BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 31

READT 019/11

IN THE MATTER OF	charges laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**REAL ESTATE AGENTS AUTHORITY (CAC 10017)**
	Prosecutor
AND	**PAUL DAVID MILLER** (Licensed salesperson)
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms J Robson - Member
Mr J Gaukrodger - Member

HEARD at QUEENSTOWN on 18 and 19 February 2013 (with subsequent written submissions)

DATE OF DECISION 24 April 2013

COUNSEL

Messrs M J Hodge and L J Clancy for prosecutor
Mr M E Parker and Ms M R Cowan for defendant

DECISION OF THE TRIBUNAL

The Issue

The Charges

[1] The defendant is charged by the Authority with misconduct as a real estate agent. Amended charges filed at our registry on 8 March 2012 read as follows.

> *"1. Following a complaint made by David and Edna McAtamney (complainants), Complaints Assessment Committee 10017 charges Paul David Miller (defendant) with misconduct under s.73(a) of the Real Estate Agents Act 2008 (Act), in that his conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful."*

Particulars

[a] Failing to disclose to the complainants a conceptual development plan in his possession, provided by the neighbouring school, showing that the school proposed to build on the playing field in front of the property at 20 Scaife Place, Wanaka (property).

[b] Misleading the complainants by advising them that there was no concern the neighbouring school would build on the playing field to the north of the property and any buildings, if built, would be situated well away from the area in front of the property.

2. In the alternative, Complaints Assessment Committee 10017 charges the defendant with misconduct under s.73(b) of the Act in that his conduct constitutes seriously incompetent or seriously negligent real estate agency work.

*"**Particulars:***

[a] Failing to disclose to the complainants a conceptual development plan in his possession, provided by the neighbouring school, showing that the school proposed to build on the playing field in front of the property;

[b] Misleading the complainants by advising them that there was no concern the neighbouring school would build on the playing field to the north of the property and any buildings, if built, would be situated well away from the area in front of the property"

[2] It is not in dispute that the conceptual development plan was in the defendant's possession at material times and that he did not disclose it to the complainants.

[3] The defendant does not accept that he misled the complainants by making the representations alleged and denies making them.

[4] A few days before the fixture, the defendant accepted guilt at the level of unsatisfactory conduct.

Background

[5] In 2008, the property was owned by the defendant together with his wife, Jeanette Miller, and Race & Douglas Trustees Ltd.

[6] On 31 October 2008 the property was listed for sale with W Thompson & Co Ltd, trading as Harcourts Wanaka. The defendant, a salesperson with Harcourts Wanaka, was recorded as the listing agent on the listing agreement.

[7] The property was advertised on the Harcourts website under the heading *"Stunning ... Style, Location, Views!!"* Other Harcourts' marketing materials similarly emphasised the property's *"stunning views"* and showed the defendant as the salesperson to contact in respect of the property.

[8] In early November 2008 Mrs Kate Bull (nee Wilkins), another salesperson with Harcourts Wanaka, introduced the complainants to the property.

[9] On 7 November 2008, a letter was hand delivered to the defendant by Mr Ronnie Moffat, the property manager at Mount Aspiring College. The letter concerned proposed development of the college's buildings and a conceptual development plan was enclosed highlighting areas of the college grounds on which building was proposed.

[10] By a 27 January 2009 sale and purchase agreement, the complainants agreed to purchase the property for $731,000.

[11] It is not in dispute that the defendant failed to disclose a copy of the development plan to the complainant at any stage prior to the transaction settling.

[12] It was put to us that, in particular, there are conflicts of evidence in respect of the following key questions:

[a] Whether or not, shortly after the letter dated 7 November 2008 (with the conceptual development plan) was delivered to the defendant, the defendant made a comment to Mr Moffat that he was *"going to have to disclose this"*, or words to that effect;

[b] Whether or not the defendant told Mrs Bull, on being asked about the college's development plans, that the college was planning to build a science block, but that this would be well away from the part of the grounds close to the property;

[c] Whether or not, in December 2008, Mrs Bull made a comment to Mr Todd, a builder and Mrs McAtamney's cousin, that the complainants would *"never be built out"*, referring to the college grounds adjacent to the property;

[d] Whether or not, in February 2009, the defendant said to John Greenwood, a prominent lawyer friend of the complainants, that there was no concern about building on the college grounds adjacent to the property;

[e] Whether or not, in or after July 2009, the defendant made a comment to Phil Gilchrist, his manager at Harcourts Wanaka, when asked about the college development documents, to the effect that he had *"put them straight into a drawer without reading them"*.

[13] As we cover below, we find all those questions to have been answered in the affirmative except, with regard to [c] above, that Mrs Bull merely said that she was sure that the defendant would be unlikely to build a house if buildings were to be erected on the adjoining school grounds. Mrs Bull felt that Mr Todd misunderstood her and that she would never have said that the view would never be built out.

The Act

[14] It is appropriate at this stage to set out s.73 of the Real Estate Agents 2008 which defines *"misconduct"* as follows:

> *"**73 Misconduct***
> *For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—*
> *(a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
> *(b) constitutes seriously incompetent or seriously negligent real estate agency work; or*
> *(c) consists of a wilful or reckless contravention of—*
> *(i) this Act; or*
> *(ii) other Acts that apply to the conduct of licensees; or*
> *(iii) regulations or rules made under this Act; or*
> *(d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee."*

[15] Section 72 of the Act defines *"unsatisfactory conduct"* as follows:

> *"**72 Unsatisfactory conduct***
>
> *For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—*
>
> *(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
> *(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
> *(c) is incompetent or negligent; or*
> *(d) would reasonably be regarded by agents of good standing as being unacceptable."*

The Facts

[16] We heard extensive evidence but narrate the facts below.

[17] On 31 October 2008, the defendant decided to sell his desirable residential home at 20 Scaife Place, Wanaka. It seems that sad family matters arose to cause him and his wife to decide to sell that home. He had gone to much care and effort to have the house architecturally designed and built well. The defendant has been a very experienced, respected, and successful real estate salesperson in Wanaka for many years.

[18] Because he worked for Harcourts, he wished that real estate agency firm to sell the property and he listed it in the usual way as a vendor but with himself as the listing agent. As it happened, one of his colleagues at Harcourts, Mrs Kate Bull, had clients (the complainants) interested in buying such a property. She introduced those clients to the property on 6 November 2008 and handled all dealings with them subsequently.

[19] The property was advertised on the Harcourts website under the heading *"Stunning ... Style, Location, Views!"*. Other Harcourts marketing materials similarly emphasised the property's *"stunning views"* and showed the licensee as the agent to contact in respect of the property.

[20] Rather curiously, on 6 November 2008, after one of the purchasers, Mrs E McAtamney, had viewed the property and become rather interested in she and her husband purchasing it, Mrs McAtamney was told by a real estate agent friend, working for another agency in the area, of a rumour circulating that an adjoining neighbour to the property, Mount Aspiring College, had plans to develop new building structures. Her friend had told her that it was being suggested that the college contemplated building a science block on the playing field adjoining the defendant's residence in a way that might affect the property's wonderful mountain view.

[21] As a result, Mrs McAtamney raised that rumour with Mrs Bull, the agent, who in turn raised that concern with the defendant licensee vendor. The defendant contacted the Principal of the college who apparently informed the defendant that the intended science block would be located away from the boundary and would not affect the property's views. The defendant passed that information on to Mrs Bull and stressed that she tell the McAtamneys to contact the college for themselves about that issue. Mrs McAtamney did that and we refer further to her evidence below.

[22] However, the very next day the college delivered what has been termed a *"good neighbour"* letter to persons in the area stating as follows:

> *"Grant Rudendam*
> *Board chair*
>
> *Mount Aspiring College*
> *7 November 2008*
> *Mount Aspiring College Development for the next 10 years*
>
> *The Occupier*
>
> *To Whom It May Concern:*
>
> *Future plans.*
>
> *We are writing to you as "good neighbours" to let you know our plans for placement of future buildings to accommodate our ever increasing roll here at the college.*
>
> *I have attached a plan showing our planned footprint increase for the next 10 years as indicated in yellow on the conceptual drawings.*
>
> *We will be undertaking this work over the next few years depending on roll increases that take place. We have used roll projections running from 1991 to 2018 to try and predict demand for facilities and we have always fallen short or predictions in this very vibrant area of the country.*
>
> *Stage 1 of the process will be placement of new classes for 2009 indicated in the pink rectangle of the plan.*
>
> *Stage 1 will also involve placement of an outdoor pursuits building to store kayaks and climbing gear as well as the relocation of the tractor shed.*

Stage 2 we hope will be the construction of a new science facility shown in the pink square.

Should you wish to discuss anything or have concerns about this development plan please call me on the below number or write to me here at school.

Sincerely yours,

Ronnie Moffat
Property Manager
Mount Aspiring College
Ph 03 443 9902
Cell 027 631 3387

Copy of letter hand delivered to neighbours.

Hand delivered to neighbours by me."

[23] That circular letter to neighbours attached a helpful plan of likely buildings to be erected at the college over the course of the next 10 years. That plan clearly indicated the likelihood of buildings being erected over that time on the playing field area adjoining the property at Scaife Road, Wanaka and showed that they would considerably impact upon its view.

[24] The defendant had conferred not only with the college's principal but also with its property manager. We refer more specifically below to the defendant's evidence. Upon receiving the said good neighbour letter, he brooded over its contents for the weekend and convinced himself that there was no need to disclose that good neighbour letter to Mr and Mrs McAtamney because of the discussions he had had with the principal and the property manager. This meant that Mr and Mrs McAtamney, the complainants, were unaware of the detail of the college's building plans in the relevant playing field area and entered into an unconditional agreement to purchase 20 Scaife Place.

[25] As it happens, in February 2009 prior to the actual settlement of the purchase, they were visited by a prominent Wellington/Auckland property-specialist lawyer friend and his wife (Mr and Mrs Greenwood) who came to view the property, which the McAtamneys were purchasing. At the property that lawyer spoke to the defendant and was told that there was no concern about building on the college grounds adjacent to the property. There was never any mention to that lawyer by the defendant of the school's said plans for placement of buildings on the relevant playing field area.

[26] As stated above, that good neighbour letter had been hand delivered to the defendant on 7 November 2008 by Mr R Moffat the property manager at the college. The complainants agreed to purchase the Scaife Place property for $731,000 under an agreement for sale and purchase dated 27 January 2009. It is not in dispute that the defendant failed to disclose a copy of the 7 November 2008 good neighbour letter and the associated development plan to Mr and Mrs McAtamney at any stage prior to their purchase transaction settling.

[27] As we cover below, the defendant now accepts that, with hindsight, he should have disclosed to Mr and Mrs McAtamney the 7 November 2008 good neighbour letter (with its attached plan) from the college.

Evidence from Mrs McAtamney (a Complainant)

[28] Mrs McAtamney's brief narrated how she had builders look through the property on 16 December 2008 when Mrs Bull was present as agent. One of the builders asked Mrs Bull if anything was going to happen at the school grounds which are at the back of the Scaife Place property. Mrs Bull said she was sure that the defendant would be unlikely to build a house if buildings were going to be put up on the adjacent school grounds.

[29] Mrs McAtamney then covered hearing a rumour that Mount Aspiring College intended to build a new science block. She spoke with someone at the college and was told that the proposed science block was to be located on the lower level of the College because of proximity to services in that area and the lack of them in the top field area adjoining the property. Mrs McAtamney put it that *"there was no indication from this conversation that any building work was planned for the top field area of the Mount Aspiring College"*. An agreement for sale and purchase was entered into on 27 January 2009 with settlement due for 2 March 2009.

[30] Mrs McAtamney covered how her friends John and Melanie Greenwood visited on 21 February 2009 and wanted to see the property being purchased. That was arranged with the defendant and the McAtamneys visited with the Greenwoods that day. Inter alia, she heard Mr Greenwood ask the defendant what the field area was at the back of the property. The defendant said that it was a school field for sport. Mr Greenwood then asked the defendant if there were any building plans for the area. The defendant replied with words to the effect of *"no, you will never be built out there"*.

[31] On 4 July 2009 Mr and Mrs McAtamney discovered that building work had commenced at the college on the top field near their property so they contacted Mr R Moffat, the property manager of the college. He then provided them with a copy of the letter and concept plans which the college had delivered to all neighbouring properties in November 2008. To that point she had been unaware of the existence of these documents or the information contained in them. She rang Mrs Bull to discuss the situation and, a little later, the manager of Harcourts at Wanaka contacted her and explained that Harcourts had not been aware of the school building plans or that the school had notified its neighbours of them.

[32] In the course of her cross-examination Mrs McAtamney emphasised that the mountain views were a paramount factor to her and her husband in purchasing the property. She would not accept that the views remain unobstructed and *"completely unchanged"*, as Mr Parker put it to her.

Evidence for Mr Greenwood

[33] Mr Greenwood is a prominent lawyer in Wellington and Auckland who specialises in property law. In his brief, he confirmed that on 21 February 2009, as Mrs McAtamney had stated, he asked the defendant at the property if any further building was proposed on what he described as *"the parkland area of the Mount Aspiring College grounds in front of the property"*. He said he asked that question

because, with school sites, building programmes are always in place. He added that the defendant's emphatic response was that there was no concern about building taking place in front of the McAtamney's property and that the school parkland would remain as park. Mr Greenwood added that the defendant indicated that, if any buildings were to be built, then they would be situated well away from the area immediately in front of the Scaife Place property.

[34] In giving oral evidence Mr Greenwood was pressed by Mr Clancy to state his best recollection of how the defendant had responded to the question from Mr Greenwood whether any further building was proposed on the parkland area of the college grounds adjacent to the property. Mr Greenwood said that he and the defendant went to the back of the McAtamney's property where there is a gate leading onto that parkland and, at that stage, Mr Greenwood had not realised the land was college land. He said he asked the defendant specifically whether there would be any building out the front of the property and then said to us: *"he was reasonably emphatic to me pointing out that no there'd be no buildings built out the front. The building programme for the school was, and he pointed to just down to the left hand side of the property, quite a way down"*.

[35] A little later in his oral evidence, Mr Greenwood told the Tribunal that because of his own experience as chairperson of a school board he specifically asked the defendant the question whether or not there would be any buildings built in front of the McAtamney's property. Mr Greenwood said that the defendant's response *"was a very resounding no*. *And he pointed to the development programme of the school. At that stage I had no idea there was a school there. Mount Aspiring School. He pointed quite a way from me to the property itself as to where the building programme would be. It was quite short. It wasn't a long conversation"*. A little later Mr Greenwood added that, at that stage, he was not aware of the land contour whereby the college grounds are on two distinct levels and that is not at all obvious from the complainant's property. There is quite a substantial drop from one level to the other (about eight feet or so) and that is not obvious from the complainant's property.

[36] Under cross-examination from Ms Cowan, Mr Greenwood added that, when they were back inside the house, the defendant again mentioned in the dining room, while looking out the front dining room window, that there would be no buildings. In the course of Mr Greenwood's conversation with the defendant, the latter pointed out that the area in issue was school ground rather than a park. It was also clarified that the defendant had stated to Mr Greenwood that there would be a building programme of some type a fair way to the left of the complainant's view.

Evidence from the Defendant

[37] The defendant stated that the first he had heard of any building development proposals by the college were from the rumour conveyed to Mrs Bull. Accordingly, on 6 November 2008 he rang the school and spoke with Mr W Bosley, its Acting Principal at the time, and confirmed that there were development plans afoot. He said he was told that the college had plans to build on the school grounds *"but no mention was made that any building would be in front of or close to the property"*.

[38] The defendant said that the very next day, on 7 November 2008, Mr R Moffat (the school property manager) hand-delivered a letter and conceptual site development plan to the defendant's home. The defendant was not there at the time.

The defendant said he recalled looking at the plan but thinking it would not adversely affect his property, nor the views out to the mountains, and it was only a conceptual site development plan which was dependant on roll growth, and was a 10 year plan.

[39] The defendant recalled speaking to Mr Moffat on either 7 or 10 November 2008 about this issue and asking what *"conceptual"* meant and whether *"it was a maybe or a definite plan"* and whether it was likely to change. He said that Mr Moffat responded that the plan was only in draft as it clearly stated and that Mr Moffat thought it was a *"top end of the scale plan"* or words to that effect, and the defendant understood that what was shown on the plan would be the maximum percentage of site cover of buildings on those grounds.

[40] The defendant denied representing to the complainants that the school would never be able to build on its land near the property at Scaife Place.

[41] He also stated that he emphatically believed that the complainants had full knowledge of the school's intended plans as they first alerted him, via Mrs Bull, of the school's intended future development. He also took the view that Mrs McAtamney had made her own enquiries to satisfy herself of development plans for the school and was aware of them. He asserted that, having made their own enquiries, the complainants came to know of the possibility of future developments at the school on the day they first viewed his property, 6 November 2008, or at least in the very early stages. He added *"I reasonably assumed they (and/or their advisors) had this knowledge having made direct enquiry of the school, and therefore it never occurred to me that it was necessary to show the McAtamneys the development concept plan – I honestly thought that they had the information for themselves. I understand now that this was a mistake and I am very sorry for that."*

[42] He then continued in his evidence-in-chief:

> *[17] I have never said that the home will never be built out but in my opinion the views would never have been built out. Those views are the views to the mountains – which is how the home was designed and built. This is obvious by the large scale windows in the lounge and kitchen and the way the property is situated on the section"*.

[43] Later in his evidence-in-chief the defendant totally refuted any conversation with Mr Greenwood discussing building plans on the school field and saying to Mr Greenwood that *"No you will never be built out there"*. The defendant only remembered discussing the aspect of the views of the mountains with Mr Greenwood.

[44] At the end of his typed brief the defendant stated

> *"[42] I am sorry that my judgement erred in such a way as to not provide the McAtamneys with a copy of the plan when I received it. I have set out above the reasons why I didn't and that is that the McAtamneys were the ones who first alerted Kate Bull, and her to me, to any development plans with the school and it was after that that I made enquiries.*
>
> *[43] Also, as a result of my enquiries I was aware that the plan was a ten-year development plan and the draft conceptual plan did not show any buildings*

directly in front of the property or that the mountain views would be obstructed in any way".

[45] He also emphasised that this procedure has caused him a huge amount of stress and concern.

[46] The defendant gave further evidence-in-chief and, of course, was cross-examined thoroughly. By that point he felt that his total refutation of Mr Greenwood's evidence about school building plans was *"a bit strong"* and said he could not be sure that he did not have such a discussion as Mr Greenwood stated.

[47] The defendant totally refuted that he had known prior to 6 November 2009 that the school had a building development programme. He seemed to be implying that his error of judgement in not disclosing the school circular was due to understandable stress due to the health of a family member which was the reason for him selling the property.

[48] Under cross-examination, the defendant seemed to now accept that Mr Greenwood's evidence is correct that the defendant had been emphatic that there would be no building in the scope of the mountain view from the property. Inter alia, the defendant seemed to be saying that there were no buildings in front of the property even now.

[49] The defendant was taken carefully through his discussion with Mr Moffat when he concluded that most development plans for the school would be on the lower level but there would be a science laboratory on the upper level well away from the view aspect of the property. He also covered his second discussion with Mr Moffat after the circular to neighbours had been issued by the college. The defendant then decided that the college's building plans did not affect the value of his property but he seemed to accept that, with hindsight, he should have disclosed the school plan to the complainants. However, he insisted that: *"I made my decision at the time based on what Mr Moffat had told me and my assessment of the views"*.

Evidence of Mr Moffat

[50] Mr Moffat was among those witnesses who provided a typed brief and made himself available for cross-examination. That was kept very relevant. Part of his typed brief stated that some days after he had delivered the college's conceptual site development plan to the defendant's property, he was on the school grounds near that property when the defendant leaned over the fence and said *"you know what that means now, it means that I'm going to have to disclose this"* or words to this effect. Mr Moffat took that to mean that the defendant was referring to the college letter to neighbours with its attached plan. He recollected that the defendant had commented that he would now need to erect a 1.8 metre fence.

[51] Mr Moffat was thoroughly cross-examined by Mr Parker. We note that Mr Moffat then explained that he recollected his said communications with the defendant because a point on his mind was whether a neighbour could stop the college building a classroom on its school grounds. He mentioned a number of times that he and the defendant had been good friends for about 25 years.

Misconduct

[52] Was the conduct of the defendant misconduct under ss.73 of the Act? Section 110(4) of the Act provides that if, after hearing any charge against a licensee, we are satisfied that the licensee, although not guilty of misconduct, has engaged in unsatisfactory conduct, we may make any of the orders that a Complaints Assessment Committee may make under s.93. The defendant has accepted that, in not disclosing the conceptual development plan to the complainants, he is guilty of unsatisfactory conduct.

Disgraceful conduct – refer s.72(a) (Charge 1)

[53] The leading Tribunal authority on disgraceful conduct under s.72(a) remains *CAC v Downtown Apartments Limited* [2010] NZREADT 06. There we held:

> *"[55] The word disgraceful is in no sense a term of art. In accordance with the usual rules it is given its natural and popular meaning in the ordinary sense of the word. But s.73(a) qualifies the ordinary meaning by reference to the reasonable regard of agents of good standing or reasonable members of the public.*
>
> *[56] The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess. See Blake v The PCC [1997] 1 NZLR 71].*
>
> *[57] The 'reasonable person' is a legal fiction of common law representing an objective standard against which individual conduct can be measured but under s.73(a) that reasonable person is qualified to be an agent of good standing or a member of the public.*
>
> *[58] So while the reasonable person is a mythical ideal person, the Tribunal can consider, inter alia, the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of ... defendant.*
>
> *[59] So in summary the Tribunal must find on balance of probabilities that the conduct of the ... defendant represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public."*
>
> [Emphasis added]

[54] As we explain below, we consider that the defendant's conduct is sufficiently serious as to be likely to be regarded by agents of good standing or reasonable members of the public as disgraceful.

[55] As set out in *Downtown Apartments*, s.73(a) allows us to assess whether conduct is disgraceful by reference to agents of good standing or reasonable members of the public. Given the special knowledge, skill, training and experience of an agent, Mr Clancy puts it that the conduct alleged in this case is particularly reprehensible; and that the hypothetical agent of good standing would well appreciate the potential consequences to a purchaser in omitting to disclose

information as to proposed development on an adjacent property and misleading that purchaser by making misrepresentations as to the issue of the likelihood of building on that adjacent property.

Seriously negligent or seriously incompetent real estate agency work (refer s.73(b)) (Charge 2)

[56] For a finding of misconduct in respect of charge 2, we must be satisfied that the defendant's conduct was seriously incompetent or seriously negligent real estate agency work. Merely negligent or incompetent real estate agency work will be unsatisfactory conduct under s.72(c).

[57] We considered the scope of misconduct in the context of serious negligence recently in *CAC 10063 v Jenner Real Estate Ltd* [2012] NZREADT 68 where we followed our earlier decision in *Cooke v CAC 10031* [2011] NZREADT 27, and noted with approval the following definition of misconduct, set out in a decision of the New South Wales Court of Appeal, *Pillai and Messiter* (No 2) (1989) 16 NSWLR 197:

> *"Professional misconduct does not arise where there is mere professional incompetence nor deficiencies in the practice of the profession by a practitioner. More is required. Such misconduct includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration ..."*

[58] In the present case, if we accept that the defendant deliberately chose not to disclose information that he knew was relevant to the transaction to the complainants, a finding of serious negligence in teams of *Jenner* and *Pillai* would be available. Even if we find that the omission was not deliberate, we agree with Mr Clancy that to fail to disclose information of the type in issue amounts to negligence so serious as to portray indifference or an abuse of the privileges which accompany being licensed as a salesperson.

[59] If we find as a matter of fact that the defendant actively misled the complainants by making the representations alleged (particular (b) to both charges), it must follow that his conduct was deliberate and, at best, seriously negligent or seriously incompetent.

[60] It is submitted for the Authority that the defendant's conduct alleged involved real estate agency work, as defined by the Act, on the part of the defendant. We agree. Section 4 of the Act defines real estate agency work as *"any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction"*. Notwithstanding Mrs Bull's involvement, the defendant was the listing salesperson and he acted to bring about a transaction on behalf of, not just himself, but also his wife and, significantly, Race and Douglas Trustees Ltd, another part-owner of the property.

Conduct Prior to the Act Coming into Force

[61] 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.

[62] As we have held on a number of occasions in cases in which a defendant was licensed or approved under the Real Estate Agents Act 1976 at the time of the conduct alleged, and where the defendant has not been dealt with under the 1976 Act in respect of that conduct, s.172 creates a three step process for ascertaining our jurisdiction to pre Act offending (see *CAC v Dodd* [2011] NZREADT 01 at [65] to [67]:

Step1: Could the defendant 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 defendant under the 1976 Act in respect of the conduct may be made.

[63] The defendant was, at the time of the conduct alleged, an approved salesperson under the 1976 Act. He has not been dealt with under the 1976 Act in respect of the conduct in issue.

[64] Under rule 16.2 of the Rules of the Real Estate Institute of New Zealand Inc, made under s.70 of the 1976 Act, any person could complain to REINZ about, inter alia, 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"*.

[65] Following investigation of a complaint, REINZ could take one of a number of steps, including referring the matter to the Real Estate Agents Licensing Board.

[66] The defendant's conduct in this case could have been the subject of a complaint and/or a referral to the Board under the 1976 Act. As discussed above, the question for us is whether or not his conduct warrants a finding under ss.72 or 73 of the Act. In any case, our powers to impose penalty are limited by s.172(2) to what could have been ordered at the time of the offending i.e. as under the 1976 Act.

The Stance of the Defendant

[67] Generally speaking, counsel for the defendant seemed to be putting it that issues of financial loss to the purchasers, the McAtamneys, and the responsibility of the defendant in regard to enquiries made by those purchasers should resonate differently before us as compared with the forum for a civil claim, but that such civil aspects are part of the context of the charges against the defendant now before us.

[68] It is submitted for the defendant that he did not mislead the complainants and that any representation he made to them was accurate in terms of the information he had at the relevant time. It is also put that any advice he gave to the McAtamneys or to anyone associated with them, such as Mr Greenwood, occurred after the agreement for sale and purchase had been entered into and had become unconditional so that any such remarks from the defendant could not have constituted any kind of inducement upon which the McAtamneys relied.

[69] It was submitted that any statement made by the defendant was based upon information he had *"gleaned"* which comprised not just the conceptual plan, but information from the school's acting Principal (Mr Bosley) and from Mr Moffat the

college's property manager. Mr Parker put it that the information from those two persons seemed in some ways at odds with the conceptual development plan but can be regarded as confirming Mr Moffat's statements to the defendant, that the plan represented the outer limits of possible development. Mr Parker also put it that, generally speaking, the playing fields adjoining Scaife Place have been preserved for the benefit of that property's expansive views. We consider that the view has been irritatingly encroached upon by new school buildings from the point of view of the McAtamneys.

[70] We accept the submission of Mr Parker that there is no evidence that the defendant knew of the school's development plans until the rumour which Mrs McAtamney had heard was put to him. We also accept that the defendant then made immediate and direct enquiry of the acting school Principal (Mr Bosley) and immediately conveyed the outcome of that back to Mrs Bull, the real estate agent dealing with Mr and Mrs McAtamney. We accept that such information was immediately conveyed to the McAtamneys by Mrs Bull and that Mrs McAtamney was also told by her that the defendant encouraged them to make their own enquiries of the school, which they did forthwith.

[71] It is put that the defendant cannot ultimately be responsible for any failure of Mrs McAtamney to make sufficient enquiry with the school *"by making a too narrow enquiry"*. As we explain below, we do not accept that submission. Linked to that is a submission for the defendant that he is not expected, as part of his duty as a real estate agent, to be *"the handmaiden of purchasers making enquiries to satisfy themselves about the development on adjoining properties to that of one in which they are interested"*. We do not accept that submission as put.

[72] We accept the submission for the defendant that he is not responsible for the surprising failure by the school to mention to Mrs McAtamney that there was conceptual development plan in existence and being circulated to neighbours at the time. Had that been mentioned then, from the outset, Mr and Mrs McAtamney would have had a direct insight into what might occur on the playing fields adjoining the property.

[73] It seemed to be put for the defendant that he should receive credit for directing the McAtamneys to make their own enquiries of the college. We accept that submission to some extent but, as we explain below, the defendant should have been utterly frank from the outset in passing on to Mr and Mrs McAtamney his knowledge of the schools' building and development plans in relation to the playing field area.

[74] Mr Parker submitted that it is reasonable for the defendant to expect the prospective purchaser to make sufficient enquiry in such a situation. We do not accept the scope of that submission even though the McAtamneys made enquiry and took professional advice, although that advice now seems to have been inadequate. Despite the stance of counsel for the defendant, we are concerned with the conduct of the defendant and not about possible deficiencies from others who might have been assisting the McAtamneys. In this case the question about likely building by the school, put by the purchasers to the agents, should have been researched by the agents and not put back to the purchasers. In any case, the agent vendor did not disclose what he knew and what he should have known to be pivotal information.

[75] We do take into account the submission of Mr Parker for the defendant that Mrs McAtamney has a significant background in local planning. She has been a Council member and chairperson on the hearings panel of the Central Otago District Council and would understand such matters as height planes, set-backs, and the like, relating to zonings in urban and rural areas. Her evidence confirmed her experience and wisdom in such matters.

[76] We note Mr Parker's submission that, at material times, the defendant understood that there would be no building north of the property and that any building would be well to the left of the view; and that he had not really relied on the circulated plan but on his discussions with Messrs Bosley and Moffat.

[77] It is submitted that the defendant did not tell Mr Greenwood there was to be no building programme by the school but said that nothing would be built *"in front"* of that part of the property which had the great view. We can accept that there was a rather cute focus of the defendant on the *"front"* aspect, but Mr Greenwood was, at least in effect, asking whether any college building was likely to interrupt the property's wonderful view of mountains.

[78] There is also a submission for the defendant that we must recognise that the college's plan was *"conceptual"* and has not been borne out by subsequent development. We consider that the property's view has already been abrogated by new college buildings. We accept that the college had no obligation to advise neighbours of its proposed development plans and that its land was, of course, appropriately zoned.

[79] Generally, counsel for the defendant submit that the charge of disgraceful conduct is not borne out on any reasonable basis by the evidence, that there was no deliberate decision to conceal made by the defendant, and that he was entitled to expect that the enquiries, made by Mrs McAtamney and/or her professional advisers from the college, would be appropriate. As already indicated, we do not agree with those submissions and we expand our views below.

[80] It was submitted that *"in any event, Mr Miller's desire to embrace his responsibility at an early stage should be a matter of weight when considering this matter"*. We take that into account.

Further Discussion

[81] We record that prior, to the commencement of the hearing, we attended at 20 Scaife Place, Wanaka and took a view of the view and of the property and its environs in general.

[82] The effect of the charges is to allege that the defendant engaged in disgraceful conduct or, in the alternative, seriously incompetent or serious negligent real estate agency work by:

[a] Failing to disclose to Mr and Mrs McAtamney a conceptual development plan showing proposed building plans for the college grounds adjacent to 20 Scaife Place, Wanaka, and/or

[b] Misleading Mr and Mrs McAtamney by advising them that there was no concern that the school would build on the playing field adjacent to the

> property and that any buildings, if any, would be situated well away from the area in front of that part of the property which had the wonderful view of mountains.

[83] We have made it clear that there is no dispute that the conceptual development plan was in the defendant's possession at material times but he did not disclose it to the complainants. It is put for him that this was an *"explicable oversight"* and that, in any case, the failure *"lies at the lower end of the scale of offending and should only attract, in all the circumstances, at most a finding of unsatisfactory conduct under s.72 of the Act"*. We disagree.

[84] A few days before the case commenced, the defendant accepted guilt at the level of unsatisfactory conduct.

[85] We cannot be sure whether the defendant had any dishonest intentions to avoid proper disclosure to Mr and Mrs McAtamney. He had placed himself in a delicate position of trust by being both vendor and listing agent. In any case, we consider that his failure to disclose the development plan to the complainants, in all the circumstances of this case, was very negligent and a disturbing breach of trust. His assessment of the plan must have been coloured by self interest in that he did not want it to show a possible interference of the view from the property. He should have known that it was vital that the development plan be disclosed to Mr and Mrs McAtamney before they purchased the property. We can only regard the defendant's failure as such a bad error of judgment as to be very negligent, if not deliberate.

[86] The concerning practical issue is that Mr and Mrs McAtamney, as purchasers, were not given proper information about the state of the property in terms of its environment; nor in answer to their perfectly reasonable enquiry of the agent and vendor. That is quite a different issue from whether the failure of the defendant has caused them to, in effect, lose money. It may well be that there has been no financial loss to them but that is not the point, which is the conduct of the defendant at all material times. His marketing emphasised the views as an inducement to buy the property and, at least by inference, as supportive of the vendors' asking price for the property.

[87] The college letter was issued for distribution to all neighbours. The plan shows the likelihood of a building being erected, or placed, very much in the foreground of the property's view. We understand that a LIM report would not provide that type of information. The solicitor for Mr and Mrs McAtamney could not be expected to know of the existence of the plan. One must reason that the defendant did not disclose the plan to Mr and Mrs McAtamney in his own interests as vendor. However, our reasoning is based on the presumption that the defendant had no idea of the school's building plans prior to November 2008.

[88] While we accept the evidence of Mr Gilchrist of Harcourts, Wanaka in his brief that the defendant told him he had put the college letter and plan straight into a drawer without reading them, we also accept his oral evidence that the defendant added that this was because he had been in touch with the college and understood that any school buildings would not be erected near 20 Scaife Place. We do not find it credible that the defendant did not read and absorb the college letter and plan.

[89] In terms of the particulars of the charges, the defendant failed to disclose to Mr and Mrs McAtamney the conceptual building plan of Mount Aspiring College. He misled them that the mountain view of 20 Scaife Place, Wanaka, would not be encroached upon. As we have explained above, that conduct was both disgraceful and/or seriously incompetent and negligent real estate agency work. That conduct was intentional on the part of the defendant; it goes well beyond mere negligence.

[90] We find the defendant guilty of misconduct. We are unlikely to contemplate any type of suppression order in his favour. We invite the Registrar to liaise with counsel and the parties to fix a date for a hearing as to penalty. We realise that our powers regarding penalty are rather limited because we may only make orders which could have been made against the defendant under the Real Estate Agents Act 1976. If counsel are unable to agree upon a timetable for procedures to a penalty hearing, then our Chairman will deal with this in the usual way by a telephone directions hearing. However, the parties may prefer to simply make submissions about penalty in writing under an agreed sequence. We reserve leave to apply.

[91] Accordingly, we find both charges proven against the defendant.

[92] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

_____
Judge P F Barber
Chairperson

_____
Ms J Robson
Member

_____
Mr J Gaukrodger
Member