BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 61

READT 082/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**RAFAL PRIOTR PIONTECKI AND SYLWIA PIONTECKA** of Hamilton, Complainants
	Appellants
AND	**THE REAL ESTATE AGENTS AUTHORITY**
	First respondent
AND	**ANGELA DAVIES** of Hamilton, Real Estate Agent
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Ms N Dangen - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION 5 August 2014

COUNSEL

Ms J K Gilby-Todd and Mr M D Branch, for appellants
Mr R M A McCoubrey, for the Authority
Mr S M Hunter, for the licensee

DECISION OF THE TRIBUNAL

The Issue

[1] By a notice of appeal dated 20 December 2013, the appellants appeal against a 3 December 2013 decision of a Complaints Assessment Committee of the Real Estate Agents Authority finding the licensee had engaged in the unsatisfactory conduct outlined below.

[2] The Committee's finding followed a 15 May 2013 decision of His Honour Judge P R Spiller in the District Court at Hamilton that the licensee had engaged in conduct which was misleading or was likely to mislead; *Piontecki & Ors v Davies and Ors* DC Ham CIV-2012-019-000406. The ultimate finding of Judge Spiller was as follows:

> *"I find that Ms Davies did not properly advise Mr and Mrs Piontecki of the risk that the property would be materially affected by the roading project known as the Southern Links By-Pass, and/or the affect that risk had on the value of the property. I find that Mr and Mrs Piontecki were misled by Ms Davies as to the risk of the roading project in relation to the property purchased. I further find that a reasonable person in the situation of Mr and Mrs Piontecki – that is with the characteristics known to Ms Davies or of which she ought to have been aware – would likely have been misled."*

[3] By agreement of all parties, we are to deal with this appeal 'on the papers'. That must be on the basis that there is no dispute on the facts but disagreement on their assessment in that the complainants consider that the licensee should be found guilty of misconduct (as defined in s.73 of the Real Estate Agents Act 2008) and that the Committee's finding of unsatisfactory conduct (as defined in s.72 of the Act), is inadequate in terms of the licensee's conduct in this case.

Background

[4] Ms Davies was the real estate agent for the vendors of a property at 164 Tamahere Drive, Hamilton. In August 2011, she showed the Pionteckis through the property a number of times over a weekend. As a result of viewing the property and speaking with Ms Davies and a registered valuer, they entered an agreement to purchase the property on 8 August 2011.

[5] On 16 September 2011, the purchase settled and the Pionteckis took possession of the property. However, In November 2011, the Pionteckis received a notice in their letterbox informing them of a community meeting for parties affected by the proposed Southern Links Bypass. At the meeting, the Pionteckis discovered that the proposed motorway route which had been chosen would pass through their property and through their house.

[6] The Pionteckis brought proceedings against Ms Davies, the real estate agency she is employed by, the valuer who valued the property, and the company which employed the valuer.

[7] Judge Spiller found that Ms Davies misled the Pionteckis in that she did not properly advise them of the risk that the property would be affected by the proposed motorway. He found all defendants (including the licensee) jointly and severally liable to pay the Pionteckis $35,000 plus an award towards costs.

[8] The Pionteckis subsequently filed a complaint with the Real Estate Agent's Authority which stated:

> *"The complainants' issues with the agents conduct are that she knowingly did not give them full information and as a result they were misled and subsequently purchased a property they would not otherwise have purchased. The agent admitted that she imparted more full information to another prospective purchaser, a solicitor, yet neglected to give the complainants the same level of information (paragraph 28 of the judgment: Ms Davies accepted that she told [the solicitor] but did not tell Mr and Mrs Piontecki, that one of the proposed routes in the investigation area crossed the Tamahere Drive property)"*.

[9] The Pionteckis sought an outcome from the Authority which would discipline the licensee's said breach of the Real Estate Agents Act (Professional Conduct and

Client Care) Rules 2009. The Committee found that Ms Davies' conduct was unsatisfactory pursuant to s.72(a) of the Real Estate Agents Act 2008 (set out below). The Pionteckis contend that had the Committee properly considered and applied the material facts, it would have found Ms Davies liable for "misconduct" pursuant to s.73(c) of the Act (also set out below).

Extension of Background from Appellant's Perspective

[10] Ms Davies is a licensed real estate agent employed by Success Realty Ltd, which trades as Bayleys in Hamilton, Rotorua and Tauranga. She has worked as a lifestyle and residential real estate agent for Success Realty since 2005, based in its Hamilton office.

[11] In July 2011 Ms Davies was engaged by the owners of 164 Tamahere Road, Hamilton, to market and sell their property. The property is located approximately 200 metres from the existing state highway. It was located within the area under investigation by the NZTA for a new transport network south of Hamilton City, named the 'Southern Links' project.

The Southern Links Project

[12] In September 2010, the NZ Transport Agency and Hamilton City Council announced that they were investigating possible routes for the 'Southern Links' project. In April 2011, the NZTA held information days to allow people to view and provide feedback on possible route options. Around this time, the NZTA also published a map and an information sheet on its website about the project. The map showed the area which was under investigation and identified three possible routes which were being investigated. The Southern Links project and the opposition to it received considerable publicity in Hamilton and was the subject of prominent articles in "The Waikato Times" newspaper.

[13] The information sheet produced by the NZTA included a timeline for the project which showed that, between April and October 2011, the NZTA would be undertaking a detailed investigation of the network options and consulting with landowners and other stakeholders. An open day would be held in October 2011 to present the results of the scheme assessment and the *"preferred network option"*. Further consultation would follow and the preferred network option would be refined. The *"detailed network"* was due to be announced in February 2012.

[14] Ms Davies recognised that the Southern Links project would be an important issue for purchasers in her area. She attended one of the information open days in Tamahere to better inform herself about the potential roading development in the area. She also spoke with her manager at the Hamilton office, Stephen Shale, about what she could do to ensure that prospective purchaser of properties within or near the area of investigation were informed of the issue. Mr Shale and Ms Davies agreed that she should explain the area under investigation and give prospective purchasers A3 colour copies of the map and information sheet from the NZTA website.

[15] Ms Davies kept several spare copies of the map and information sheet in her car so that she would always have sufficient copies to hand out. It is also put that as it was difficult to identify particular streets on the map, Ms Davies took care to point out approximately where the property was in relation to the area under investigation; and she explained that the final route had not been determined and could fall anywhere within the area under investigation; and was not limited to the three routes

shown. Ms Davies says that she referred people (including the appellants) to the NZTA website for a clearer version of the map and more information on the project. The NZTA itself emphasised to interested parties that the final route could lie anywhere within the investigation envelope.

[16] The property at 164 Tamahere Drive was located within the investigation area and intersected one of the three routes identified on the map, the route coloured blue. Although the appellants initially denied that they received the map; they now accept that Ms Davies gave it to them. They complain, however, that Ms Davies did not explain clearly to them that the blue line ran through the subject property. They refer, in particular, to evidence that Ms Davies had a conversation regarding the map with another potential purchaser where the location of the blue line was discussed with reference to the property.

The Appellants' property

[17] On 6 August 2011, Mrs Piontecki asked Ms Davies to show her and her husband through a property at Swayne Road in Cambridge. Ms Davies had shown the Pionteckis though four or five properties since 2009. They had previously made an offer on a property in Rosebank Drive which was approximately 250 metres from the route designated for the Hamilton-Cambridge bypass. Ms Davies arranged for her husband, who is also a real estate agent, to show the Pionteckis through the Swayne Road property that day. That afternoon she called Mrs Piontecki to ask for her views on the property and suggested that she also view the Tamahere Drive property, which was very similar.

[18] Ms Davies met the Pionteckis at the Tamahere Drive property on the morning of Sunday, 7 August 2011. We are told that she explained to them that the NZTA was planning to construct part of the Southern Links project in the area broadly bounded by Pencarrow Road, Airport Road, and State Highway 1. She also explained that three routes were being investigated at the time but emphasised that the network could go anywhere within the area marked green on the map. Ms Davies gave the Pionteckis a flyer for the property and at the same time gave them an A3 colour copy of the NZTA map and information sheet. Ms Davies pointed out on the map where the property was in relation to the area under investigation and the proposed routes. Ms Davies explained that the final route had not yet been determined and could fall anywhere within the investigation area. Ms Davies also told the Pionteckis that they should visit the NZTA website for a clearer version of the map and more information on the Southern Links project.

[19] Ms Davies again met with the Pionteckis at the property the following morning, Monday 8 August 2011. They were under some time pressure as they had an agreement to sell their existing home subject to them agreeing to purchase another property by the following Friday. The Pionteckis entered into a conditional sale and purchase agreement with the vendor of the Tamahere Drive property that morning. The agreement was conditional on a builder's report, a LIM report, and finance.

[20] At approximately 1.00 pm that day, Ms Davies met Mr Piontecki again at the property with his valuer, Mr Sweeney. A Mr Bob Cullinane, one of the vendors of the property, also joined them. Ms Davies raised the Southern Links project again while Messrs Sweeney and Cullinane were present. She told Mr Piontecki that the NZTA was investigating the area in which the property was situated, that three routes were being considered, but that the final route had not been determined. At the District Court hearing, Messrs Cullinane and Sweeney confirmed this conversation. Mr

Sweeney had told Mr Piontecki that he should *"check with NZTA"*. Mr Cullinane was not challenged on this aspect of his evidence and Mr Sweeney was not cross-examined at all. Accordingly, it is put for the licensee that the appellants must be taken to have accepted their evidence.

[21] The following day, 9 August 2011, Ms Davies completed a transaction report for the Bayleys' *"deal file"*. She noted on the transaction report as follows: *"Discussed the proposed Southern Links bypass with purchaser twice. 2nd time in front of valuer and vendor while doing valuation"*.

[22] Ms Davies also prepared typed notes for the deal file. The date for each entry refers to the date on which Ms Davies typed the notes rather than the date on which the event occurred. On 11 August 2011 Ms Davies noted that she had brought up the Southern Links network with Mr Piontecki in the presence Messrs Cullinane and Sweeney. The transaction report and the typed notes were included with the documents provided to the CAC.

Findings of the Complaints Assessment Committee

[23] In its decision of 3 December 2013 the CAC found the licensee breached Rule 6.2 (set out below) of the Professional Conduct and Client Care Rules 2009 (which were in force at the time). The CAC stated that it did not find that the actions of the licensee amounted to conduct that would bring the industry into disrepute. The CAC agreed with the District Court that the licensee had engaged in misleading conduct which is a breach of Rule 6.4 (set out below).

[24] In respect of this misleading conduct, the CAC expressed itself in line with the judgment of the District Court that the licensee misled the complainants by failing to be clear enough on the issue of the potential risk they were taking.

[25] Ultimately, the CAC found that the licensee engaged in conduct that fell short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee. Accordingly, the CAC determined under s.89(2)(b) of the Act that it had been proved, on the balance of probabilities, that the licensee had engaged in unsatisfactory conduct. Having done so, the CAC determined that the orders made by the District Court were sufficient.

[26] It is interesting that despite there being the District Court decision finding a failure by the licensee to properly advise the complainants of the risk of the said roading project and that the complainants were misled by the licensee, the Committee, in its full and careful reasoning included the following paragraphs:

> *"4.2 The licensee has denied the breach and stated that she ensured that the complainants were well aware of the SLP and the potential for the property to be affected by the project.*
>
> *4.3 The licensee stated that she discussed the SLP with the complainants on two occasions, gave the complainants a copy of a map showing the investigation envelope being considered for the routes and recommended that the complainants sought more information through the NZTA website.*
>
> *4.4 Although the parties agree that two discussions took place about the SLP, the gravity of the potential risk to the property appears to have been missed by the complainants.*

4.5 The complainants stated that their impression after the discussion with the licensee were that the two potential routes for the SLP would be 500 metres from the property. The complainants assessed that at that distance they could not hear or see the road from the property and therefore it would not be an issue. The complainants stated that they then put the SLP from their mind.

4.6 The Licensee is adamant that she did not make any comment about the distance being 500 metres. She said she made it clear that there had been no final decision made about the final route and that it could fall anywhere within the investigation envelope area indicated on the NZTA map. One of these options clearly cut across the boundary of the property.

4.7 The Committee is satisfied that the licensee was under the impression that she had made full disclosure on a potential risk whereas we find that the complainants appear to have formed the impression that the road would be far enough away that it would not affect the property.

4.8 During the second meeting the vendor and the valuer were present and have given evidence to support the licensee's position of what was said about the SLP.

4.9 The licensee stated that she had prepared A3 sized copies of a map from the NZTA website which showed the investigation envelope for the SLP. The map showed the property as being in an area that could be affected by the project. The Committee notes that another potential purchaser to view the property was given a copy of the map by the licensee. The complainants deny that they were given this map and there is no independent evidence to support either version of events.

4.10 The complainants appear to have made no further inquiries about the SLP with NZTA or their solicitor. The Committee finds this a mitigating factor, particularly as the complainants stated that they did not wish to live near a busy road.

4.11 The Committee first considered the aspects of rule 6.2. In the Committee's view the licensee appears to have acted in good faith. Disclosure was made to the complainants at the first opportunity and then again in front of witnesses. The Committee finds that there has been no attempt to hide the information from the complainants.

4.12 On the subject of being treated fairly, it could be argued that the complainants were not given the same amount of information as the other buyer. The District Court had the benefit of hearing evidence from all parties and preferred the evidence of the complainants in regard to whether or not the map was provided. The Committee agrees that failure to show the complainants the position of the property in relation to the SLP would constitute unfair treatment and therefore finds a breach of 6.2. …

4.18 The complainants have suggested that this conduct is a wilful breach of the rules and should be considered as misconduct under section 73. The Committee has found no evidence to indicate a wilful breach on the part of the licensee.

4.19 Finally, the Committee notes that the complainants have New Zealand residency but English is their second language. The Committee believes that this is a case of cross communication where the licensee genuinely believed she had made full disclosure but the complainants were under the impression that there was a low to negligible risk that was far in the future. The onus for clear and unequivocal communication rested with the licensee."

Relevant Statutory Provisions

*"**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."

[27] The (now revoked) Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, apply to this case given the actions complained of arose prior to the 2012 rules coming into force. The relevant provisions from Rule 6 are:

"6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.

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."

DISCUSSION

[28] Some of the other Rules have relevance (e.g. 9.1 or 9.3) but they were not addressed before us.

[29] If we find that there is a prima facie case of *"misconduct"* under s.73 of the Act, we would make a determination that the complaint or allegation be considered by us and the procedure under s.91 of the Act would be followed. The Committee would be obliged to frame an appropriate charge and lay it before us in writing; and give written notice of that determination and a copy of the charge to the person to whom the charge relates and to the complainant. In other words, it is not open to us on appeal from a Complaints Assessment Committee to find misconduct without more. This is because, under s.111(5) and s.89(2) it would not be open to a Committee to find misconduct proved.

The Stance of the Authority

[30] Mr McCoubrey accepts, of course, that an appeal before us is a rehearing so that we are to make findings of fact on the evidence before us. He makes the following observations:

[a] The CAC concluded that there was unfair treatment under rule 6.2. This was a result of the complainants not being given the same amount of information as the other buyer. However, the Committee found that there had been no attempt to hide information from the complainants. Insofar as the Committee in mitigation was surprised that the appellants' solicitor did not note the proposed route in the LIM report, following the filing of the appeal the Authority has sent a letter to the parties acknowledging that it was an error to have made that suggestion. Accordingly, the acknowledged mistake in the CAC's decision is of no moment for this appeal to us;

[b] More generally, not every breach of s.9 of the Fair Trading Act 1986, which provides that *"no person shall, in trade, engage in conduct that is misleading and deceptive or is likely to mislead or deceive"*, will inevitably result in a finding of misconduct under s.73 of the Real Estate Agents Act 2008. Conduct which is caught by s.9 of the Fair Trading Act 1986 will vary widely from deliberate and dishonest deception to inadvertent conduct which is nevertheless likely to mislead or deceive; and it is put

> that, as such, conduct which is caught by s.9 of the Fair Trading Act 1986 mirrors conduct which may breach the Rules. A contravention of the Rules may be wilful, reckless or inadvertent. It is not every contravention of the Rules that will result in a finding of misconduct.

[31] The appellants acknowledge that they did not bring this complaint as a means for further compensation, but in order to see Ms Davies held accountable within her own profession for her failure to follow the Rules. Mr McCoubrey notes that the CAC has found her accountable for not following the Rules.

[32] Ms McCoubrey puts it that to establish misconduct under s.73 of the Act, it must be established that there has been a deliberate departure from accepted standards or some serious negligence. He submits that it was open to the Committee in the circumstances of this case to find that this test had not been met and that the licensee's conduct, while falling below that which a reasonable member of the public is entitled to expect from a reasonably competent licensee, was unsatisfactory conduct, rather than misconduct. Mr McCoubrey also submits that the Committee was further entitled to find that the orders made in the District Court were a sufficient response to the licensee's unsatisfactory conduct.

The Stance of the Appellant Complainants

[33] Counsel for the appellant complainants submit that the Committee failed to properly consider and apply material facts; took into account irrelevant facts, and made mistakes of facts and placed undue weight on certain facts; and its finding of misleading conduct should have led to a finding of misconduct rather than unsatisfactory conduct.

[34] Initially we had some misgivings about dealing with this appeal 'on the papers' but there does not seem to be any real dispute about the facts as perceived by all parties and it is accepted that we are dealing with the matter de novo.

[35] It is put for the appellants that the Committee did not consider the following matters to be material facts namely, that there were three proposed motorway routes, two that were some distance from the property and one which passed directly through it; and that the licensee pointed out to another prospective purchaser that one of the routes passed directly through the property, but she did not do the same for the complainants. In any case, we do consider those matters as material. The complainants point is that the licensee gave them less information than she gave another purchaser, the licensee admitted that in the course of the District Court hearing, and Judge Spiller referred to that as crucial as to why he considered that the licensee had misled the complainants.

[36] Counsel for the complainants go on to submit that certain parts of the Committee's decision show that it failed to properly consider crucial facts; namely, its paras 4.7, 4.11 and 4.12 set out above. The point made for the appellants is that those facts are not disputed but seem to have been completed disregarded by the Committee.

[37] Counsel for the appellants submit that if a licensee accepts that one purchaser was told more extremely relevant information than another, then the same licensee could not be satisfied that he or she has made full disclosure of all relevant information held in relation to a potential risk. It is put that the fact that one of the proposed motorway routes passes through the property, coupled with the fact that

the licensee knew that and had told another prospective purchaser so, was material to the complaint and any failure to properly consider such facts has resulted in a flawed outcome.

[38] The submissions for the appellants then continue as follows:

> *"**Mistake of Fact and Irrelevant Facts***
>
> *22. The Pionteckis submit that the CAC made mistakes of fact that, either on its own, or combined with the other matters of appeal, affected its decision causing a flawed outcome."*

[39] Counsel for the appellants then refer to the mitigation error we refer to in para [30][a] above and states:

> *"26. The LIM report matter was used in mitigation by the CAC. Given it was an error, this made the information that Ms Davies' shared with the Pionteckis even more critical. Had the CAC correctly identified that the LIM report was irrelevant and thus not used it in mitigation, it is submitted that it would have reached a different outcome.*
>
> *27. The second mistake of fact that the Pionteckis submit affected the CAC's decision, was its statement at 4.17 of the decision:*
>
> > *"The Committee believes that a more experienced licensee may have included a clause in the sale and purchase agreement requiring due diligence in relation to the SLP, or an acknowledgment that the complainants were aware of the potential risk to the property formed by the SLP."*
>
> *28. Counsel refers the Tribunal to paragraph 18 of the notice of appeal which outlines Ms Davies' substantial and impressive record. It is submitted that the CAC erred in suggesting that Ms Davies was anything but experienced.*
>
> *29. Further, it is submitted that her level of experience is entirely irrelevant in terms of her obligations under the Act. As previously set out, Ms Davies failed to disclose the full extent of her knowledge in relation to the risk that the property faced. Even if Ms Davies was inexperienced (not accepted), that is a breach of a fundamental obligation which cannot be excused on that basis.*
>
> *30. The final factual finding of the CAC that the Pionteckis submit was incorrect and would have contributed to a flawed outcome, is summarised in the decision as follows:*
>
> > *"4.18… The Committee has found no evidence to indicate a wilful breach on the part of the licensee.*
> >
> > *4.19 … The Committee believes that this is a case of cross communication where the licensee genuinely believed that she had made a full disclosure."*
>
> *31. These findings flowed directly from the CAC's earlier failures to properly consider the facts. Had the CAC properly considered the material facts, it*

could not possibly have found that Ms Davies genuinely believed that she had made full disclosure when she acknowledged at the Court hearing that she did not.

32. In summary, if the correct factual situation is considered, it is submitted that the correct decision is that:

[a] Ms Davies either wilfully or recklessly failed to disclose a significant potential risk to the Pionteckis; and

[b] Ms Davies did not act in good faith nor deal fairly with the Pionteckis."

[40] It is submitted for the appellant complainants that the licensee, Ms Davies, was in breach of Rules 6.2, 6.3, 6.4 and 6.5, whether there was a deliberate breach or mere indifference; and that Ms Davies should be found to have engaged in misleading behaviour amounting to misconduct under s.73(c) of the Act.

Further Matters Raised by the Complainants

[41] Counsel for the appellants note that Ms Davies, in her response to the initial complaint laid, set out the steps she says she took to bring the Southern Links Bypass to the Pionteckis' attention. It is put that Ms Davies' response raised a number of evidential matters that were disputed at the hearing. It is put that Ms Davies has not addressed the actual issue which is that she gave more information to another prospective purchaser.

[42] The question was put to Ms Davies in cross-examination in the District Court:

"Q. And did you tell them the same as what you said to Gina, that [the property] falls within the blue line?

A. It falls within the investigation area. Here is the blue line that crosses Tamahere Drive.

Q. But you didn't say what you told me that you'd said to Gina which was, "This property falls within the blue line." You didn't tell him that?

A. No I didn't, no."

[43] Counsel for the appellants also dispute a matter of fact. They refer to it being stated on behalf of the licensee that the appellants, despite initially denying that a map was given to them, now accept that one was given to them; but the appellants deny that a map was given to them and assert that it is irrelevant to the question whether or not the licensee satisfied her professional obligations given she has admitted that she gave more information to another prospective purchaser.

The Stance of the Licensee

[44] Counsel for the licensee noted that the Committee followed the District Court decision in which His Honour Judge P R Spiller held the licensee had not taken sufficient steps to inform the appellants of a potential roading project in the vicinity of the property they were considering to purchase, and found the licensee liable for misleading conduct in breach of the Fair Trading Act 1986. That Court accepted that the licensee advised the appellants that the NZTA was investigating the area and

that there were three potential routes for a new road; but Judge Spiller found that the licensee failed to advise the appellants that one of the three potential routes ran through their property.

[45] It was noted that the licensee told the appellants to make their own enquiries, but Judge Spiller found that the licensee should have gone further having particular regard to the fact that English was only the second language of the appellants.

[46] Counsel for the appellants emphasises, inter alia, that the evidence before the District Court showed that the licensee went to considerable lengths to draw the proposed roading project, then some 15 to 20 years away from construction, to the appellants' attention and to encourage them to make their own enquiries. It is put for the licensee that, pursuant to Judge Spiller's decision, the appellant complainants have been fully compensated so that (it is put) there is no basis for a finding of misconduct and this appeal should be dismissed.

[47] Counsel for the licensee acknowledges that the District Court held that the licensee did not properly advise the appellants of the risk that the property would be materially affected by the roading project, but submits there is no suggestion that she intended to mislead them.

[48] Counsel for the licensee notes that, although the appellants are of Polish origin, they have lived in English speaking countries for 20 years, are well educated, experienced in business, and at all material times were receiving independent legal advice about their purchase. He notes that their lawyer reviewed the LIM for the property which highlighted its proximity to roading developments in the area and that the licensee thought the complainants to be competent and sophisticated purchasers who intended to remain in the house for five to seven years, whereas the proposed motorway extension was not projected to commence for another 15 to 20 years.

[49] The District Court ordered that the licensee pay the appellants $30,000 (they had claimed $200,000) as the material difference to the value of the property, and also ordered her to pay $5,000 damages for general stress to the appellants. Those sums have been paid.

[50] Counsel for the licensee emphasises that there has been no suggestion that the licensee deliberately misled the appellants or disregarded her professional obligations to them, but that she acted in good faith and there has been no question of deceit, i.e. deliberate mis-statements, and that was affirmed by Judge Spiller. It is also emphasised that although finding unsatisfactory conduct by the licensee, the Committee found *"no evidence to indicate a wilful breach on the part of the licensee"*.

[51] Part of the arguments for the licensee put to us by Mr Hunter read:

> *"33. First, the appellants submit that the CAC failed to have regard to differences between what Ms Davies told another potential purchaser and what she told them. The appellants say, and the Court found, that in her discussions with another purchaser Ms Davies pointed out that the property fell close to the blue line on the map, whereas in her discussions with the appellants she said only that the property lay within the broader green investigation area on the map.*
>
> *34. This submission is simply wrong. The CAC expressly noted the District Court's finding on this matter and endorsed it in its decision: see paragraph 4.12.*

35. Second, the appellants submit that the CAC wrongly criticised the appellants' solicitor for her approval of the LIM. The CAC later withdrew this criticism. This issue is not relevant to the appeal, which is concerned with Ms Davies' conduct rather than questions of mitigation (the appellants having accepted that they have been compensated).

36. Third, the appellants criticise the CAC for its observation that a more experienced licensee might have included a clause concerning the Southern Links project in the sale and purchase agreement. The appellants say that Ms Davies was sufficiently experienced and that in any event a lack of experience does not excuse her conduct.

37. The CAC's observation had no bearing on its finding that Ms Davies conduct was inadvertent rather than wilfully misleading. The Committee simply made a helpful observation as to how Ms Davies might deal with issue such as these in the future. The appellants' criticism of the CAC is misplaced and irrelevant to the issues on appeal.

38. Fourth, the appellants submits that Ms Davies acted wilfully, recklessly or in bad faith. There is simply no evidence for this and it is contrary to the way in which the case was approached in the District Court. In this regard, it is also relevant to refer to the District Court's costs judgment which is attached. The Judge held that "[w]hile the plaintiffs have succeeded in this matter, they have done so only in part in the face of reasonable arguments." Plainly, the Judge would not have made such a statement if he considered that Ms Davies had acted in bad faith."

Our Findings

[52] It is submitted for the licensee that this appeal should be dismissed. As indicated above, it is submitted for the appellants that the Committee's finding of unsatisfactory conduct against the licensee should be replaced with a finding from us of misconduct i.e. meaning that we should direct the Committee to lay charges of misconduct to be heard by us.

[53] This is a case where it is borderline whether or not the level of failure by the licensee reaches *"misconduct"* rather than *"unsatisfactory conduct"* as each concept is respectively defined in ss.73 and 72 of the Act set out above. The licensee's failures, which we have outlined above and which were comprehensively covered by Judge Spiller in the District Court, certainly fall short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee in terms of s.72 of the Act. Also, in terms of that section those failures contravene the above Rules, were negligent, and would reasonably be regarded by agents of good standing as being unacceptable. Accordingly, the failures are, at least, "*unsatisfactory conduct*" as defined in s.72 of the Act.

[54] However there is an issue whether those failures also, in terms of the definition of "*misconduct*" in s.73 of the Act, can be regarded as disgraceful, or seriously negligent, or a reckless contravention of the Act or the Rules. We accept that the licensee did not intend to mislead or under-inform the complainants but, in the context covered above, her conduct comes very close to being seriously negligent. Nevertheless, it is somewhat puzzling that the complainants did not appreciate the risk to the property from the roading project.

[55] The onus of proof is on the appellants but only to the standard of the balance of probabilities.

[56] When we stand back and consider this situation we find that the licensee has been at least negligent in not giving the same disclosure and advice to the complainants which she gave to another prospective purchaser at material times and in not outlining clearly enough to the complainants the risks they were incurring in purchasing the property. All in all, it is very arguable whether the offending level of "*misconduct*" has been reached. However, we prefer to find that the licensee is guilty of unsatisfactory conduct at a high level.

[57] Accordingly, a concerning issue is the type of penalty to be imposed on the licensee. Although the Committee, in its careful, thorough, and well reasoned decision, determined that the orders made by the District Court were sufficient, we consider that quite some more thought needs to be given to the appropriate penalty to be imposed on the licensee. It should be possible to deal with the penalty issue by a series of succinct submissions from each party. We therefore direct the Registrar to arrange for all counsel to participate in a telephone conference with our Chairperson to formulate a timetable for such submissions on penalty.

[58] 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

_____
Ms N Dangen
Member