².

[20] Prior to settlement, IM raised concerns with Ms Sun and BR about the size of Lot 1. On or about 15 February 2018, Ms Sun and IM were engaged in a conversation on the messaging application “WeChat” regarding the size of Lot 1 and the impact on the easement relating to the lot. Ms Sun sent a WeChat message to IM informing her that BR was “very frustrated and anxious” and that his “bank loan is nearly due”. IM subsequently sought to cancel the transaction.

[21] None of the ASPs relating to the lots referred to above ultimately settled.

[22] BR submitted a complaint to the Real Estate Agents Authority (the Authority) about various aspects of Ms Sun’s conduct in August 2018.

[23] The Committee inquired into the allegations, investigated and determined to lay a charge against Ms Sun in accordance with s 91 of the Act (the charge).

THE CHARGE

[24] The particulars of the charge against Ms Sun laid by the Committee pursuant to s 73(b) of the Act is (in summary) that Ms Sun engaged in seriously negligent or seriously incompetent real estate agency work by:

- (a) marketing and/or offering the five lots for sale without agency agreements being in place, in breach of r 9.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules);
- (b) misrepresenting the net size of three of the lots (Lots 1, 2 and 3) to the purchasers, and failing to take adequate steps to ensure prospective purchasers were informed of the need to obtain professional advice about the lot sizes, in breach of rr 5.1 and 6.4 of the Rules;
- (c) disclosing confidential information about BR to the purchaser of Lot 1 (IM), in breach of rr 6.1, 9.1 and 9.17 of the Rules;

- (d) failing to ensure that all the versions of the ASPs prepared for Lots 1, 2 and 15 contained the same material particulars in the GST schedules before each version of the ASPs was signed, in breach of rr 5.1 and 9.9 of the Rules.

[25] Ms Sun is defending the charge.

THE EVIDENCE

[26] Statements of Evidence were filed by the Committee and the following witnesses were called at the hearing before the Tribunal:

- (a) SE, the purchaser of Lot 3;
- (b) XZ, the purchaser of Lot 15;
- (c) BR, the director of PE Ltd;
- (d) BD, the branch manager at Barfoots Torbay at the relevant time of the events;
- (e) KX, an office administrator at Barfoots Torbay at the relevant time of the events;
- (f) Gerald Gallacher, a senior investigator at the Authority.

[27] Ms Sun gave evidence at the hearing and also called evidence from the following individuals at the hearing before the Tribunal:

- (a) WZ, an associate of two of the purchasers IM (the purchaser of Lot 1) and DI (the purchaser of Lots 2 and 13);
- (b) WE, Ms Sun's mother, who visited the subdivision in 2016;
- (c) BI, Ms Sun's husband and her sales assistant at Barfoots at the relevant time of the events.

RELEVANT STATUTORY PROVISIONS

[28] Section 3 of the Act states as follows:

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.

[29] Section 73(b) states as follows:

73 Misconduct

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

...

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

...

[30] The Committee submits that Ms Sun breached rr 5.1, 6.1, 6.4, 9.1, 9.6, 9.9 and 9.17 of the Rules. These provide as follows:

5 Standards of professional competence

- 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

...

6 Standards of professional conduct

- 6.1 A licensee must comply with fiduciary obligations to the licensee's client.

...

- 6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

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.

...

- 9.6 Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.

...

Agency agreements and contractual documents

...

- 9.9 A licensee must not submit an agency agreement or a sale and purchase agreement or other contractual document to any person for signature

unless all material particulars have been inserted into or attached to the document.

...

Confidentiality

...

9.17 A licensee must not disclose confidential personal information relating to a client unless—

- (a) the client consents in writing; or
- (b) disclosure is necessary to answer or defend any complaint, claim, allegation, or proceedings against the licensee by the client; or
- (c) the licensee is required by law to disclose the information; or
- (d) the disclosure is consistent with the information privacy principles set out in section 22 of the Privacy Act 2020.

...

[31] The Committee is required to prove the charge against Ms Sun on the balance of probabilities.¹

[32] We turn now to consider each of the particulars relating to the charge.

Did Ms Sun offer or market the lots in the subdivision for sale without agency agreements?

Submissions

[33] The Committee submitted that Ms Sun breached r 9.6 of the Rules by marketing and/or offering for sale lots in the subdivision to prospective purchasers without agency agreements being in place.

[34] The Committee submitted that Ms Sun did not enter into any agency agreements to market the five lots until 8 June 2016 (in respect of Lots 2, 3, 13 and 15) and 15 June 2016 (in respect of Lot 1). Despite there being no agency agreements in place, Ms Sun took prospective purchasers to view the subdivision between early 2016 and June 2016.

[35] When giving evidence, Ms Sun accepted that it would not have been permissible for her to market or offer any of the lots for sale before 8 June 2016 as the agency

¹ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [118].

agreements were not in place. Ms Sun submitted that she did not advertise or promote the subdivision prior to 15 June 2016. Ms Sun did, however, accept that she took various prospective purchasers to visit the site of the proposed subdivision before the agency agreements were signed. IM and DI visited the subdivision in early 2016 and in March or April 2016. Another prospective purchaser, NA (who did not end up purchasing a lot) visited the site with Ms Sun in late May 2016. Also WZ and WE visited the site in late May or early June 2016.

[36] Ms Sun also referred to a “list and sell” clause which was attached to the ASPs. This clause stated as follows:

List & Sell Clause

The Vendor acknowledges that they have been advised by Barfoot & Thompson that exposing the property through a marketing and promotion campaign has the potential to obtain the best possible price for the property and that it has been recommended to them that they seek their independent advice in that regard. The Vendor acknowledges that having been given that advice they have made the choice not to expose the property to a marketing and promotion campaign and to accept the offer on this agreement as an ‘off market’ sale. The vendor further acknowledges that they have been advised, and that they accept, that the Purchaser may cross-lease, subdivide, renovate or immediately place the property back on the market and by doing so may achieve a higher price than the offer on this agreement.

[37] Ms Sun submitted that this clause meant that a real estate agent can arrange for potential buyers to view a property prior to signing an agency agreement. She said that this was permissible in circumstances where no advertising or marketing campaigns took place. Ms Sun submitted that she had never learned throughout her time when training to become a real estate agent that she could not take people to view a property before obtaining a listing.

[38] However, Ms Mok submitted that, as is apparent from the clause itself, the purpose of such a clause is to ensure the vendor acknowledges that they have received advice about the benefits and downsides of not undergoing a marketing and promotional campaign when selling their property off-market. She submitted that the fact that a property may not be on the open market, and a “list and sell clause” is included in the ASP, does not obviate the need for a written agency agreement to be in place before any marketing of the property occurs, whatever form that marketing may take.

[39] The Committee submitted that the question for the Tribunal is whether the visits to the subdivision by the prospective purchasers constitute “marketing” the subdivision for the purposes of r 9.6. Ms Mok submitted that those visits did constitute marketing as

the purpose of the visits was to generate an interest on the part of those visiting to purchase a lot in the subdivision.

[40] Ms Sun would not accept that she was acting in her capacity as a salesperson during those visits. She said that she took the purchasers there as “simply showing them around the sections” and that they went and had ice-cream afterwards and went on a sightseeing tour. She said if she had been acting in her capacity as a real estate salesperson she would have tried to take them to look at other sections.

[41] However, Ms Mok submitted that, as Ms Sun had been engaged by BR to sell lots in the subdivision on two occasions over the previous two years, Ms Sun knew that BR would have been engaging her services to sell the lots as part of a third attempt now that resource consent had been granted. Ms Sun acknowledged in her written response to the Committee that BR “wishes for me to find suitable purchasers at the earliest instance if possible.” In that same response Ms Sun also referred to the site visits to the subdivision in 2016 as being with “Prospective Purchasers” and that BR had asked her to sell the lots “as quick as possible” to allow him to get a favourable position with his bank when refinancing. Ms Sun also acknowledged at the hearing that during the site visits she did provide some information to the purchasers such as “the surrounding environment” and “the rough location of the sections”.

[42] Ms Mok also referred to BD’s statement of evidence whereby he stated that Ms Sun told him that “she had been preparing a pool of buyers for when the sections were released, and that she already had received expressions of interest”.

[43] Ms Mok also referred to SE’s evidence where she said that Ms Sun told her about Lot 3 in May 2016 and that she should purchase that lot. SE said it was Ms Sun who told her about the section, including information about its size and what could be built on it, and that Ms Sun was her main point of contact.

Discussion

[44] We agree with Ms Mok’s submissions and find that Ms Sun took prospective purchasers to the subdivision in order to generate an interest in purchasing lots in the subdivision.

[45] Whilst Ms Sun said that she only took the purchasers to the subdivision to show them around the sections and then go sightseeing, we find this inconsistent with her earlier response to the Committee whereby she referred to BR having requested she find suitable purchasers as early as possible. Ms Sun said she did not “market” the property until after the listing agreements were signed. However, we find that her actions

in taking the prospective purchasers to the property were plainly to stimulate their interest in purchasing lots.

[46] Every piece of information given to someone other than the vendor of a property can be information that may lead to that other person taking the next step towards what the licensee hopes will be an eventual purchase, and is “marketing” the property. We have previously found that the phrase “market or offer to sell” in r 9.6 includes:²

any action taken or thing done which has the intention of stimulating interest in that property such that a sale (or other disposition) of the property may occur. Further, marketing is not confined to giving information to a person who has been identified by the licensee as having a particular interest in the particular property being marketed. If that were the case, the examples given in r 9.6 would not be within the definition of marketing, as their intention is to arouse such interest among as yet unidentified persons.

[47] We reject Ms Sun’s argument that the “list and sell” clause had the effect of rendering an agency agreement unnecessary. Rule 9.6 of the Rules requires there to be an agency agreement in place before a property is marketed. As noted by the Tribunal in *Tafilipepe*, marketing “can occur by many other means, not the least of which would be personal contact”.³

[48] As submitted by Ms Mok, the issue in this case is whether Ms Sun marketed the lots before agency agreements were in place.

[49] We are satisfied that the Committee has proved on the balance of probabilities that Ms Sun marketed the lots to prospective purchasers. Under r 9.6, that should only have occurred if she was authorised to do so through an agency agreement.

Did Ms Sun make misrepresentations to the purchasers with regard to the lot sizes and did she breach her professional obligations by failing to recommend that the purchasers obtain professional advice?

Submissions

[50] The Committee submitted that Ms Sun made misrepresentations to prospective purchasers about the net areas of Lots 1, 2 and 3. Ms Mok submitted that the key issues for the Tribunal to determine were:

- (a) the extent to which Ms Sun personally made positive misrepresentations and/or provided false information about the net sizes of these lots; and

² *Complaints Assessment Committee 414 v Tafilipepe* [2019] NZREADT 13 at [57].

³ At [55].

- (b) the extent to which Ms Sun breached her professional obligations by failing to recommend the purchasers obtain professional advice.

[51] In her statement of defence Ms Sun did not deny that misrepresentations were made to the purchasers of Lots 1, 2 and 3 regarding the lot sizes, but said that it was BR who made these misrepresentations to the purchasers. Ms Sun said that she was only ever passing on information received from BR.

[52] However, Ms Sun admitted that she personally made misrepresentations about the size of Lot 3 to SE. This was confirmed by SE at the hearing. She also stayed in contact with IM and DI via WeChat and conceded under cross-examination that she had passed on incorrect information about the net sizes of the lots to IM and DI when messaging them.

[53] BR provided Ms Sun with a copy of the plans of the subdivision approved by the council as early as May 2016 which included a document containing a memorandum of easements that applied to each of the lots in the subdivision. The plans clearly showed the various lots were subject to easements as outlined in the memorandum of easements table. Ms Mok submitted that it was clear from Ms Sun's evidence that she did not understand what the plans showed and did not understand what an easement was.

[54] BR said he was present at the subdivision when Ms Sun made visits to the lots with the various purchasers in early 2016. He only recalled personally encountering two visitors at the most brought by Ms Sun. He said one visitor was likely to have been IM as that is what Ms Sun told him, but he did not recall who the other visitor was. He said he barely spoke to either visitor because he was operating earthmoving machinery. He said Ms Sun accompanied the visitors to the site and she was the one talking to them. He said the only thing he recalled being asked by either visitor during these visits was the date by which the subdivision was expected to be completed. He was unable to give a precise date as resource consent had not been granted at the time of the visits.

[55] WZ, WE and BI all gave evidence for Ms Sun at the hearing and said that at the various visits to the site it was BR who told them what the sizes of the lots would be. BR told them that Lot 1 consisted of a net area of 603 m², Lot 2 a net area of 603 m² and Lot 3 a net area of 601 m². They said that BR told them these were net areas and did not contain a driveway and that the common driveway would not be an issue for the purchasers. They alleged that BR told them that a house of over 400 m² could be built on each lot and also a swimming pool. They said that BR also told them that due to new council regulations, Lots 1, 2 and 3 could be further subdivided into two separate sections and BR would be willing to provide all the underground services for each section in advance.

[56] The Committee submitted that each of Ms Sun's witnesses had a personal connection with her, her mother WE, her husband BI and her former neighbour WZ. Ms Mok submitted that it was notable that each of the written statements provided by these witnesses contained almost identical wording as to the specific misrepresentations made. Ms Mok submitted it could be inferred from the similarities across the statements that these witnesses conferred with Ms Sun about their evidence relating to the visits so that their accounts were aligned with Ms Sun's. Ms Mok submitted that both WE and BI especially sought to give evidence to cast Ms Sun in a favourable light.

[57] BR said he was aware that Ms Sun, IM and DI had alleged that he made misrepresentations about the net sizes of Lots 1 and 2 during visits to the subdivision. He denied that he made any statements to IM or DI regarding the sizes of the lots. He says he was not asked, and did not say anything, about the size of any of the lots during the visits or any other visits by prospective purchasers. He said he did not make any statements about the size of the lots as he had engaged Ms Sun as the salesperson to discuss and promote the lots.

Discussion

[58] We have previously given extensive consideration to licensee's obligations under r 6.4 and by association, r 5.1. Whilst licensees are not expected to be a lawyer or surveyor, a licensee must make "every effort to know the product that they are selling".⁴

[59] Licensees have an active role in conveying information about a property. If a licensee is asked about particular aspects of a property, such as the property's legal boundaries, then the licensee would be obliged to make proper enquiries and confirm where the boundaries were and if unsure recommend that the purchaser obtain advice from a professional person such as a surveyor or lawyer. Similarly, an easement has an important impact on the usable area of a lot and, if unsure, a licensee should make enquiries as to the impact such an easement will have on a section.

[60] We find on the balance of probabilities that Ms Sun did misrepresent the lot sizes to WZ, IM, DI and SE. Even if Ms Sun was simply making the misrepresentations based on the information she received from BR, she cannot rely on having been a conduit for that information. She lacked an understanding of the subdivision and the easements outlined in the plans. Ms Sun was out of her depth and should have sought clarification from her supervisor, BD, or recommended that the purchasers obtain professional advice. As a result of this, the purchasers of Lots 1, 2 and 3 agreed to purchase the lots in reliance on incorrect information.

⁴ *Fitzgerald v Barfoot & Thompson Ltd* [2014] NZREADT 43 at [21].

[61] Whilst Ms Sun claimed in her oral evidence that she had recommended that the purchasers take advice when they signed the ASPs, this was not consistent with her previous responses which did not mention her having taken any such steps.

[62] When giving evidence at the hearing, BI initially stated that Ms Sun had recommended that WZ seek professional legal advice, however on further questioning from the Tribunal, BI conceded that he had not in fact heard Ms Sun recommend that WZ seek professional or legal advice. There was no further evidence which could persuade us that Ms Sun recommended that the purchasers seek professional advice. We find that Ms Sun did not recommend that the purchasers obtain professional advice.

[63] We are satisfied on the balance of probabilities that Ms Sun breached her duties under rr 5.1 and 6.4.

Did Ms Sun disclose confidential information relating to BR to one of the purchasers, IM?

Submissions

[64] The conduct in issue relates to a WeChat conversation in February 2018 between Ms Sun and IM regarding the dispute as to the net size of the lots. Ms Sun said to IM:

IM, I will go and talk with BR. He is very frustrated now. He is very anxious because there has been no update from this side. The bank loan is nearly due. I hope you can have a proper discussion.

[65] Ms Sun sent a screenshot of the conversation to BR. This was during a conversation in which Ms Sun was attempting to convince BR to resolve the dispute about the driveway easements with the purchasers.

[66] Ms Mok submitted that Ms Sun's evidence on this issue was inconsistent throughout the course of the proceedings. In her statement of defence, Ms Sun accepted having engaged in the WeChat conversation with IM and discussing the subject of the bank loan with her. However, Ms Sun maintained that it was IM who had raised concerns about BR's financial situation, and that Ms Sun had not been the one to disclose the information. She maintained this position in her opening submissions. However, during her evidence at the hearing, Ms Sun raised concerns as to the legitimacy of the WeChat messages, suggesting they had been altered or photoshopped when provided as part of the evidence by BR. This was the first time Ms Sun had raised this.

[67] Ms Mok submitted that it was pure speculation by Ms Sun that the images had been altered. Ms Sun had already in evidence admitted to having a WeChat

conversation with IM. Furthermore, under cross-examination, Ms Sun was unable to say what aspect of the conversation with IM depicted in the screenshot was not an accurate representation of what Ms Sun had said to IM. Ms Mok submitted further that at the hearing Ms Sun did not question BR as to the legitimacy of the messages. For these reasons, Ms Mok submitted that the Tribunal should accept the messages in the hearing bundle as accurately depicting the conversation that took place between Ms Sun and IM.

[68] Ms Mok submitted that the issue then is whether the information Ms Sun disclosed was confidential to BR and whether this was disclosed in breach of Ms Sun's professional obligations. She submitted that it was important to look at the context in which these messages were sent. Settlement had not occurred and Ms Sun was still acting for PE Ltd. Titles had been issued for the lots and concerns had been raised about the common driveway and the net areas of each of the lots. Ms Sun had raised concerns about managing her relationship with BR with BD, her supervisor. BD said in his response to the Committee that he had in turn warned Ms Sun on two occasions about her need to comply with her fiduciary obligations to PE Ltd.

[69] It was submitted by Ms Mok that information about a vendor's financial circumstances is plainly information of a kind which would typically be confidential. She submitted that in this case, information that a vendor was under financial pressure, because a bank loan was nearly due, was significant. The information about PE Ltd's financial circumstances may have given the purchasers an advantage in any negotiations with PE Ltd about settling the dispute as to the net sizes of the lots.

[70] Ms Sun submitted that BR never informed her about his personal financial position, the owner of the property was PE Ltd and that her conversation with IM did not involve PE Ltd's financial position. Ms Sun claimed in her evidence that she was not privy to information of this kind and that in any event she had not signed a confidentiality agreement with Mr BR.

[71] In evidence, BR was clear that the information about the bank loan which he had conveyed to Ms Sun related to PE Ltd and not his personal financial situation. Ms Mok submitted that it was difficult to see how Ms Sun would have known this information about PE Ltd's financial situation, if not from BR. She submitted that it is immaterial that there was no confidentiality agreement in place between BR and Ms Sun, and that Ms Sun's position on this issue displayed a fundamental misunderstanding of her professional obligations under the Rules.

Discussion

[72] The confidentiality provisions in rr 9.16 to 9.18 make it clear that licensees must not disclose confidential information except in a narrow set of circumstances, including where the client provides consent in writing.

[73] We find that Ms Sun was made aware of this confidential information about PE Ltd's financial situation by BR in confidence. She should not have passed this information onto IM and had no authority to do so. BR did not give Ms Sun permission to disclose the information. Furthermore, the disclosure was particularly inappropriate given the issues arising around settlement of the transactions and knowledge of this information was a factor that could have affected settlement for the particular lot.

[74] We do not accept Ms Sun's evidence that the WeChat conversation had been photoshopped or altered in any way. In the earlier stage of the hearing process, Ms Sun accepted having engaged in WeChat conversations with IM and Mr BR around the relevant time. The messages are consistent with the issues raised by IM about the lot sizes. Furthermore, under cross-examination by the Committee, Ms Sun was unable to say what aspect of the WeChat conversation with IM, as depicted in the screenshot, was not an accurate representation of what Ms Sun had said to IM.

[75] We find on the balance of probabilities that the evidence supports the Committee's charge that Ms Sun breached her obligations under rr 6,1, 9.1 and 9.17 of the Rules.

Did Ms Sun fail to complete material parts of the ASPs?*Submissions*

[76] Ms Mok submitted that Ms Sun failed to insert material particulars into the ASPs before obtaining the purchasers' signatures. Specifically, she submitted that Ms Sun failed to ensure the GST schedules for the ASPs were filled in to reflect the GST status and relevant information relating to the purchasers.

[77] Ms Mok submitted that consistent evidence was given by BR, some of the purchasers, and Ms Sun that multiple original versions of the ASPs were signed by each of the parties (at least two copies). This was consistent with Ms Sun's practice at the time and confirmed by her supervisor, BD. Each party's solicitor would retain one original version, with any additional copy stored by Barfoots.

[78] Ms Sun accepted in evidence that each of the ASPs was signed on 26 June 2016 which was a Sunday. She took the ASPs into Barfoots for processing the following day

(27 June 2016). Barfoots' records, which Ms Sun did not dispute, showed that the ASPs were scanned into Barfoots' system around 3 pm on that day. The following day, Ms Sun sought GST numbers for the purchaser of Lots 2 and 13, indicating that these numbers had not been inserted into the ASPs when reviewed.

[79] It was submitted by Ms Mok that Barfoots' copies of the ASPs attached in the hearing bundle show that the GST information was missing from the GST schedules in each ASP when they were taken back to Barfoots by Ms Sun on 27 June 2016. Each of the ASPs recorded that the purchase price for the lots was "plus GST". PE Ltd was registered for GST and this was specified on the front page of each ASP. Ms Mok submitted that as a consequence, each GST schedule was required to be completed.

[80] Ms Mok further submitted that the evidence showed that the vendor and purchaser copies of the ASPs each appeared to be the same as Barfoots' copies, but with the GST schedule completed. She submitted that this indicates that the GST schedules for these versions of the ASPs were not completed before being signed by the parties, otherwise the scanned versions held by Barfoots would also have had completed GST schedules, given the order in which they were finalised, signed and processed.

[81] Ms Sun accepted in evidence that the GST position of the parties is important, as that will affect what the purchaser ultimately has to pay. Furthermore, she accepted that the GST schedules were blank when she took the ASPs back to Barfoots for processing. However, she stated that she had directed someone at Barfoots to fill in the missing information in the ASPs as she was heading overseas the next day. Under cross-examination by Ms Mok, Ms Sun did not accept that she should have waited until she had confirmation of the GST information before presenting the ASPs to the parties for signing.

[82] Ms Mok submitted that the evidence confirms that Ms Sun was in a rush to have the ASPs signed before she was due to leave the country on 28 June 2016. As a result, she left the GST schedules blank to be filled out later. She submitted that Ms Sun ought to have ensured that the purchasers' GST position was filled in and clear before they signed the ASPs. At the very least the questions contained in the schedules ought to have been answered.

Discussion

[83] Ms Mok submitted that Ms Sun breached rr 5.1 and 9.9 by failing to ensure that all the material particulars were contained in the ASPs before they were signed. We

agree with Ms Mok. Ms Sun had a responsibility as the salesperson to ensure that the ASPs were correct and completed in all respects before they were signed by the parties.

[84] As the Tribunal observed in *Ali v Real Estate Agents Authority*, completing the ASP is an “essential part” of a licensee’s job and is “what the commission rewards the agent for doing.”⁵

[85] Ms Sun accepted under cross-examination by Ms Mok that the GST schedules were blank when she took them to Barfoots for processing. She said that she accepted that before the parties signed the ASPs, she failed to ensure that the GST schedules were completed.

[86] It is of concern that Ms Sun directed someone else at Barfoots (whose identity remains unknown) to fill out the missing information in the ASPs as she was heading overseas. Ms Sun should have waited until she had confirmation of the purchaser’s GST information before presenting the ASPs to the parties for signing. Her explanations under cross-examination for not completing the GST schedules, shows a lack of understanding on Ms Sun’s part as to the importance of ensuring material particulars in ASPs are filled in before they are signed by the parties.

[87] We find that Ms Sun’s conduct showed a clear lack of care and skill, contrary to r 5.1, and involved her breaching her obligations under r 9.9.

As a result of the above breaches of the Rules, did Ms Sun engage in misconduct under s 73(b) of the Act?

[88] As submitted by Ms Mok, *Complaints Assessment 20003 v Jhagroo* remains the leading authority on what constitutes an offence under s 73(b) of the Act.⁶

[49] 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.

[89] *Morton-Jones v Real Estate Agents Authority* provides an analysis of s 73(a) and (b) of the Act as follows:⁷

⁵ *Ali v Real Estate Agents Authority* (CAC 302) [2016] NZREADT 10 at [21].

⁶ *Complaints Assessment Committee 20003 v Jhagroo* [2014] NZHC 2077 at [49].

⁷ *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804 at [29].

[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.

[90] Ms Mok submitted that in the present case, Ms Sun’s breaches of her professional obligations were repeated and serious in nature. She submitted that her failure to meet acceptable standards of real estate agency work commenced from the very outset of her marketing the lots in the subdivision, continuing throughout the process of signing and processing the ASPs.

[91] Ms Mok submitted that stepping back and looking at Ms Sun’s conduct cumulatively, the evidence demonstrates that she engaged in seriously negligent and incompetent real estate agency work, and that she is therefore guilty of misconduct under s 73(b).

[92] We find that Ms Sun breached her obligations to her clients under rr 5.1, 6.1, 6.4, 9.1, 9.6, 9.9 and 9.17 of the Rules. Ms Sun’s actions were seriously negligent and such that would bring the real estate industry into disrepute. None of her errors were minor or technical and multiple breaches of the Rules took place.

[93] We find that Ms Sun’s conduct involves a serious departure from acceptable standards. We are satisfied that the Committee has established to the required standard that Ms Sun’s conduct constituted seriously negligent or incompetent real estate agency work. We find Ms Sun guilty of misconduct under s 73(b) of the Act.

OUTCOME

[94] The Tribunal finds Ms Sun guilty of misconduct under s 73(b) of the Act.

[95] 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 Sun are to be filed and served within a further 10 working days.

[96] 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

[97] 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 Sun.

C A Sandelin
Deputy Chairperson

G J Denley
Member

P N O'Connor
Member