BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 6

READT 025/16

IN THE MATTER OF	Charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 408
AGAINST	DANIEL REED Defendant
Hearing:	24 November 2016, at Nelson
Tribunal:	Hon P J Andrews, Chairperson Mr J Gaukrodger, Member Ms N Dangen, Member
Appearances:	Ms K Lawson-Bradshaw, on behalf of the Committee Mr J Waymouth, on behalf of Mr Reed
Date of Decision:	8 February 2017

DECISION OF THE TRIBUNAL

Introduction

[1] Complaints Assessment Committee 408 ("the Committee") has charged Mr Reed with misconduct in respect of the sale of a property at Tasman; near Nelson, ("the property") in the latter half of 2014. The charge was laid following a complaint made to the Real Estate Agents Authority ("the Authority") in June 2015 by the vendors of the property.

[2] The Committee has alleged under s 73(c) of the Real Estate Agents Act 2008 ("the Act") that Mr Reed wilfully or recklessly breached ss 134 and 135 of the Act, and rr 10.2, 10.3 and 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"). This charge will be referred to as "the substantive charge".

[3] In the alternative, the Committee has alleged that Mr Reed's conduct in the course of the sale constituted seriously incompetent or seriously negligent real estate agency work, under s 73(b) of the Act ("the first alternative charge"). In the further alternative, the Committee has submitted that if the Tribunal is not satisfied that Mr Reed's conduct amounted to misconduct, it should find that Mr Reed engaged in unsatisfactory conduct under s 72 of the Act ("the second alternative charge").

Summary of the background facts

[4] The relevant events occurred between June and October 2014. We note areas where there is a dispute as to particular events.

[5] Mr and Mrs Whitty ("the Whittys") (with one other person)[1] owned the property. They decided to sell it.

[6] The property comprised 0.8245 hectares, on which a house had been built in 2006. Part of the house had been designed and used for bed and breakfast accommodation. According to a "General Property Information" document dated 17

[1] The third owner was a trustee company.

February 2014, the capital value (land and improvements) of the property was, at that time, $1.1 million ("the rateable value") [2]. Before marketing the property, the Whittys obtained a market valuation from a registered valuer, who inspected the property on 23 June. The market value was assessed at $1.13 million ("the market valuation").

[7] On 23 June, the Whittys met with Mr Reed at the property to discuss marketing it. Mr Reed was employed by Vining Realty Group Ltd in Nelson, trading as Bayleys Nelson ("the Agency"). Mr Reed held a branch manager's licence. Mr Reed did not challenge the Whittys' evidence that he viewed the property and said it was beautifully presented and would create plenty of interest.

[8] On or about 10 July,[3] Mr Reed visited the Whittys again. There was a dispute as to what was discussed at this meeting, and what information Mr Reed provided to the Whittys.

[9] At, or immediately after, this meeting the Whittys signed a "Bayleys Agency Contract – Residential" ("the Agency contract"). The Agency contract was signed by Mr Reed on 23 June and by the Whittys on 10 July. It provided that:

[a] The Agency had a sole agency until 30 September;

[b] The commission would be $35,000 (estimated on the basis of the rateable value of $1.1 million); and

[c] Marketing costs were estimated at $3,828.15, for a six week marketing programme.

[10] The first Open Home was held on 3 August, run by Mr Reed and another salesperson, Ms Tomlinson. The Whittys were in Queensland on holiday at the time. On 4 August, Mr Reed reported to them by email that five groups had gone through

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2 This was referred to in the evidence as either the "rateable value", "registered value", or "government value". The term "rateable value" will be used in this decision.

3 The Whittys' evidence was that there was a meeting on 10 July, then a further meeting. Mr Reed's evidence was that there was one meeting, on 10 July. We consider that nothing turns on this point.

the property and that there had been some telephone and email enquiries. Mr Reed set out the feedback from the Open Home attendees. Mr Reed noted that this was "a solid start and we have two groups going back for a second viewing". Mr Reed also reported that internet viewing was "going extremely well".

[11] Dr and Mrs Docker ("the Dockers") attended the Open Home on 3 August. They knew that the property had just come on the market. There is a dispute as to whether Mr Reed made a statement to them concerning the sale price.

[12] The Dockers viewed the house again on 4 August. Ms Tomlinson visited the Dockers that evening and they drafted an offer to purchase the property for $1.050 million. Mr Reed then telephoned the Whittys and advised them of the offer, which they rejected. The Dockers made a further offer at $1.075 million, which the Whittys also rejected.

[13] Later on 4 August, Mr Reed telephoned the Whittys and asked if they had any objection to his showing his partner through the property. He telephoned them again that evening and offered to purchase the house for $1.1 million. There is a dispute as to what he said to the Whittys when making the offer, and the level of the offer.

[14] The Dockers' evidence was that they were told on 5 August that a higher offer had been made on the property. Mr Reed's evidence was that the Dockers withdrew their offer before he made his offer to the Whittys. We find that Mr Reed's offer was made after the Dockers' offers were rejected, albeit a very short time after.

[15] Mr Reed sent the Whittys an Agreement for Sale and Purchase of the property at $1.1 million by email on 5 August ("the Sale Agreement"). Mr Reed had drawn a line through the box at the bottom of the Sale Agreement which stated that the sale was made by "Vining Realty Group Limited – A member of The Bayleys Realty Group". He wrote "PRIVATE SALE" under the box. The Whittys signed the Agreement and returned it to Mr Reed on 6 August.

[16] The Sale Agreement was settled on 3 October. We note that the Whittys were not charged commission on the sale.

[17] Mr Reed sold the property in February 2015, after carrying out some work on it, for $1.4 million.

Summary of the charges

[18] The substantive charge and the alternative charges were founded on the same factual background, set out above.

[19] The particulars of each of the charges were that:

[a] In breach of s 134 of the Act, Mr Reed:

[i] failed to obtain the Whittys' informed consent to continue acting on the sale when he had a conflict of interest arising out of his decision to purchase the property for himself;

[ii] did not obtain that consent in writing in the prescribed form, as required by s 134 and Form 2 of the Schedule to the Real Estate Agents (Duties of Licensees) Regulations 2009 ("Form 2");

[iii] failed to explain the existence and nature of his conflict of interest; and

[iv] failed to explain to the Whittys that he would be in possession of information that the Whittys would expect to be confidential.

[b] In breach of s 135, Mr Reed:

[i] Failed to provide the Whittys with a written (or any) independent valuation of the property;

[ii] failed to provide the Whittys with a written (or any) appraisal of the property (in breach of r 10.2 of the Rules);

[iii] failed to advise the Whittys how the properties referred to in documents provided to them had been selected and how that information could be reflected in the price for the property (in breach of r 10.3); and

[iv] failed to act in the Whittys' best interests (in breach of r 9.1).

[20] The Committee's case was that Mr Reed's failures constituted a wilful or reckless contravention of the Act and Rules (s 73(c)), or was seriously incompetent or seriously negligent real estate agency work (s 73(b)).

[21] Mr Reed accepted at the hearing that he allowed the sale to himself and his partner to proceed without getting the Whittys' consent in the prescribed form, and without providing them with a written (or any) valuation by a registered valuer, as required by ss 134(1) and (3), and 135. He also accepted that he did not tell the Whittys that because of his failure to comply with the requirements of ss 134 and 135, they could cancel the sale contract.

[22] Counsel for Mr Reed, Mr Waymouth, submitted that Mr Reed's failure to act in accordance with ss 134 and 135 was neither a wilful or reckless contravention of the Act, nor seriously incompetent or seriously negligent real estate agency work. He submitted that the proper finding in respect of Mr Reed's breaches was that he had engaged in unsatisfactory conduct.

[23] Mr Waymouth further submitted that the evidence established that Mr Reed had complied with rr 10.2, 10.3 and he submitted that the evidence did not establish that Mr Reed had failed to act in the Whittys' best interests, in breach of r 9.1.

[24] Accordingly, the issues to be determined are:

[a] whether Mr Reed breached rr 10.2, 10.3, and/or 9.1;

[b] (if the Tribunal finds that Mr Reed breached rr 10.2, 10.3, and/or 9.1) whether Mr Reed's breaches of the Act and the Rules (as admitted and found by the Tribunal) constitute misconduct under s 73(c) or (b);

[c] (if the Tribunal finds that Mr Reed did not breach rr 10.2, 10.3 and/or r 9.1) whether Mr Reed's admitted breaches of the Act (on their own) constitute misconduct under s 73(b) or (c); and

[d] (if the Tribunal does not find that Mr Reed is guilty of misconduct under s 73(c) or (b)) whether it should find that Mr Reed's conduct (as found and/or admitted) amounted to unsatisfactory conduct under s 72. (The Tribunal notes Mr Waymouth's submission that Mr Reed's breaches of ss 134 and 135 amount to unsatisfactory conduct).

[25] Therefore, we consider, first, whether Mr Reed breached rr 10.2, 10.3 and/or 9.1.

Did Mr Reed breach rr 10.2 and 10.3?

[26] These Rules are logically considered together. They provide:

> *Appraisals and Pricing*
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> 10.2 An appraisal of land or a business must–
>
> (a) be provided in writing to a client by a licensee; and
>
> (b) realistically reflect current market conditions; and
>
> (c) be supported by comparable information on sales of similar land in similar locations or businesses.
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> 10.3 Where no directly comparable or semi-comparable sales data exists, a licensee must explain this, in writing, to a client.

[27] As to what is required to comply with rr 10.2 and 10.3, Ms Lawson-Bradshaw referred us to the Tribunal's consideration of those rules in *Rodgers v Real Estate Agents Authority*, in which it agreed with the Authority's submission that:[4]

> … an appraisal needs to do more than simply show a prospective client comparable properties and sales figures and must inform the prospective client why the properties have been selected and how that information translates in to the appraised price that the licensee has arrived at for the property.

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4 *Rodgers v Real Estate Agents Authority* [2016] NZREADT 7, at [50].

[28] We are required to make factual findings as to whether Mr Reed provided the Whittys with a written appraisal of the property and, if so, whether it complied with rr 10.2 and 10.3.

[29] It was not contested that the Whittys signed the Agency contract at the meeting on 10 July. The contest in the evidence concerns what written information was provided to them before they signed it.

[30] We note, first, the Whittys' evidence that when they met Mr Reed on 23 June they asked him what he thought the property might achieve in the current market, and that he was reluctant to give a figure, but indicated that houses in the area were selling for around the rateable value.

[31] They further said that (either at the first meeting on 23 June or later) Mr Reed gave them a two-page document listing the sale prices of 12 properties, all but two of which were in Tasman ("the sales list"). This document records at the top "Bayleys Nelson 23/06/14". This suggests that the sales list may have been given to the Whittys at the meeting on 23 June, but we do not have to determine the point. The Whittys perused the sales list and made notes on it as to the variation of the sale prices against the rateable value of the properties.

[32] The Whittys said Mr Reed also gave a copy of the "Property Information Memorandum" booklet ("PIM") for a property sold by him. They did not recall receiving three PIMs as Mr Reed asserted. They said Mr Reed also gave them a marketing proposal for the Property, and a document headed "Bayleys Schedule of Fees".

[33] Mr Reed's evidence was that he also gave the Whittys a single-page document headed "Bayleys Comparative Market Sales Appraisal" ("the Bayleys appraisal form"). This document contains a section headed "Details of comparable properties available for analysis", then a bold heading "Sale". There are then sub-headings "Your Property", "Recent Sales" and "For Sale". For each of these sub-headings there are columns headed "Govt value $", "Bedrooms", "Land ($m^2$)", "List Price" and "Sold Price". None of this section has been filled in. Underneath this section

there is a box labelled "Taking the above comparisons into account we would expect the market value of your property to be in the range of:" In the space alongside this, Mr Reed wrote "around $1,100,000". In a "Comments" box Mr Reed wrote "CMA is attached along with PIMs of some of our recent sales".

[34] The Bayleys appraisal form was signed by Mr Reed and dated 9 July 2014. It has not been signed and dated by the Whittys. The Whittys said they did not receive it, and if they had they would have queried it, as "$1,100,000" was below their market valuation. They also said that they asked Mr Reed what price he thought the property might achieve in the current market and that he was reluctant to give a figure but indicated that houses in the area were selling for around rateable value.

[35] Mr Reed's evidence was that he gave the Whittys an appraisal of the property (at "around $1.1 million") and that notwithstanding that the Bayleys appraisal form was not signed by the Whittys, he gave it to them. He suggested that it was included in the package of documents given to the Whittys, and was overlooked when they signed other documents.

[36] Ms Lawson-Bradshaw submitted that the evidence established that the Whittys were only presented with the sales list and the three PIMs. She submitted that this was clearly insufficient to comply with rr 10.2 and 10.3, as those documents did not provide the Whittys with even basic information as to how the properties referred to were comparable, or semi-comparable, to their own property. Further, she submitted that even if Mr Reed gave this information orally, it did not comply with the requirement in rr 10.2 and 10.3 that it be given in writing.

[37] Mr Waymouth submitted that Mr Reed gave the Whittys an appraisal (at around $1.1 million) and that this realistically reflected current market conditions[5]. He submitted that Mr Reed gave the Whittys comparative information by way of the sales list and the three PIMs, and that the Rules do not specify what form of "writing" is required. Regarding the Bayleys appraisal form, he submitted that Mr Reed's evidence that this was overlooked both by the Whittys and by himself should be accepted. He submitted that the Tribunal could be satisfied a market appraisal

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5 See r 10.2(b).

was prepared and given. Even if that were not accepted, he submitted that it was not the case that nothing was done.

[38] We accept the Whittys' evidence that Mr Reed did not give them an oral appraisal. His statement that "houses in the area were selling for around the rateable value" was not an appraisal of the market value of their property, in particular. Even if Mr Reed had given the Whittys an oral explanation of the ways in which the sales list and the PIMs provided the comparative information from which an appraisal could be provided, that patently would not have satisfied the requirement for the appraisal to be in writing.

[39] We find that in the present case, the Whittys were not given a written appraisal of the property. While the Bayleys appraisal form provides for information to be given (which would go some way towards satisfying the requirements for an appraisal)[6], no such information was set out. Further, in light of the fact that the Bayleys form was not signed by the Whittys, whereas other documents they were given were signed (the Agency contract itself, the Agency's schedule of fees, and the marketing proposal), we accept the Whittys' evidence that Mr Reed did not give them that form.

[40] Further, we find that the sales list and the three PIMs do not equate to a written appraisal. Those documents do not provide information as to why the properties referred to were considered comparable, or how they realistically reflected current market conditions. We do not accept Mr Waymouth's submission that the sales list and the PIMs were "sufficient" for the purposes of r 10.2 and 10.3. The sales list simply lists all properties of up to five hectares within a three kilometre radius of the Whittys' property, sold between 23 June 2011 and 23 June 2014, for between "$800000" and "$999999999". There is no description of the age, nature, and condition of the property (in particular, of any house on the property) or designated land use. The PIMs do not, themselves, explain in writing why those properties were comparable to the Whittys' property, and they do not disclose their sale prices.

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6 We note that the Bayleys appraisal form does not provide for any explanation as to how properties have been selected for comparison, or how that information translates into the appraised price arrived at.

[41] A market appraisal is an important part of the process of entering into an agency agreement to market a property. This is made abundantly clear by rr 10.2 and 10.3, and expanded on in the notes to those Rules in the Real Estate Agents Handbook. The importance of a market appraisal is stressed by the requirement in r 10.2 that the appraisal is given in writing, and in r 10.3 that if there is no comparative sales data that, too, must be explained in writing.

[42] Accordingly, the Tribunal finds that Mr Reed breached rr 10.2 and 10.3.

Did Mr Reed breach r 9.1?

[43] Rule 9.1 provides:

> 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.

[44] This allegation was founded on the Dockers' evidence that when they arrived at the first Open Home they were told by Mr Reed that the sale price for the property was not expected to go above its rateable value (that is, $1.1 million). This is disputed by Mr Reed, whose evidence was that he indicated to all parties attending the Open Home that the "Government Valuation" was $1,100,000 and "ideally we were looking for people shopping above that mark".

[45] Ms Lawson-Bradshaw submitted that the Dockers' evidence should be accepted and that the Tribunal should find that Mr Reed breached r 9.1 when he told them that the sale price was not expected to be more than the rateable value.

[46] Mr Waymouth submitted that the Dockers accepted in cross-examination that it was "highly likely" that they received the PIM for the property at the Open Home (a substantial document) yet did not mention this in their statements of evidence and that the Dockers were looking at other houses at the time, and had made an offer on one. He accepted that the Dockers' both agreed that Mr Reed came out and greeted them, but he submitted that as they did not recall getting the PIM, and as they were looking at other houses, the Tribunal should give no weight to their evidence as to what Mr Reed told them about the sale price for the property. He submitted that

there is inconsistency between Dr Docker's evidence and that given by Mrs Docker and, in the circumstances, the Tribunal should accept Mr Reed's evidence.

[47] Mr Waymouth further submitted that the Whittys were happy with the price they received which, he submitted, was close to their wish to sell the property for $1.2 million (once the fact that they were not charged commission was taken into account). Accordingly, he submitted, there was no breach of r 9.1.

[48] We do not find there to be any inconsistency between Dr and Mrs Docker's evidence. Mrs Docker said that Mr Reed's "opening comments to us, as we arrived, was that they did not expect the property to sell for over the RV value". Dr Docker's evidence was that "when we arrived to view the property, we were met by Mr Reed. As we got out of the car, Mr Reed approached us and made a comment that the property was not expected to go past the registered valuation". Apart from a subtle variation of wording, there is no difference in the evidence. Further, we do not accept that the fact that the Dockers were looking at other houses should cause us to give their evidence any less weight.

[49] Mr Reed's evidence that he did not say that the sale price for the property "was not expected to go over the rateable valuation" was not put to either Dr or Mrs Docker. We note that the level of both the first and second offers made by them is consistent with their evidence as to Mr Reed's comment that the sale price was not expected to be more than $1.1 million. On the balance of probabilities, we accept the Dockers' evidence and find that Mr Reed told them that the sale price for the property was not expected to be over the rateable value of $1.1 million. In doing so he significantly reduced the possibility that the property would sell for the price the Whittys (his clients) wished to achieve,

[50] We therefore find that Mr Reed breached r 9.1.

Do Mr Reed's admitted breaches of ss 134 and 135 of the Act and the breaches of rr 10.2 and 10.3, and 9.1 constitute misconduct?

[51] We turn to consider the issue set out at [24][b], above. We note that in the light of our findings regarding the breaches of rr 10.2, 10.3, and 9.1, we are not required to consider the issue set out at [24][c].

[52] In its judgment in *Barfoot & Thompson Ltd v Real Estate Agents Authority*,[7] the Court of Appeal summarised the obligations imposed by ss 134 and 135. Briefly paraphrased, the Court said:

[a] The client's consent is effective only if given in the prescribed form and the client is provided with a valuation in accordance with s 135.[8]

[b] The valuation, made by an independent registered valuer, must be given to the client either before seeking the client's consent or, with the agreement of the client, within 14 days after the consent. Any consent given without the valuation is ineffective.[9]

[c] The consent must be given in the prescribed form, that is, Form 2.[10]

[d] The conflict of interest between the client and the licensee is self-evident. The licensee's loyalties are divided between the duty owed by an agent to act in the best interests of the vendor clients, and the licensee's self-interest in securing an agreement on terms favourable to himself or herself.[11]

[e] A licensee's objective as would-be purchaser necessarily conflicts with the best interests of the client as vendor. Moreover, the licensee may be in possession of information that the client could reasonably expect to be

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7 *Barfoot & Thompson Ltd v Real Estate Agents Authority* [2016] NZCA 105, [2016] NZAR 648.
8 At [12].
9 At [13].
10 At [16].
11 At [45].

> confidential and of other material information that ought, properly, be disclosed to the client.[12]

[53] We consider first the evidence and submissions regarding the breaches of ss 134 and 135.

Informed consent

[54] It was not disputed that Mr Reed did not comply with s 134 as to obtaining the Whittys' informed consent to his buying the property.

[55] Ms Lawson-Bradshaw submitted that as the selling agent, Mr Reed was privy to information that was confidential and private to the Whittys, and not available to ordinary purchasers. Mr Reed did not comply with the obligation to obtain informed consent in the proper form, he did not explain the conflict of interest and its implications, and he did not tell the Whittys they were entitled to cancel the Sale Agreement. He could not assume that the Whittys would understand and agree to his continuing to act on the sale, when he had been contracted to try to get other people to pay as much for the Property as he could get them to. Such an assumption would completely subvert the purpose of the Act to "promote and protect the interests of consumers … and to promote public confidence in the performance of real estate agency work".[13]

[56] Mr Waymouth submitted that in *Barfoot & Thompson* the Court of Appeal provided a very strong and proper guideline for the industry as a whole, and it is now clear beyond doubt what is required. He submitted that prior to the judgment, it was not clear as to what "informed consent" was, and what factors were to be taken into account when dealing with the "consent" issue.

Independent valuation

[57] There was a dispute in the evidence regarding Mr Reed's obligation to provide the Whittys with an independent market valuation. Both Mr and Mrs Whitty said

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12 At [48].
13 Section 3(1) of the Act.

that when Mr Reed first expressed an interest in buying the property he gave no indication that he had obligations or requirements to be complied with before he could buy their property for himself. Mr Reed's evidence was that when he offered to purchase the property he told the Whittys that, by law, he had to obtain an independent market valuation. He said that Mr Whitty's response was that there was no need for that, as Mr Reed could "use his valuation". On that basis, he said, he proceeded to complete the purchase without providing an independent valuation. This evidence was put to Mr Whitty and he responded that after they accepted the offer Mr Reed said that he had to get a valuation. Mr Whitty said his response was "we've already got a valuation, why do we need another one?" We accept the Whittys' evidence that Mr Reed did not tell them that he was required, under the Act, to provide them with an independent valuation, at his own cost.

[58] Ms Lawson-Bradshaw submitted that Mr Reed's evidence that he believed he did not need to comply with this obligation, as the Whittys had their own valuation, was absolutely unreasonable. He was clearly required by ss 134 and 135 to provide an independent market valuation. She further noted that Mr Reed failed to advise the Whittys that, in those circumstances, they were entitled to cancel the Sale Agreement.

[59] Mr Waymouth noted that Mr Reed's offer to buy the property for $1.1 million was higher than the offer made by the Dockers. He submitted that Mr Reed had raised the matter of a valuation with the Whittys and was told that he could use the valuation they had obtained. He submitted that if a licensee intends to breach ss 134 and 135 when buying from a vendor, who may or may not be aware of those provisions, the licensee would not make any reference to a valuation.

Submissions as to whether a finding should be made that Mr Reed was guilty of misconduct under s 73(c) or (b)

[60] Ms Lawson-Bradshaw submitted that the evidence established that Mr Reed's breaches were clearly wilful. Regarding the breaches of ss 134 and 135, she submitted that Mr Reed was well aware (from his 11 years' experience and training as a licensee) of the statutory provisions, and his explanation for not complying with them could not be accepted. She submitted that Mr Reed at no point lost this

obligation; calling the transaction a "private sale" on the Agreement for Sale and Purchase, and not charging commission, did not absolve him. He was still required to comply with the Act, and follow the correct process.

[61] Ms Lawson-Bradshaw also referred to Mr Reed's evidence that he did not advise the Agency of his purchase of the property, although ongoing sales would usually be discussed at meetings of salespeople, and his concession that no one except members of his sales team knew he was buying the property privately, and no one in his team knew that he had not advised the principal of the Agency, Mr Vining. She submitted that this evidence should be taken into account in the Tribunal's determination whether Mr Reed's breaches constitute misconduct. She submitted that Mr Reed's silence within the Agency concerning his purchase weighed against a finding of unsatisfactory conduct under s 72 instead of a finding of misconduct under s 73.

[62] Ms Lawson-Bradshaw submitted that it is irrelevant if the Whittys were "happy" with the price paid by Mr Reed. She submitted that, being unaware of matters Mr Reed was required to disclose to them, they knew no better. Ms Lawson-Bradshaw further submitted that Mr Reed's breaches of rr 10.2, 10.3 and 9.1 aggravated the seriousness with which his breaches of ss 134 and 135 were to be regarded.

[63] Finally, Ms Lawson-Bradshaw submitted that if Mr Reed's breaches of the Act and Rules were not found to be wilful or reckless, they were at least seriously incompetent or seriously negligent.

[64] Mr Waymouth submitted that the evidence did not support a finding of misconduct on either of the charges brought under s 73. He submitted that the Sale Agreement was clearly correct and regular on its face, in that it was a standard Bayleys agreement. He submitted that if Mr Reed had set out (wilfully or recklessly) to breach the Act, he would not have used a Bayleys agreement. Rather, he would have obtained an "unbranded" one.

[65] He submitted that Mr Reed's evidence that he raised with the Whittys the matter of getting a valuation demonstrated that his failures should not be found to be misconduct under s 73. He submitted that this was a crucial distinction between a finding of misconduct under s 73, and a finding of unsatisfactory conduct under s 72.

[66] Mr Waymouth described Mr Reed's actions between 4 and 6 August as a "brain fade". Mr Reed had "thought it was OK, I don't have to get a valuation, I can do the deal". He submitted that Mr Reed acknowledged that he had made a mistake, and had admitted it at the earliest opportunity, and that this acknowledgement pointed to a finding under s 72 rather than under s 73. He submitted that if Mr Reed had acted wilfully or recklessly, or in a manner that was seriously incompetent or seriously negligent, he would have tried to hide it. Mr Waymouth further submitted that Mr Reed had been open in his communications with the Whittys' solicitors as to the fact that he was the purchaser, and the solicitors had not asked him to produce an independent valuation.

[67] Mr Waymouth referred to Mr Reed's evidence that at a later date he bought a property in the Marlborough Sounds, and followed the proper process in doing so. He submitted that if Mr Reed had intended to "avoid the Act" when buying the Whittys' property, he could be expected to do so again in the later purchase. However, he had not.

[68] Mr Waymouth accepted that Mr Reed has 11 years' experience in the industry, and is licensed as a branch manager and knows what licensees are required to do. However, he submitted that with the Whittys' sale, Mr Reed innocently and genuinely believed that he was acting correctly. He submitted that in order for the Tribunal to find that Mr Reed wilfully contravened the Act, it must be found that he acted deviously, and there was no evidence of that. He further submitted that there was no evidence that Mr Reed had acted recklessly, or was seriously incompetent or seriously negligent. He submitted that Mr Reed's failures were "mere" negligence.

Our assessment

[69] There is no dispute that at all times Mr Reed knew what was required under ss 134 and 135, and what was required under rr 10.2, 10.3, and 9.1. He knew that he had to comply with each of the requirements, and he knew what he had to do in order to comply with them.

[70] The provisions of ss 134 and 135 are clear: a licensee carrying out real estate agency work in respect of a transaction must obtain the client's consent where the licensee acquires the land to which the transaction relates, and the client's consent is effective only if it given in the prescribed form (Form 2) and the client is provided with a valuation by an independent registered valuer. The requirements under rr 10.2, 10.3, and 9.1 are also clear. The requirements are reflected in the Agency's "Standards and Disciplines Policy":[14]

> A written appraisal must be provided BEFORE the listing is signed. The REAA approved guide for signing an agency agreement must be provided to the Vendor before signing.[15]
>
> Staff purchasing[16]
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> The rules of the Real Estate Authority and the requirements of the Real Estate Agents Act 2008 must be complied with.
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> The owner or owners of the property concerned must be advised in writing of the purchaser's occupation and the extent of his or her involvement in the purchase. On a Bayleys Sole Agency the listing licensee negotiates the sale and normal company commission policies apply if the purchaser is a real estate licensee.

[71] We reject Mr Waymouth's (implicit) submission that in *Barfoot & Thompson* the Court of Appeal introduced any new requirement into ss 134 and 135. While the Court expanded on the sections and the obligations imposed, that was only to emphasise the extent of the obligations. In doing so, the Court endorsed the decisions of the High Court, the Tribunal, and the Complaints Assessment Committee regarding the obligations. We do not accept that the nature of a

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14 Vining Realty Group Limited Standards and Disciplines Policy
15 At page 4.
16 At page 8.

licensee's obligations under those sections is to be regarded any differently now than before the Court of Appeal's judgment.

[72] We have found that Mr Reed:

[a] did not provide a written appraisal of the property before the Agency contract was signed;

[b] did not explain to the Whittys the nature and implications of his buying the property (in particular that he had a conflict of interest);

[c] did not obtain the Whittys' consent to his purchasing the property in the prescribed form;

[d] did not provide the Whittys with an independent market valuation of the property;

[e] did not explain to the Whittys that as they had not given their consent in the prescribed form, and he had not provided them with an independent market valuation, they were entitled to cancel the Sale Agreement;

[f] allowed the transaction to be completed without having complied with his obligations under the Act and Rules.

[73] We have concern as to the speed at which this transaction proceeded. Mr Reed made his offer on 5 August notwithstanding that:

[a] the agreed marketing programme was for a six-week campaign (up to 14 September);

[b] he told the Whittys on 23 June that the property "would create plenty of interest";

[c] he reported to the Whittys on 4 August that the first Open Home was "a solid start" and that "internet viewing was going extremely well"; and

[d] the Dockers made offers on 5 August, immediately after their second viewing following the first Open Home.

[74] There is no evidence that in the very short period before the Whittys signed the Sale Agreement, also on 5 August, the Whittys were offered the option of continuing the marketing campaign in the hope of offers being made either after further Open Homes, or resulting from the internet viewings. Mr Reed said in answer to a question from the Tribunal that "a range of things" was discussed with the Whittys by telephone, and that "everything was very transparent". He also said (in his statement of evidence) that he "made it very clear" to the Whittys in a telephone conversation on 5 August that Ms Tomlinson (his associate salesperson) "would exhaust all interested parties and had exhausted all potential buyers on our database before I would proceed with any interest of my own".

[75] The fact that Mr Reed proceeded to make an offer the same day causes us to doubt whether Ms Tomlinson "would exhaust" and "had exhausted" all potential buyers before Mr Reed's offer was made. Further, there was no opportunity, within that short period, for any potential buyers who were not already on the database to show themselves.

[76] We also doubt that Mr Reed's interest in buying the Property necessarily meant that he had to make an offer immediately after the first Open Home. As listing agent he could easily have allowed more time to elapse and made an offer at a later stage. He would have been well aware of how marketing was proceeding.

[77] We are also concerned that Mr Reed did not disclose the fact of his purchase to the Agency (in particular its principal), and that members of his team were not aware that he had not disclosed it. If Mr Reed had disclosed his purchase, it would have been evident that the purchase raised compliance issues that had to be addressed. In the circumstances of Mr Reed's purchase, these issues were not addressed.

[78] We do not accept Mr Reed's explanation of a "brain fade" on the day. Even if he believed that he did not have to meet his obligations under the Act and the Rules when he made the offer, when he heard back from the Whittys accepting it, when he

sent them the Sale Agreement, and when the Whittys returned the signed Sale Agreement (all of which occurred over two days), there was ample time for Mr Reed to correct the position before he settled the purchase. During that period he had ample opportunity to tell the Whittys that he had failed to comply with his obligations, and to advise them they could cancel the Sale Agreement; he did not.

[79] Nor do we accept that Mr Reed's use of a Bayleys standard Sale and Purchase Agreement form, amended to state that it was a "private sale" takes his actions out of the realm of s 73, and into "mere" negligence. We do not accept that the fact that he used the Agency form shows that he did not act wilfully or recklessly, or that he was not seriously incompetent or seriously negligent. Further, we do not accept that calling the transaction a "Private Sale", and not claiming commission, absolved him of his obligations under the Act and Rules. To the contrary, it possibly demonstrates that he was aware of those obligations but believed that he could avoid them.

[80] Further, if the reference in Mr Reed's communications with the Whittys' solicitors was intended to be a submission supporting the reasonableness of his belief that he did not have to comply with the Act and Rules, or that his culpability was reduced because he was not asked to produce an independent market valuation, then we reject that submission. It is not a solicitor's role to check Mr Reed's compliance with the Act and Rules.

[81] The standard of proof for disciplinary charges under the Act is the balance of probabilities[17]. We do not accept Mr Waymouth's submission that in applying the standard we must take into account the professional consequences of a finding of misconduct. To do so would be to apply a form of "intermediate" standard of "balance of probabilities for disciplinary proceedings", and the authorities do not support such a standard of proof.[18]

[82] We reject the submission that Mr Reed innocently and genuinely believed that he was acting correctly. The submission can be given little weight in light of the

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17 Section 110(1) of the Act.

18 See *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1; *Real Estate Agents Authority (CAC 301) v Murphy* [2015] NZREADT 42, at [79].

importance of the obligations, and the fact that he is a licensee with many years' experience, and is licensed as a branch manager.

[83] The substantive charge alleged that Mr Reed's breaches of the Act and Rules were wilful or reckless. We are not satisfied that the breaches were wilful, that is, that he set out to avoid complying with his obligations in order to secure his purchase. Regarding the allegation that Mr Reed's breaches were reckless, we have referred to earlier decisions of the Tribunal in which charges of reckless breaches of the Act and regulations were considered.[19] We have reservations as to the proper application of the term "reckless" in the context of a charge of a breach of professional obligations. Notwithstanding that reservation, we are not satisfied that Mr Reed's breaches were "reckless". Accordingly, we do not fine Mr Reed guilty of misconduct under s 73(c).

[84] The first alternative charge alleged that Mr Reed's breaches of the Act and Rules were seriously incompetent or seriously negligent. Section 73(b) is to be applied using the plain meaning of the words "seriously incompetent" and "seriously negligent". Whether conduct amounts to "seriously incompetent" or seriously negligent" real estate agency work is a question to be assessed in the circumstances of each case.[20] In each case the Tribunal must be satisfied on the balance of probabilities that the found conduct was seriously incompetent and/or seriously negligent real estate agency work.

[85] Notwithstanding his experience in the industry and his knowledge of the relevant provisions of the Act and the Rules, Mr Reed's belief that he was acting correctly demonstrated a serious misunderstanding of ss 134 and 135 of the Act, and rr 10.2, 10.3 and 9.1 of the Rules. Those provisions are clearly fundamental to the Act's purpose of promoting public confidence in the performance of real estate agency work. A breach of those provisions which are well known to all licensees, let alone one with Mr Reed's experience, must be regarded seriously. We are satisfied

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19 See *Real Estate Agents Authority (CAC 10003) v Raj* [2012] NZREADT 37; *Real Estate Agents Authority (CAC 20004) v Clark* [2013] NZREADT 62; *Real Estate Agents Authority (CAC 20004) v Lindsay* [2013] NZREADT 113; *Real Estate Agents Authority (CAC 10073) v Cho* [2013] NZREADT 93.

20 See the discussion in *Complaints Assessment Committee v Cui* [2015] NZREADT 1, at [51]–[54].

that the Committee has established to the required standard that Mr Reed's conduct constituted seriously incompetent real estate agency work.

[86] Mr Reed's failure to take any steps to check and/or seek advice as to whether his belief that he was acting correctly and in accordance with the requirements of the Act and the Rules was correct must also be taken seriously. It is not acceptable for a licensee to assume knowledge and understanding on the part of the client, and it is not acceptable for a licensee to assume that the requirements of the Act and Rules do not need to be complied with in a particular case. That is what occurred in this case, and we are satisfied that the Committee has established to the required standard that Mr Reed's conduct constituted seriously negligent real estate agency work. Accordingly, we find Mr Reed guilty of misconduct under s 73(b).

[87] We are not, therefore, required to consider whether Mr Reed should be found to have engaged in unsatisfactory conduct under s 72 of the Act. Had we been required to do so, we would have found that Mr Reed had had engaged in unsatisfactory conduct under each of subsections (a) to (d) of s 72.

Outcome

[88] The Tribunal finds Mr Reed guilty of misconduct pursuant to s 73(b) of the Act.

[89] Counsel are to confer and advise the Tribunal whether penalty may be determined on the papers and, if so, propose a timetable for submissions. In the event that counsel advise the Tribunal that a hearing is required, the Case Manager will schedule a telephone conference for the purpose of setting a hearing date and timetable for submissions.

[90] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the

date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews
Chairperson

_____
Mr J Gaukrodger
Member

_____
Ms N Dangen
Member