

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2012] NZREADT 16

READT 44/10

**IN THE MATTER OF** an appeal under s 111 of the Real Estate Agents Act 2008

**BETWEEN** **ANDREW RUSSELL**

Appellant

**AND** **REAL ESTATE AGENTS  
AUTHORITY (CAC 10012)**

First respondent

**AND** **JANICE LONG**

Second respondent

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Ms J Robson - Member  
Mr G Denley - Member

**HEARD** at NELSON on 1 March 2012

**DATE OF DECISION:** 20 April 2012

**REPRESENTATION**

The appellant on his own behalf  
Ms N Wilde, for first respondent  
Ms J Maslin-Caradus, for second respondent

**DECISION OF THE TRIBUNAL**

***The Issue***

[1] Was the Real Estate Agents Authority correct to find the second respondent guilty of unsatisfactory conduct but impose no penalty? Andrew Russell (the appellant) appeals against a 30 September 2010 decision of Complaints Assessment Committee 10012 (the Committee) to that effect. The basic issue was whether the licensee had arranged a misleading advertisement about a vacant section for sale on Old Coach Road in the Tasman District.

[2] Following a complaint from the appellant against licensed salesperson, Janice Long (the Licensee), the Committee conducted an enquiry and dealt with the complaint on the papers. It determined that the Licensee was guilty of unsatisfactory conduct contrary to s.72(a) and (c) of the Real Estate Agents Act 2008 (the Act) referred to further below. At page three of its decision the Committee said:

*“... In relation to the advertising, it is not clear that it was misleading to say the possibility of purchasing additional land existed. It was, literally speaking, a correct statement, in relation to the second paper road and possibility in relation to the other 'rural land' referred to by Mrs Long. The CAC's assumption is that, despite the Malcolm's previous objection and belief that a half share for each had been agreed, purchasing it was still fairly described as a possibility.*

*The CAC is not satisfied that the advertisement was misleading but has found the statement in her email dated 25 September 2008 "The vendors have not attempted to purchase the other portion of the paper road" was clearly wrong and misleading.”*

[3] No order by way of penalty was imposed by the Committee in respect of the finding of unsatisfactory conduct, because the conduct in question pre-dated the Act coming into force.

### **Background**

[4] The complaint arose in the context of the Licensee having acted as agent to sell a vacant lot of land on Old Coach Road in the Tasman District (the property).

[5] The appellant was the ultimate purchaser of the property. There were essentially two parts to his complaint. First, he said that, on two occasions during his negotiations to purchase the property, the Licensee wrongly advised him that the vendors had not attempted to purchase a paper road abutting the Southern boundary of the property. Second, he says that the Licensee's advertisement containing the words *"An opportunity may exist to acquire some additional adjoining land"* was misleading in the circumstances where the vendor, Doug Nottage (on behalf of his wife and himself), had given the following information to the Licensee in a 12 November 2007 letter from vendor to Licensee:

*“There is no reason at all why any new owner should not claim to have the other bit of unused paper road stopped. I should explain that we would have claimed the other piece of paper road too, but at the time the neighbours felt that they would like to keep that option open in case they subdivide. At the time their access ran through our title and immediately adjacent to that bit of paper road. However, the paper road is extremely steep and our neighbours have since moved their access away from our land, running off the formed road further north. That being the case it seems extremely unlikely that they would not be opposed to the remaining bit of paper road being stopped.*

[6] The licensee was also provided with a 16 February 2007 letter from vendor to Tasman District Council applying to stop another paper road abutting the property (the Western paper road) which stated:

*“... We approached the adjacent owners to the west of the paper road, Rachel Marion and Phillip Stephen Malcolm, to see if they would like to have half of the [Western] paper road added to their title but they were not interested. Instead they have, as per the attached aerial photo, signed a statement that they have no interest in the piece of road that has been cross hatched on the photo, and it is this piece of road that we are applying to have stopped and added to our title.*

*The Malcolms wanted the other small section of unformed road to be kept open in case they need it in the future for subdivision access purposes."*

[7] A paper road is a road which is legally established and recorded in survey plans to provide access to land, but has never been physically formed. Paper roads are legal roads, so the public has the same rights of access to them as for a normal road. There is a process for applying to stop a paper road and purchase it from the relevant local council under the Local Government Act 1974. To stop a paper road, an application must be made to the local council, and a survey plan compiled and deposited with Land Information New Zealand. The general public are invited to make objections to the road stopping and, if these are upheld, it cannot go ahead.

[8] In about 2007 the vendors had successfully stopped and acquired a paper road which abutted the Western side of the property in about 2007. However, a second paper road abutted the Southern side of the property and it is the 'Southern paper road' which is in issue in this appeal.

[9] The appellant purchased the property from the Nottages in October 2008. The appellant says that, in March 2009, he approached the local council to stop the Southern paper road. As part of the application process the appellant was required to obtain consent from the adjoining neighbour, Stephen Malcolm. The appellant says that Mr Malcolm made it clear that he had always opposed the stopping of the other piece of road and that he had made that clear to the Nottages.

[10] Accordingly, this appeal concerns a 100 square metres paper road to the South of the property and whether Mrs Long misrepresented the appellant's ability to acquire that paper road in addition to the property.

[11] Mr Russell suggests that Mrs Long did make misrepresentations and that her conduct was grossly negligent or, alternatively, deliberately dishonest and misleading. He contends that her conduct was therefore more serious than "*unsatisfactory conduct*".

[12] It is submitted for Mrs Long that her conduct was at the lower end of the scale of "*unsatisfactory conduct*"; that there was no deliberate or dishonest conduct; and that no penalty is warranted. In any event as we explain below, neither the Committee nor this Tribunal has any ability under the relevant legislation to impose a penalty.

[13] At all material times in 2007 and 2008, Mrs Long was an approved salesperson. In late 2007, Mrs Long was engaged by the vendors (Mr and Mrs Nottage) of the property which was bordered by two paper roads owned by the Tasman District Council (TDC). One such road is to the west and one to the south.

[14] The vendors of the property had purchased the Western paper road from the TDC, so that it was included with the property when it was sold to the appellant. The vendors provided Mrs Long with a 16 February 2007 letter (referred to above) which they had written to the TDC. It explained that the neighbours to the west wanted the other Southern paper road "*to be kept open in case they need it in the future for subdivision access purposes.*" Mrs Long had also received the said 12 November 2007 notes from the vendors which gave more detail about that Southern paper road.

[15] Mrs Long listed the property on 29 November 2007. She placed advertisements in the local papers which referred to the Southern paper road as follows: *"Opportunity may exist to acquire some additional adjoining land"*

[16] Mr Russell approached Mrs Long in relation to the property by email. Mrs Long responded to him on 12 December 2007 saying (inter alia): *"There is another paper road adjoining on the southern side of the property which perhaps could be purchased from the Council to increase the size of the section further again"*.

[17] A conditional sale and purchase agreement for the property was concluded between the vendors and Mr Russell on 12 March 2008 at a price of \$190,000. There were no conditions in the agreement concerning the southern paper road. Mr Russell later terminated the agreement as he was unable to sell his existing property in Sumner, Christchurch.

[18] By that stage, Mr Russell was considering re-commencing negotiations for the property by submitting a new and lower offer to the Nottages through Mrs Long. He asked Mrs Long by email on 25 September 2008:

*"Have they [the vendors] ever attempted to purchase all the paper rd that bounds the property. And if yes, was there any opposition from the council or from the neighbours or any other party?"*

[19] Mrs Long responded on 25 September 2008: *"The vendors have not attempted to purchase the other portion of paper road."*

[20] On 21 October 2008 a new agreement for sale and purchase of the property was concluded between the vendors and Mr Russell at a price of \$162,500. Again, there were no conditions in it concerning the Southern paper road. The sale settled.

[21] However, in June 2009 Mr Russell lodged a complaint with the Authority concerning Mrs Long's 25 September 2008 statement that the vendors had not attempted to purchase the Southern paper road.

[22] The Real Estates Agents Act 2008 replaced the Real Estates Agents Act 1976 on 16 November 2009.

### ***Relevant legal principles***

*"Unsatisfactory conduct" compared with "misconduct"*

[23] Section 72 of the Real Estates Agents Act 2008 provides that a licensee is guilty of "unsatisfactory conduct" if the licensee carries out real estate work that:

- (a) *falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
- (b) *contravenes a provision of this Act or of any regulations or rules made under this Act; or*
- (c) *is incompetent or negligent; or*

(d) *would reasonably be regarded by agents of good standing as being unacceptable.*"

[24] Section 73 of the 2008 Act provides that a licensee is guilty of "misconduct" if the conduct is disgraceful, seriously incompetent, or seriously negligent.

*Penalties for conduct occurring prior to 17 November 2009*

[25] Section 172(2) of the 2008 Act provides that if the relevant conduct occurred before 17 November 2009, the Committee or this Tribunal may only order penalties which could have been ordered at the time the conduct occurred.

[26] At the time the said conduct occurred (i.e. in 2007 and 2008), the Real Estate Agents Act 1976 was in force. The 1976 Act provided for disciplinary proceedings before Regional Disciplinary Committees and, below that, Regional Disciplinary Sub-Committees. The standards of conduct were contained in the REINZ Rules. For whatever reason, no Regional Disciplinary Committee was ever established regarding the complaint leading to this case.

[27] In *CAC v Downtown Apartments Limited (in liquidation)* [2010] NZREADT 06, His Honour Judge Hobbs noted that, under the 1976 Act, the only penalties available in respect of a salesperson were a fine of \$750 and censure against the controlling licensed estate agent. His Honour explained:

*"[42] Disciplinary proceedings could be taken before Regional Disciplinary Subcommittee for a breach of the REINZ Rules. The available orders were a maximum fine of \$750 and censure. However, the difficulty is that disciplinary proceedings before Regional Disciplinary Sub Committees were conducted on a vicarious basis based on the concept of "effective control". Although a complaint about a breach of the Rules could be made against an approved salesperson or branch manager under rule 16.2, the responsible party, against whom orders could be made was the licensee who was in effective control of the salesperson or branch manager.*

*[43] This was made clear by rule 16.22 which relevantly provided as follows: "Where the RDS (Regional Disciplinary Subcommittee) finds a breach of duties and obligations imposed by the Act and these rules: 16.22.1, it may exercise one or more of the following disciplinary powers:*

*16.22.1.1 Order the member, or, where the member is a company, the principal officer of the company, to pay the institute such sum by way of penalty (not exceeding the sum prescribed by s.70(1)(0) of the Act (\$750), as the RDS thinks fit;*

*16.22.1.2 Censure the member, or, where the member is a company, the principal officer of the company."*

*[44] Although (the second defendant) was an approved salesperson under the 1976 Act, (the second defendant) was not a member i.e. a licensed real estate agent). Therefore orders could not have been made against (the second defendant) in respect of the conduct at issue in this proceeding."*

***Duties on a licensee in respect of information provided by a vendor***

[28] We are concerned with the conduct of Mrs Long as set out above, which is accepted by her, the licensee. We are particularly concerned with her statement that “*the vendors have not attempted to purchase the other portion of paper road*”. Perhaps, the advertisement was misleading?

[29] This Tribunal has already determined that an unintentional misrepresentation can amount to unsatisfactory conduct under s.72: *Handisides v CAC & Cruden* [2011] NZREADT 36.

[30] On the basis of the material submitted by the Licensee, in particular, the information provided to the Licensee from the vendor, and recorded on the Licensee's file, that the vendors had considered purchasing the Southern paper road and had taken steps to try and purchase it, the Licensee cannot demonstrate that she took all reasonable steps to confirm her statement of 25 September 2008 was correct. The issue is simply whether the vendors had attempted to purchase the Southern paper road; and the information on her file confirmed that they had.

[31] With regard to the licensee's emailed misrepresentation to the appellant on 25 September 2008, the Licensee cannot avail herself of the mere conduit defence discussed in *Handisides*. There is nothing in the email to suggest that she was merely passing on information given to her by the vendors.

[32] In any case, the Licensee accepts that she engaged in unsatisfactory conduct albeit, she maintains, for personal health reasons. She submits that her culpability was at the lower end of the scale.

[33] The appellant says that the Committee should have found that the Licensee's conduct prima facie amounted to misconduct under s.73 of the Act. He submitted there are two scenarios in which the Tribunal could possibly consider that the Licensee engaged in misconduct, namely, if there was an evidential foundation to show that:

- [a] The Licensee's misrepresentation was intentional or dishonest and therefore would reasonably be regarded as disgraceful (s.73(a)); and/or that;
- [b] The Licensee's error was seriously incompetent or seriously negligent (s.73(b)).

[34] The focus of the disciplinary provisions under the Act is primarily on the culpability of the licensee in making the misrepresentation in the first place. Whether the misrepresentation is in fact relied on (and whether that reliance causes loss to the complainant) will often be relevant to the question of penalty, but it will not be determinative of liability. As noted by this Tribunal in *Wright v CAC 10056 & Woods* [2011] NZRADT 21:

*“The emphasis [under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009] is on the conduct of the licensee. The Rules provide that licensees must ensure that they are open and honest with purchasers so that they are not misled in their decision to make an offer to purchase a property. There does not need to be any reliance by the purchaser on the*

*statements (or lack of statements) by the agent and it is clear that a duty of utmost good faith is required from the agent.”*

**Conduct prior to the Act coming into force**

[35] The conduct alleged in this case took place prior to the Act coming into force on 17 November 2009. Section 172 of Act therefore applies. It provides:

***“172 Allegations about conduct before commencement of this section***

*(1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,-*

- (a) At the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and*
- (b) The licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.*

*(2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the Tribunal may not make, in respect of that person and in respect of that conduct, any, order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred.”*

[36] In summary, in cases in which a licensee complained about was licensed or approved under the Real Estate Agents Act 1976 (the 1976 Act) at the time of the conduct alleged, and where that licensee has not been dealt with under the 1976 Act in respect of that conduct, s.172 creates a three step process (see *CAC v Dodd* [2011] NZREADT 01 at [65] to [67]):

- Step 1: Could the licensee have been complained about or charged under the 1976 Act in respect of the conduct?
- Step 2: If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?
- Step 3: If so, only orders which could have been made against the licensee under the 1976 Act in respect of the conduct may be made.

[37] At the time of the conduct alleged, the Appellant was an approved salesperson under the 1976 Act. The Appellant has not been dealt with under the 1976 Act in respect of the complaint. We comment further below on the three steps identified in *Dodd*, as they apply in the present case.

### *Step 1*

[38] Under rule 16.2 of the Rules of the Real Estate Institute of New Zealand Incorporated (REINZ Rules), made under s.70 of the 1976 Act, any person could complain to REINZ about, among other things, breach of the REINZ Rules by a salesperson. The REINZ Rules included broad duties, including that members conduct themselves in a matter "*which reflects well on the Institute ... and the real estate profession*" (Rule 13.1)

[39] Following investigation of a complaint, REINZ could take one of a number of steps, including referring the matter to a Regional Disciplinary Sub-Committee, which could, in turn, make orders of censure and impose fines against the salesperson's employing agent; (Rule 16.22.1).

[40] Therefore, the appellant's alleged conduct in this case could have been the subject of a complaint and/or disciplinary action under the 1976 Act.

### *Step 2*

[41] It is for us to consider the evidence and determine whether a finding of unsatisfactory conduct is appropriate.

### *Step 3*

[42] Should the Committee's finding of unsatisfactory conduct be confirmed, only orders which could have been made against the Appellant under the 1976 Act are available to the Tribunal by way of penalty

### ***The Oral Evidence of Mrs Long***

[43] We not only have the benefit of a detailed amended brief of evidence from Mrs Long dated 1 August 2011, but also she gave oral evidence before us and was, of course, carefully cross examined. Much of her evidence is covered in the factual outlay set out above. However, she states that she had no knowledge of any attempt by the Malcolms to buy the paper roads. She referred to the history of the saga in some detail and to relevant documents.

[44] In her evidence brief of 1 August 2011, Mrs Long admitted that, in retrospect, she could have made things clearer to the appellant in respect of the Southern paper road and feels that her health issues at the time may have contributed to her failure to have addressed the issue better with and for the appellant. She noted that if, on 25 September 2008, she had checked her file and noted again the vendors' (the Nottages) letter to the local Council dated 16 February 2007, she would have explained to the appellant that the vendors had considered purchasing the Southern paper road but decided not to proceed with such an attempt because neighbours (the Malcolms) had wanted to keep it available as an accessway in case they (the Malcolms) subdivided their land. Mrs Long felt that even had she gone into that further detail, nothing would have changed because she had said in her email of 25 September 2008 to the appellant that the vendors had not attempted to purchase the Southern paper road and this indicated, she felt, that the position with it was unclear.



[45] As she also put it, one might have thought that the appellant and/or his solicitors would have attempted to clarify the position with the local Council and/or by contacting the Malcolms. Also, if the appellant had told Mrs Long that he wished to purchase the Southern paper road, she feels she would have suggested that he include investigation of its status as a condition in the agreement for sale and purchase of the section from the Nottages.

[46] It also seems that Mrs Long may have been influenced by her knowledge that, by then, the Malcolms had moved the access to their property northwards and the vendors thought it extremely unlikely that the Malcolms would now be opposed to the purchase by them, or by a purchaser from them, of the Southern paper road.

[47] Mrs Long stated her surprise that the Nottages, as vendors to the appellant, had accepted his final offer of \$162,500 given their expectation of a much higher figure. She felt that it was unlikely they would have accepted anything less had the appellant raised with them that the Southern paper road might not be available for purchase by him.

[48] Inter alia, Mrs Long emphasised that at no stage did she intentionally mislead the appellant about any facts relating to the property and that she felt she had gone out of her way to help him at all stages. She again noted that if acquisition of the Southern paper road was so important to the appellant, he ought to have raised the matter with her so that it could be made a condition of the agreement for sale and purchase and investigated for him in good time with the Council, the neighbours, and considered by his solicitors.

[49] She emphasised that this is her only complaint in 24 years of work in the real estate industry and it has caused her much distress.

[50] Mrs Long said that she had found the vendor (Mr Nottage – with whom she dealt) a most sincere and genuine person and does not doubt any of his statements to her. She also fulsomely apologised to the appellant for her error and all the stress and trouble which has resulted for him.

[51] We record that the appellant then cross examined Mrs Long in some detail in a most intelligent manner, which is not surprising as he is a highly regarded school teacher.

[52] The appellant emphasised his concern that Mrs Long had not contacted Mr Nottage and put to him the two specific questions the appellant had wanted answered in September 2008. Mrs Long responded that she could not explain that and felt her health issues at the time affected her concentration and that it was all in the context of her approaching the vendor about price. The two questions were:

- “1. Have they ever attempted to purchase all the Paper Road that bounds the property and, if yes, was there any opposition from the Council or from the neighbours or any other party?”*
- 2. In relation to the purchase of the Paper Road they are currently buying [the Western strip], has there been any opposition from the Council, neighbours or any other party?”*

[53] The appellant constantly emphasised to us his concern that these two questions were not put to the vendor by Mrs Long. She stated to us that she accepted that acquiring the Southern paper road to add to the property would be a benefit to some people but not necessarily to others, and that the property (a section) acquired by the appellant had great location and views. However, Mrs Long seemed to agree that, generally, people would think it a benefit to have vacant land next door.

[54] In cross examination, Mrs Long admitted again that it was an oversight on her part that she did not check back on her file in September 2008 to see the earlier correspondence from Mr Nottage which would have shown that there had been effort, to some degree, by him to ascertain whether he might be able to buy the paper road in question (i.e. the Southern paper road).

[55] It was put to her that her newspaper advertisement indicated that the opportunity may exist to buy the Southern paper road when, in fact, it did not and that she should have disclosed this. She responded "*well at the time it was all very vague*" but accepted that there had been an oversight on her part not to go back on her file and inform the appellant that there had been some type of attempt by Mr Nottage to buy the paper road in question but that had been thwarted by Mr Malcolm.

[56] Inter alia, Mrs Long admitted that she had not checked with the neighbour Mr Malcolm to see if he had changed his mind about opposing the selling of the paper road by the Council as she had relied on knowing Mr Nottage to be thoroughly honest. She was also conscious that whatever was the attitude of Mr Malcolm, he could change his mind. Consequently she had never said that the paper road could be purchased but only that it "*may*" be possible to purchase it.

### **Discussion**

[57] It is submitted for Mrs Long that her statements that there was a possibility of acquiring the Southern paper road from the TDC were not inaccurate as they were made at an early stage in the marketing process when the vendors had indicated to Mrs Long in their notes that they thought the neighbours would not object to purchase of the paper road. It is also submitted for Mrs Long that she had expressed the ability to acquire the Southern paper road as only no more than a possibility.

[58] Mrs Long acknowledges that her e-mail statement of 25 September 2008 that: "*The vendors have not attempted to purchase the other portion of paper road*" could have *been* clearer. She could have consulted the vendors' letter to the TDC which was on her file. She could, therefore, have responded more precisely to say that the vendors had considered purchasing the Southern paper road but, since the neighbours had wanted to keep it available as an access way in case they subdivided, the vendors had decided not to try to acquire it from the TDC.

[59] It is put for Mrs Long that her e-mail statement, although less detailed than it could have been, was not in itself inaccurate because, although the vendors had made some preliminary enquiries of the neighbours, they had not taken any firm steps to try to acquire the paper road. For instance, they had not approached the TDC in relation to purchasing it and they had not tried to negotiate with the neighbours.

[60] It is also put for Mrs Long that she had no dishonest intent in responding as she did. Mrs Long had cancer issues at the relevant time. She believes that she may have failed to check the letter to the TDC and give a more detailed answer because of these issues.

[61] The only motive which Mrs Long could have had to mislead Mr Russell was to ensure the sale of the property was concluded to earn her commission. It was noted that the commission Mrs Long earned on the eventual sale was \$2,113.20 plus GST and before tax. Mrs Long has had a long and successful career in real estate with no other complaints. She is of good character. She has attested that she would never risk her reputation for such a sum. She had wanted Mr Russell to undertake a thorough investigation of the property. She encouraged Mr Russell to visit the TDC because of her concerns about various aspects of the property. She arranged such an appointment, picked Mr Russell up and drove him to the TDC. There is no evidence that Mrs Long had anything but goodwill towards Mr Russell.

[62] It is further submitted that Mrs Long's statement (that the owners had not attempted to acquire the Southern paper road) did not cause Mr Russell any loss and merely amounted to an indication that the position with regard to the Southern paper road was unclear and, in addition, even if she had responded in more detail, until Mr Russell investigated the current position with the neighbours, the TDC, and probably his solicitor, it would remain unclear.

[63] As the Committee pointed out, the neighbours could have objected to the paper road being added to Mr Russell's land regardless of whether they had turned down the idea before; or they could have indicated no opposition earlier, but then later changed their mind; and it was Mr Russell's decision not to investigate further and clarify the current position; and it was Mr Russell's decision not to obtain the neighbours' commitment to allow him to purchase the Southern paper road prior to purchase, or to insert a condition to that effect into the agreement for sale and purchase.

[64] It is submitted for Mrs Long that if Mr Russell had tried for a lower purchase price on the grounds that the neighbours might not consent to his acquisition of the southern paper road, the vendors would *have* been unlikely to accept that. Mrs Long has confirmed that she was surprised that the vendors accepted the final purchase price as they did, and that during the sale process they were adamant that the value of the property was considerably higher than the price they accepted. In addition, the vendors were of the view that, because of changed circumstances, the neighbours would probably not oppose acquisition of the Southern paper road by the vendors or the appellant.

[65] It was put firmly to Mrs Long that fraud was being alleged against her. She responded that there was no deliberate concealment of anything on her part but simply an honest oversight. She was pressed that there was never the opportunity for the purchaser of the Nottage property to purchase the Southern paper road (i.e. adjoining the South of it), but she maintained that the possibility always and still does exist.

[66] There was evidence from a Mr W J Vining who is the manager at Bayleys, Nelson, for whom Mrs Long works. He said that the paper road in question is inaccessible, unusable, and unformed and that the Malcolms' interest in acquiring it had been that it would facilitate them obtaining a second title (to their lands in the

area) which, apparently, would have resale benefits for them. Mr Vining considers that there have never been proper negotiations with Mr Malcolm regarding purchasing the Southern paper road (from the Council) and that he might not necessarily oppose that if there were proper negotiations in a businesslike way. Mr Vining also expressed the view that the Nottage property did not need to acquire the Southern paper road as the property which the appellant purchased was a marketable parcel by merely having had added to it the paper road adjoining it to the West.

[67] As well as filing briefs of evidence, and referring understandably to evidential matters in his submissions, the appellant gave oral evidence also. However, most of that has been covered above. He emphasised that he regards it as a fact that Mr and Mrs Malcolm opposed any closure of the Southern paper road to enable it to be added to the Nottage property, and he was not advised of that, and there was never any opportunity for him to buy it as purchaser of the Nottage section.

[68] The appellant is of the very strong view that Mrs Long failed in her duty as a real estate agent by not disclosing that issue to him and by endeavouring to make it a positive attribute of the property he acquired that there was the possibility of adding to it the land in the Southern paper road. Inter alia, he put it that Mrs Long should never have relied on advice about the matter from Mr Nottage as vendor. He accepts that he has acquired desirable rural land with nice views. However, his concern is that without the land comprising the Southern paper road being added, his building platform is only of a modest size and, also, he would have had more flexibility with site placement of a house in terms of boundaries.

[69] It can be said in favour of Mrs Long that at all stages she used very conditional language in terms of whether there was a likelihood of the Southern paper road becoming available to an owner of the Nottage property. Also it seems to us that it may very well still be available if negotiations were commenced and handled in a sensible manner.

[70] This is not a case of a conscious effort by a real estate licensee to mislead. There is no ingredient of dishonesty. The failure to which Mrs Long admits is rather understandable in all the circumstances and her attitude seems to have always been one of cooperation and helpfulness to the appellant, and for some time genuine regret. One can understand the concern of an intelligent man like the appellant, but we do not think that this is the right forum for him to be addressing whatever his loss may be. We note that the appellant is of the view that Mr and Mrs Malcolm will indefinitely oppose any effort of the appellant's to acquire the land currently in the remaining Southern paper road. He seems to have approached them about that in fairly recent times, but we do not know how realistic his proposition to them was.

[71] We realise that the appellant asserts that there has been serious misconduct on the part of Mrs Long in terms of the facts outlined above and that it is wrong for us to be dealing with the matter on the basis of unsatisfactory conduct. We have given that rather important submission of the appellant's much consideration but are firmly of the view that this is a situation of unsatisfactory conduct (as the Committee found), on the part of Mrs Long only and there has not been misconduct.

[72] It is submitted for Mrs Long that, in all the circumstances, her conduct was at the lower end of the scale for unsatisfactory conduct. We agree. We accept that

Mrs Long is very sorry indeed about the way things have turned out and that Mr Russell regrets his purchase.

[73] Because we confirm the finding of unsatisfactory conduct, the issue of penalty arises. We have previously held that findings of unsatisfactory conduct, as distinct from findings of misconduct, are analogous to findings made by Regional Disciplinary Sub-Committees under the old statutory framework, *CAC 10024 v Downtown Apartments Limited* at [39] to [44]. The orders which could be made by Regional Disciplinary Sub-Committees (for breaches of the Real Estate Institute of New Zealand Rules) were a maximum fine of \$750 and censure. However, these were orders against the approved salesperson's employing agent rather than the salesperson or branch manager personally.

[74] As covered above, neither the Committee nor this Tribunal has the power to impose a penalty on Mrs Long. The relevant conduct occurred when the 1976 Act was still in force. By virtue of section 172(2) of the 2008 Act, the 1976 Act *governs* penalty. Penalties under the 1976 Act could only be ordered against a member, i.e. a licensed real estate agent who belonged to the Real Estate institute of New Zealand. At all relevant times, Mrs Long was an approved salesperson only. She was not a licensed real estate agent and not a member of the institute. As with the second defendant in *Downtown Apartments*, the Tribunal is therefore prevented from ordering any penalty against Mrs Long.

[75] No orders by way of penalty could be made against the appellant in respect of our finding of unsatisfactory conduct which was the finding of the Committee at first instance. The legislative framework prevents us from awarding the appellant any compensation which, in any case, would have required an offence of misconduct. For the above reasons, this appeal is dismissed so that the decision of the Authority (through its Committee) stands.

[76] When we stand back and absorb all the above, we are conscious that, as Mrs Long now genuinely regrets, she failed to provide proper background to the appellant as he has asserted and as we have covered above. However, this was an understandable enough error for a person unwell at material times and, also, in terms of her not having accessed (nor needing to have) the relevant information on her file for quite some months, and also being in good faith of the view that it did not really make much difference to the overall scene whether the two questions which the appellant wished her to put to the vendor were accurately answered or not. It had been ten months since the material which ought to have been disclosed to the appellant had been viewed by Mrs Long on her file when she processed his request for further information in September 2008.

[77] We simply confirm the finding of the Committee of the Authority of unsatisfactory conduct by Mrs Long and also the finding that there be no penalty in all the circumstances.

[78] We are a little concerned that the appellant has been well aware, and has accepted, from the early stages of these proceedings that neither the Authority nor this Tribunal had power, in this particular case, to award compensation in any way because of the date of the offending. It seems that the appellant has pursued these proceedings in quite some detail in the hope of uncovering evidence which he can use in some other forum, presumably, the civil jurisdiction of the District Court. We

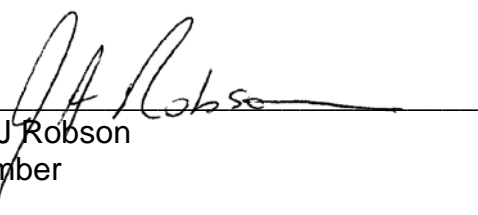
do not think that is a proper use of this forum where our focus is on the nature of the conduct of a particular real estate agent/licensee.

[79] We realise that it has also been submitted by Ms Maslin-Caradus (for Mrs Long) that any public interest in having Mrs Long's name published has already been served by publication at the level of committee of the Authority; and that this Tribunal should make an order prohibiting further publication of Mrs Long's name in respect of this matter. However we decline to grant suppression of name for Mrs Long.

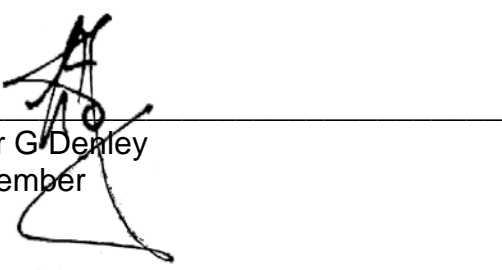
[80] The issue of costs and disbursements does not seem to arise but we reserve leave to apply on any consequential matters.

  
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Ms J Robson  
Member

  
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Mr G Dentley  
Member