BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 46

READT 089/12

IN THE MATTER OF	charges laid under s.91 of the Real Estate Agents Act 2008
BETWEEN	**REAL ESTATE AGENTS AUTHORITY (CAC 20006)**
	Prosecutor
AND	**MARK WALLACE** (licensed salesperson)
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

HEARD at AUCKLAND on 9 April 2013

DATE OF THIS DECISION 4 June 2013

APPEARANCES

Mr L J Clancy, counsel for prosecution
Mr P J Napier, counsel for defendant

DECISION OF THE TRIBUNAL

The Charges Against the Defendant

[1] Mark Wallace ("the defendant") faces two misconduct charges laid by Complaints Assessment Committee 20006 under s.73(b) of the Real Estate Agents Act 2008 ('the Act').

[2] It is alleged that the defendant was seriously negligent in acting on the sale of a property at 6A Waikaremoana Place, Howick in that he:

[a] stated to the purchaser, Dianne Kern, that the property was not a leaky home, when the property was of materials and design which rendered it likely to be leaky, and when he suspected from his experience that the property may be a leaky home; and

[b] failed to tell Mrs Kern that another offer had been made for the property until after Mrs Kern had made her offer.

[3] The precise charges against the defendant were laid on 7 November 2012 and read:

"Following a complaint made by Jeanne Watkinson and Jeffrey Watkinson, Complaints Assessment Committee 20006 charges Mark Wallace (defendant) with misconduct under s.73(b) of the Real Estate Agents Act 2008 (Act), in that his conduct constituted seriously negligent real estate work.

Particulars:

On 22 March 2009 and 26 April 2009, during open homes held for the purpose of selling a property at 6A Waikaremoana Place, Howick, the defendant stated to Dianne Kern and others that the property was not a leaky home, when the property was of materials and design which rendered it likely to be leaky, and when he suspected from his experience that the property may be a leaky home.

Complaints Assessment Committee 20006 further charges the defendant with misconduct under s.73(b) of the Real Estate Agents Act 2008 (Act), in that his conduct constituted seriously negligent real estate work.

Particulars:

Failing to tell Dianne Kern when asked that there was another offer made on the property until after she had made her offer."

Basic Evidence for the Prosecution

[4] On 22 March 2009, the late Dianne Kern attended an open home at the property, which was for sale and marketed by the defendant. She attended the open home with Clare Nicholson, a licensed salesperson who had been helping her look for a house closer to where her daughter, Joanne Watkinson, lived.

[5] Ms Nicholson states that she was present when, during the open home on 22 March 2009, Mrs Kern asked Mr Wallace if the property had any leaking problems. The defendant responded that the property was not a leaky home and that he would not have taken the listing if it was.

[6] Mrs Kern also asked if there had been any offers on the property and the defendant told her that there had not.

[7] Mrs Kern and Ms Nicholson attended a second open home at the property on 26 April 2009. Also present at the second open home was Mrs Kern's daughter, Joanne Watkinson. Ms Nicholson and Ms Watkinson state that Mrs Kern again asked the defendant about whether the property had any issues with leaks. Both state that the defendant again confirmed that the property was *"not a leaky home"*.

[8] On 27 April 2009, Mrs Kern made a written offer of $370,000 for the property. The offer was to be presented to the defendant by Ms Nicholson but, the defendant informed Ms Nicholson that he had a second offer from another potential purchaser to be presented to the vendors at the same time. Ms Nicholson and Mrs Kern had been given no prior notice of a second offer.

[9] In light of the second offer, Ms Nicholson telephone Mrs Kern from the property and the latter decided to increase her offer to $373,000 which was accepted by the vendors.

[10] The sale and purchase agreement included a builder's report condition. A building inspection by Mike Davidson was arranged and his report prepared. That

report raised concerns as to possible moisture ingress and recommended intrusive testing.

[11] On 3 May 2009, Mrs Kern discussed the Davidson report with the defendant.

[12] Mrs Kern spoke to Ms Nicholson about the report and expressed her wish to cancel the contract. The issue was raised with Mrs Kern's solicitor, who failed to give written notice in due time to the vendor that the report was unsatisfactory as required by clause 15 of the agreement for sale and purchase.

[13] Ms Nicholson subsequently spoke with the defendant and asked if the vendors of the property would allow Mrs Kern to cancel the contract given the issues disclosed in the Davidson report, notwithstanding the conveyancing solicitor's failure to raise the issue in time. The defendant expressed sympathy for Mrs Kern but stated that the vendors would not accept cancellation of the contract.

[14] The sale and purchase transaction settled in early June 2009.

[15] Post settlement a second building inspection was arranged by Trevor Hutchings who recommended that the property be assessed by a weathertightness expert. Accordingly, building consultants, Maynard Marks, inspected the property in March 2010. The resulting April 2010 report recommended that the entire house be re-clad, and decayed timber framing be replaced, at an estimated cost of $250,000.

[16] Mrs Kern later reached a settlement with her conveyancing solicitor in respect of the failure to notify the vendor in time of Mrs Kern's objection to the builder's report. We understand that the solicitor agreed to meet the Mrs Kern's costs of remedying the property's faults.

[17] Mrs Kern passed away in December 2010. The property was sold by Mrs Kern's family to a builder who was aware of the history of the building.

The Defence Case

[18] The defendant states, inter alia:

[a] he had sold the property to the vendors, Alex Chan and Catherine Tan, in 2005.

[b] in early 2009 he viewed the property and advised the vendors on how to present it for sale, including recommending washing and painting the exterior and replacing some wallpaper and carpet.

[c] he did not see any evidence of water damage and did not suspect the property was a leaky home.

[d] he does not recall being asked if the property was a leaky home or stating that it was not.

[e] he was aware that Mrs Kern's building report identified weathertightness concerns.

[f] he *"felt sick"* about the outcome for Mrs Kern.

[g] in respect of the second offer for the property, at the time he told Mrs Kern that there was no other offer, he believed an earlier offer from a second potential purchaser had been rejected and was at an end. He only found out that the second offer was in fact to be presented shortly before Mrs Kern's offer was to be given to the vendors.

Salient Further Evidence from the Following Witnesses

Mrs J B Watkinson

[19] Mrs Watkinson, the daughter of the late Mrs Kern generally confirmed the above facts. She stated that, at the open home of 26 April 2009, her mother noticed the type of plaster cladding on the house and that the house had been repainted inside and out and had been recarpeted. She asked the defendant: *"Is this a leaky home?"*. Mrs Watkinson (who was with them) states that the defendant replied: *"No it's not a leaky home"* and *"I wouldn't be associated with a leaky home"*, and the defendant added that the carpet had been damaged by the vendors' dog and had been replaced *"because the sellers wished to make the property more presentable"*.

[20] Mrs Watkinson, inter alia, said that when the report of Mr Davidson, a builder, was to hand on 30 April 2009 her mother met with Mr Davidson on 2 May 2009 and he said: *"You don't want this house, walk away"*, and that upset Mrs Kern and she wanted to walk away from the purchase but the agreement allowed the sellers to remedy any fault.

[21] Mrs Watkinson said that her mother took the report to the defendant to discuss it (while the defendant was conducting another open home) and the defendant said that the builder was being too fussy and suggested an alternative building inspector.

[22] As covered above, Mrs Kern's solicitor overlooked cancelling the purchase contract and settlement took place. Mrs Watkinson said that the first time there was rain, water poured from above the ranchslider into the dining room of the property and onto the carpet. The witness said that her mother took possession of the property on 9 June 2009 and she was there assisting her mother and it rained that very day and the witness saw water pouring in a sliding door and flooding onto the new carpet.

[23] A second builder was retained and recommended obtaining a registered watertight-homes expert. As also covered above, Maynard Marks conducted destructive testing and presented a building defects report recommending that the entire house be reclad, and that decayed timber framing be replaced, at an estimated cost of $250,000.

[24] Very sadly, Mrs Kern passed away in hospital on 8 December 2010.

[25] Mrs Watkinson was carefully cross-examined on the basis that the defendant denied that he was even asked by Mrs Kern whether the home was a leaky house. The witness asserted that she heard the discussion referred to above as she was only about one metre away from the defendant as he spoke. It was also put that the defendant would deny that he said that the first building inspector was *"too fussy"* and, in fact, told Mrs Kern the proper procedures which her solicitor needed to follow. There was reference to an entry in Mrs Kern's diary that the water was *"dripping"* rather than *"pouring"*.

The Witness Ms Clare L Nicholson

[26] Ms Nicholson was acting on behalf of Mrs Kern and as a conjunctional selling agent with the defendant. She was also present when Mrs Kern asked the defendant if the property had any leaking problems because Mrs Kern had noticed that the house cladding was a type of plaster. The witness said that the defendant responded that the house had been painted inside and out for presentation prior to going to the market and *"it is not a leaky home"* and added he would not have taken the listing on if it was a leaky home. He also added that he had known the vendors for a long time and that any agent who sells a leaky home has his name tarnished and will become known for selling leaky properties.

[27] Ms Nicholson's evidence generally corroborated the facts set out above. Inter alia, she mentioned that Mrs Kern had strongly expressed that she wanted the contract cancelled by her lawyer but he overlooked doing so. Indeed she had spoken to the defendant asking if the vendors would allow Mrs Kern to cancel the agreement due to the findings on the builder's report and the failure of the solicitor to make requisition; but he responded that he felt sorry for Mrs Kern's predicament and suggested that she would need to sue her solicitor for compensation.

[28] In cross-examination, inter alia, Ms Nicholson mentioned how Mrs Kern very much liked the house on the property but because of the cladding being of a plaster type was worried that it might leak. The witness referred to the property having *"a monolithic cladding system"*. She said that from her experience she knew there could be weathertight issues with that type of cladding and that was well known in the real estate industry at the time, and was why the late Mrs Kern put the issue to the defendant at the second open home on 26 April 2009. Ms Nicholson was particularly questioned as to whether the weathertight issue was put to the defendant because he would deny that it was raised at all. Ms Nicholson said she absolutely disagreed with the defendant's denial and asserted that the issue was put to him by the late Mrs Kern as set out above and done so in her presence.

[29] Also under cross-examination, Ms Nicholson admitted that from the presentation of the property for sale one could not see any signs of previous water ingress. However, she felt that any good agent should know that type of property *"may have such issues"* and that the defendant must have wondered why there needed to have been so much repainting and refurnishing to prepare the property for market, and that he should not have believed the explanation of it being to cover damage done by the vendors' dog.

[30] Ms Nicholson seemed to be saying that the defendant was deficient in the normal appraisal process he would have taken before listing the property.

The Investigator Mr G M Gallacher

[31] The evidence of Mr Gallacher was adduced by consent in terms of his signed and typed brief of 26 February 2013. In particular, Mr Gallacher adduced supporting correspondence and documentation and the said builders' reports. He noted that on 23 March 2012 the defendant had advised him by email that he (the defendant) was unable to supply a copy of his market appraisal of the property.

The Evidence of the Defendant

[32] The defendant said that in January 2009 the vendors approached them to advise them on selling the property because he had sold it to them in 2005. He went and viewed the property and was told by the vendors that the wallpaper and carpet had been destroyed in places as it had been ripped and stained by the vendors' dog. He suggested that they chemwash the outside of the house, have the exterior painted, rewallpaper the inside foyer and stairwell, and replace some of the existing wallpaper and carpet. He said he did not see any evidence of water damage when he sold the property to the vendors in 2005 nor did he in 2009. He added *"I did not know that the house was likely to be leaky and I did not suspect from my experience that it may be a leaky home. It showed no signed of being a leaky home"*.

[33] Later in his typed evidence in chief the defendant stated:

> *"9. I do not recall Mrs Kern, or her agent, asking me if the property had weathertightness issues or if it was a leaky home. I do not believe that I stated to Mrs Kern, or any other person, that the house was not a leaky home. It is my policy to never warrant the structural integrity or weathertightness of any building. I also always strongly recommend inserting a condition in an agreement for sale and purchase to allow the purchaser time to obtain a building report and seek expert advice"*.

[34] He again stated that he was unaware of any problems with the property and that the vendors had not advised him of any problems.

[35] The defendant then went through much the same narrative or basic facts as set out above; although in terms of the first building report, which identified weathertightness issues with the building, he said he did not know that the building inspector had told Mrs Kern to *"walk away from the property"* but he knew that the report had identified weathertightness issues and that Mrs Kern was very concerned.

[36] He denied that he had said to Mrs Kern that the inspector had been too fussy and says he did not suggest referring the matter to an alternative building inspector and he added *"rather, I told Mrs Kern and her agent to ensure that the correct procedures were followed by notifying the vendors of the defects, in accordance with the agreement for sale and purchase"*. He said he telephoned Mrs Kern's solicitors twice on 4 May 2009 to remind them that they needed to provide notice of cancellation to the vendors by 5.00 pm that day at the latest. Inter alia, he said he was *"really disappointed"* that Mrs Kern's solicitor had not followed the correct procedure and that he *"felt sick about the outcome for Mrs Kern"*. He said that until he received the briefs filed by the prosecuting Committee in this case, he had been unaware that a second building inspector was engaged by Mrs Kern and that a settlement had been reached between her and her solicitor.

[37] With regard to the second charge, there was quite some inconclusive evidence in cross-examination of the preceding witnesses. The defendant said to us that about one and a half weeks before Mrs Kern had made her offer, another offer had been made by clients of a colleague of the defendant's but that offer was not accepted by the vendors. The defendant understood that those clients then terminated interest in the property. When the defendant was advised by Ms Nicholson that Mrs Kern would make an offer, Ms Nicholson also asked him if

there were any other offers and he said that there were not *"because that was my understanding"*.

[38] However, before Ms Nicholson actually brought Mrs Kern's offer to him he telephoned his said colleague to double check that her clients were no longer interested in the property and was very surprised to hear that her client wanted her prior offer tabled in the hope that it might be accepted. The defendant advised his colleague that would lead to a multi-offer situation and his colleague was comfortable with that. Accordingly, when Ms Nicholson brought him Mrs Kern's offer, he informed her that he was in receipt of another offer and there was now a multi-offer situation. Ms Nicholson said that she would inform Mrs Kern of the multi-offer situation. Both offers were put to the vendors and were for the same price. Both prospective purchasers were asked if they wished to increase their offer and Mrs Kern did by $3,000 which was accepted by the vendors.

[39] Of course, the defendant was carefully and thoroughly cross-examined by Mr Clancy. Generally speaking, it was put to the defendant in some detail that the state of the property when he inspected it in early 2009 must have alerted him to possible issues over weathertightness, especially in terms of his history of dealing with the property. It was put to him that various factors were visible even to a layman and, for example, there was reference to the type of cladding and the state of various joints. However, the defendant insisted: *"I saw no visible evidence"* of concern.

[40] The defendant also insisted that Mrs Kern had not raised any concerns with him prior to her signing her offer to purchase. He emphasised that he had her insert a condition in the agreement which should have allowed her to cancel the contract as matters had developed. He said he had no recollection of telling Mrs Kern that he would never have allowed a leaky home to be listed.

[41] He was also, of course, carefully cross-examined over the multi-offer situation which developed. He said that he had gone back to his colleague to have her chase up the previous offerers because *"I was just leaving no stone unturned"*. The defendant also noted that the vendors' asking price had originally been $399,000 which is why they had rejected the first offer, at $370,000, from the clients of his colleague. He then seemed to be saying that he had his colleague telephone the other offerers because he was uncertain whether they had terminated interest in the property or not.

[42] The defendant did not keep any diary notes over material times but indicated that from now on he will be. He also accepted that he had not recommended to the vendors that they obtain a building report prior to marketing the property but said that, in future, he would do that as a safeguard both to vendors and himself.

[43] Inter alia, the defendant seemed to be saying that he had got to know the vendors so that *"I took them at their face value"*. He seemed to mean that he believed their story about the dog having caused so much damage to the property that it needed quite some upgrading to be ready for market. He said that he would never again be influenced by such instructions from a vendor.

Issues

[44] Mr Clancy submitted that the key factual issues include the following:

[a] whether or not the defendant stated that the property was *"not a leaky home"* on either (or both) 22 March 2009 or 26 April 2009.

[b] whether or not the defendant knew, or ought to have known, that there was a real risk the property had weathertightness issues, given its construction materials and design.

[c] whether the defendant had the opportunity to give Mrs Kern more notice of the second offer and the fact that there was then a 'multi-offer' situation.

Relevant Sections in the Act

[45] Section 72 of the Act defines *"unsatisfactory conduct"* and s.73 defines *"misconduct"*. Those sections read 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.*
>
> ***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."*

[46] We also set out Rules 6.4 to 6.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009:

> *"6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.*
>
> *6.5 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Further, where it appears likely, on the basis of the licensee's knowledge and experience of the real*

estate market, that land may be subject to hidden or underlying defects, the licensee must either –

(a) obtain confirmation from the client that the land in question is not subject to defect; or

(b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

6.5 A licensee must not continue to act for a client who directs that information of the type referred to in rule 6.5 be withheld.

6.6 A licensee must not continue to act for a client who directs that information of the type referred to in rule 6.5 be withheld."

[47] However, as we detail below, these rules were not in force at material times to this case.

[48] Depending on our findings of facts, the question may arise whether the defendant's conduct was seriously negligent and, therefore, misconduct within s.73(b) of the Act.

[49] Negligent, rather than seriously negligent, real estate agency work will amount to unsatisfactory conduct under s.72(c) rather than misconduct.

[50] We considered the scope of misconduct arising from serious negligence 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 privilege which accompany registration ..."*

Conduct Prior to the Act Coming into Force

[51] The conduct alleged in this case occurred before the Act came into force on 17 November 2009. Section 172 of the Act therefore applies.

[52] As we have previously held in a number of decisions, in cases where a defendant was licensed or approved under the Real Estate Agents Act 1976 at the time of the conduct alleged, and where the defendant had not been dealt with under the 1976 Act in respect of that conduct, s.172 creates the following three step process:

[a] Step 1: Could the defendant have been complained about or charged under the 1976 Act in respect of the conduct?

[b] Step 2: If so, does the conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?

[c] 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.

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

[54] The defendant could have been complained about or charged under the 1976 Act. 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 an agent, branch manager of salesperson. The REINZ Rules included broad duties, including that members conduct themselves in a manner *"which reflects well on the Institute ... and the real estate profession"*. 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.

[55] Accordingly, we may consider the charges against the defendant under the Act. Should we find misconduct or unsatisfactory conduct proved, the issue of penalty arises. As set out above, for conduct before November 2009, only orders which could have been made under the 1976 Act are available. Should misconduct be found proved, it is our practice to consider the issue of penalty separately, after our decision on liability is issued; we also tend to so proceed when finding unsatisfactory conduct.

[56] 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 rather than findings by the said Board; refer *CAC v Downtown Apartments Limited* [2010] READT 06 at [39] to [44].

[57] The Orders that could be made by Regional Disciplinary Sub-Committees (for breaches of the REINZ Rules) were a maximum fine of $750 and censure. However, these were orders against the approved salesperson's employing agent rather than the salesperson personally. Accordingly, we have previously held that penalty orders, including fines, cannot be imposed for unsatisfactory conduct by salespersons where the unsatisfactory conduct occurred prior to the Act coming into force; e.g. see *Handisides v CAC & Cruden* [2011] READT 36 at [43 and [46].

[58] Therefore, should we find that the defendant's conduct amounts to unsatisfactory conduct, but not misconduct, no orders by way of penalty would be available.

Discussion

[59] We cannot be satisfied, on the balance of probabilities, that the charge of *"failing to tell Diane Kern when asked that there was another offer made on the property until after she had made her offer"* has been proved. As explained above, at the material time the defendant did not know that there would be another offer.

[60] It seems curious to us that the defendant telephoned his colleague to ascertain that his colleague's prospective purchasers were no longer interested when, according to his evidence to us, he was sure they had terminated their interest. However it seems to us, that when he was asked by Mrs Kern whether there was another offer, he was entitled to feel that not only was there not another offer but it

was unlikely that the previously interested people would resume interest in the property. Accordingly we dismiss that charge of misconduct; nor do we think that the facts relating to it warrant our finding unsatisfactory conduct proved against the defendant in that respect.

[61] We suspect that the defendant might have thought that the previous offerers could well still be interested so that he contacted his colleague. He may have done that to put some pressure on Mrs Kern. He may have simply been thorough in his representation of the vendors. Indeed his actions gained them a further $3,000 to the price. However, on that issue we do not think that his conduct has been proved deficient in terms of the Act.

[62] Our concerns are much deeper with regard to the charge of misconduct relating to the property being a leaky home.

[63] The prosecution submits that, given the extent and prominence of weathertightness issues in the New Zealand residential property market over the past 10 years, and if we find that the defendant made the misrepresentations alleged, a finding of serious negligence against the defendant would be available. We agree with Mr Clancy that the consequences of misrepresentations about weathertightness by licensees can be devastating for consumers and making such misrepresentations could portray indifference and be an abuse of the privileges accompanying being licensed as a real estate agent.

[64] We note that the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, in a footnote to Rule 6.5 (set out above), specifically provide as follows:

> *"For example, ... houses built within a particular period of time, and of particular materials, are or may be at risk of weathertightness problems. A licensee could reasonably be expected to know of this risk (whether or not a seller directly discloses any weathertightness problems). While a customer is expected to inquire into risks regarding a property and to undertake the necessary inspections and seek advice, the licensee must not simply rely on caveat emptor. This example is provided by way of guidance only and does not limit the range of issues to be taken into account under rule 6.4."*

[65] Mr Napier submits for the defendant that he was not wilfully or recklessly in contravention of the Act and nor does his conduct amount to seriously incompetent or seriously negligent real estate agency work. He puts it that the most the defendant could be guilty of is unsatisfactory conduct, but that the defendant should be acquitted of both charges.

[66] Inter alia, Mr Napier put it that the defendant could not have in any way suspected a weathertightness problem regarding the property or he would not have advised Mrs Kern to include a condition in her offer allowing her to cancel the contract if such an issue existed. There is some logic in that. The relevant clause reads:

> *"Clause 15.0*
> *This agreement is conditional upon the purchaser arranging and approving within 5 working days of the date of this agreement, a building report in respect of the property, including but not limited to water tightness and structural*

integrity. If any aspect of this report is unsatisfactory to the purchaser, the purchaser shall before exercising any right of cancellation pursuant to this clause, by written notice to the vendor require the vendor to remedy any such aspect. Failure to file such notice the purchaser shall be deemed to have accepted the report. The vendor shall within 3 working days of receiving the purchasers notice advise the purchaser whether or not he/she will remedy the matter notified by the purchaser. If the vendor does not notify the purchaser in writing within such period that he/she intends to rectify, the purchaser may at any time thereafter cancel this agreement. If the vendor does give notice that he/she intends to rectify, it shall be the vendor's obligation to undertake such rectification in a tradesman like manner at his/her own cost prior to the settlement date."

[67] That clause 15 seems to us to be a fairly standard clause aimed at rectification/repair of the property rather than cancellation of the purchase.

[68] Mr Napier emphasised that the defendant had inspected the house in early 2009 and saw no evidence of weathertightness problems nor did he at any later time. There is no clear evidence to the contrary nor by inference; but the state of the property in early 2009 should have alerted an experienced salesperson.

[69] Mr Napier also seemed to be putting it that the current rules were not replicated under previous legislation so that the defendant could not apply nor breach rules which did not exist at material times. We agree.

[70] Mr Napier strongly submits that there is absolutely no evidence that the defendant in any way knew that there was a weathertightness problem with the house and that the vendors did not even give him a hint of that possibility and he cannot be covering up something which he did not know about. As Mr Napier put it, if we find that the defendant did not make any representation that there was no leaky building problem, then there is no case against him.

[71] However, in terms of our experience at assessing the credibility of witnesses, we much prefer the evidence for the prosecution from the daughter of Mrs Kern (i.e. Mrs J Watkinson) and from the real estate agent representing Mrs Kern (i.e. Ms C Nicholson) that Mrs Kern asked the defendant if the property had any leaking problems and he responded in the negative and that he would not have taken the listing if it was.

[72] We find that a question was put to the defendant by Mrs Kern about the weathertightness of the property as covered above and he gave a dismissive answer when he should have known that there was quite a risk of her concerns being valid because of the type of construction and materials used for the house. Also, in terms of his initial viewing of the property in 2009, he should have realised that the state of it, which he strongly advised the vendors to remedy, was likely due to weathertightness problems and that the vendors' story of dog damage was not credible in the circumstances.

[73] We consider that the defendant must have known that there could be leak problems and, certainly, should have known that in terms of the type of house and his experience when he viewed it in January 2009. We consider that, in terms of his knowledge, experience, and duty, he was not justified in assuring Mrs Kern that the property had no leak issues. Mr Napier submits that, even if we come to that

conclusion, the defendant has merely been negligent and not seriously negligent so that while we could find unsatisfactory conduct we could not make a finding of misconduct. We disagree and consider that, in the circumstances of this case, the defendant's conduct was both seriously negligent, and seriously incompetent, real estate agency work; and, at least, was a reckless contravention of the Act.

[74] Mr Clancy submits that the defendant was seriously negligent in his real estate agency work in making his statement at the open home that the property had no issues with leaks. We agree. We note, of course, the defendant's evidence that he has no recollection of making any such representation (that the property is clearly not a leaky home). However, we are very satisfied from the evidence that he did make that representation.

[75] It seems to us that, at the very least, he made such a representation to Mrs Kern without any basis. It is also concerning that, in terms of his knowledge of the property, its appearance, and the well-known leaky-home-syndrome for certain types of construction, it defies common sense that he could have given such an assurance or representation to Mrs Kern on 22 March 2009 and 27 April 2009. He denies doing so before us against strong evidence to the contrary. We find that the weathertightness issue was clearly raised with him as Mrs Watkinson and Ms Nicholson have stated in their evidence which we deal with above, and we assess them as truthful witnesses.

[76] It is relevant that (as we have covered above) the condition, clause 15, added to the offer from Mrs Kern on the advice of the defendant could have protected Mrs Kern by enabling her to cancel the purchase if the vendors failed to rectify, and that the defendant did seem to endeavour to assist her take advantage of that condition. However, we are concerned with the defendant's conduct at the open homes of 22 March 2009 and 26 April 2009 when he misrepresented the situation of leaks to Mrs Kern.

[77] We have found, on the balance of probabilities, that the representation was made by the defendant to Mrs Kern as stated by the prosecution witnesses and set out above, and at that time constituted seriously negligent conduct by the defendant. We realise that careful investigation was needed by experienced builders to disclose the extent of the weathertightness problems, but there were sufficient signs of the need for investigation without those, such as, insufficient and inadequate flashings and soffits, type of material used, and type of construction applied. We consider that warning bells should have arisen in the mind of the defendant as early as January 2009 when he inspected the property prior to its renovation and that certainly, when the weathertightness question was put to him at the open home on 22 March 2009 and again on 26 April 2009 by Mrs Kern, he was in no position to give the representation and assurance which he did that the property had no leak issues.

[78] It also seems to us that, against the background of the question put to the defendant by Mrs Kern at the open homes, his response was very reckless. It should have been obvious to him that there was a weathertightness risk simply from the nature of construction of the home and the materials used. There was also his viewing of the state of the property in January 2009. In any case, an experienced agent would have seen some type of risk such as to not be able to give such an assurance to Mrs Kern about weathertightness.

[79] We also take the view that whatever the legislation and its regulations might have been at material times, the defendant had a duty of care to be fair and truthful to all parties with whom he dealt. We consider that he was most dismissive of the question put to him by Mrs Kern and seriously failed in skill, care, competence, and diligence to deal with the possibility of a weathertightness problem.

[80] Accordingly, we record that we have dismissed the second charge as explained above, but we find the defendant guilty of misconduct under s.73(b) of the Act in that his conduct over the leaky home issue constituted seriously negligent real estate work.

[81] In accordance with our usual practice, and as sought by counsel, we direct the Registrar to liaise with the parties and arrange a Directions Hearing to facilitate procedural orders towards a fixture for us to decide penalty. We realise that our powers over penalty are somewhat restricted because the offending occurred prior to the coming into the force of the present Act and its regulations. Mr Napier is, of course, entitled to raise the issue of non publication/name suppression but, currently, we are not much attracted to such a course. Our sentencing powers in this particular case are so restricted that it may be possible to conclude the sentencing issue without a further formal hearing.

[82] 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.

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Judge P F Barber
Chairperson

_____
Mr J Gaukrodger
Member

_____
Mr G Denley
Member