BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 26

READT 38/15

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
BETWEEN	**COMPLAINTS ASSESSMENT COMMITTEE (per CAC 402)**
	Prosecutor
AND	**MS TANYA DUNHAM** of Tauranga, Real Estate Salesperson
	Defendant

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms N Dangen - Member

HEARD at TAURANGA on 3 December 2015 (with subsequent series of typewritten submissions)

DATE OF THIS DECISION 24 March 2016

COUNSEL

Ms C P Paterson, for the prosecuting Authority
Mr P Hunt, for the defendant

DECISION OF THE TRIBUNAL

Introduction

[1] This is another case about, mainly, loss of a view by a purchaser.

[2] On 9 June 2015, Complaints Assessment Committee 402 laid misconduct charges against Tayna Dunham ("the defendant') under s 73 of the Real Estate Agents Act 2008. The defendant faces two charges of misconduct:

[a] The first charge alleges that the defendant failed to disclose to Rosie and Jared Ogilvy ("the complainants") that building work was planned for a neighbouring property to 42 Forrester Drive ("the property"), and that this would affect the property's views;

[b] The second charge alleges that the defendant failed to disclose, at the relevant time, that the vendors of the property were her parents.

[3] The defendant denies the charges. She asserts that she pointed out the proposed building work at the neighbouring property (at 53 Forrester Drive, Tauranga) to the complainants and orally disclosed that the vendors were her parents. The defendant is a licensed salesperson at the Pyes Pa branch of Realty Link Tauranga Ltd (trading as L J Hooker).

The Charges in Full

> *"Following a complaint by Rosalie and Jared Ogilvy ("complainants"), Complaints Assessment Committee 402 ("Committee") charges Tanya Dunham ("defendant") as follows:*
>
> ***Charge 1***
>
> *The Committee charges the defendant with misconduct under s 73(c)(iii) of the Real Estate Agents Act 2008 ("Act"), in that she wilfully or recklessly contravened Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.*
>
> *Particulars*
>
> *The defendant withheld information that should, by law or in fairness, have been provided to the complainants, namely, information about planned building work at 53 Forrester Drive likely to affect the view from 42 Forrester Drive, which had been notified to the defendant by the owner of 53 Forrester Drive on 2 August 2013.*
>
> ***Charge 2***
>
> *The Committee further charges the defendant with misconduct under s 73(c)(i) of the Act, in that she wilfully or recklessly contravened ss 136-137 of the Act.*
>
> *Particulars:*
>
> *The defendant failed to disclose to the complainants, orally and/or in writing, that a person related to the defendant, namely her parents, would benefit financially from the sale of 42 Forrester Drive, before or at the time that the defendant assisted the complainants to make a written offer for the property.*
>
> ***In the alternative to charges 1 and 2***
>
> *In the event that, after hearing the charges against the defendant, the Tribunal is satisfied that the defendant, although not guilty of misconduct, has engaged in unsatisfactory conduct, the Committee charges the defendant with unsatisfactory conduct under ss 72 and 110(4) of the Act."*

Factual Background

[4] On 27 July 2013, the defendant listed the property for sale. The vendors were Tom and Dulcie Fisher, who are the defendant's parents.

[5] On 2 August 2013, Jon Keate, owner of 53 Forrester Drive which is across the road from the property, emailed the defendant informing her of his plans to build a new double garage with a second storey above. Mr Keate asked the defendant to inform any potential purchasers of his plans, as the extension would affect the property's water views. Mr Keate also offered to provide the defendant with a copy of the building plans.

[6] That building work seemed to comprise reconstructing the existing double garage and adding to it, on what had been spare land, a granny flat with a substantial upstairs floor across the entire addition and garage. The bottom floor of the addition (under the granny flat) seems to be a further garage.

[7] The defendant never obtained the building plans from Mr Keate but acknowledged receipt of the email and, as a result, altered marketing material for the property so as not to include a picture of the view from the property that would be affected.

[8] On 25 August 2013, the complainants first viewed the property.

[9] On the evening of 29 August 2013, the complainants made an offer of $380,000 for the property subject to finance, a LIM, and a building report.

[10] On 29 August 2013, the complainants' offer was accepted by the vendors. The defendant provided contractual documents to the complainants on 30 August 2013.

[11] On 31 August 2013, the complainants conducted a building inspection of the property along with Mr Ogilvy's father. During this visit, according to the complainants, they found out for the first time that the vendors were the defendant's parents. They allege that, until this point, the defendant had told them only that the vendors were relatives of hers and she had not specified that they were her parents.

[12] Also during this visit, the defendant mentioned that the neighbours across the road were going to build something. Mr Ogilvy remarked that it looked like just a single storey garage, the defendant did not disagree or tell them that the addition would actually be two stories. Nothing further was said by the defendant about the proposed building works to the complainants, including on the key issue of whether the second storey would affect the view.

[13] On 2 September 2013 the parties finalised the sale and purchase agreement for the property.

[14] On 28 November 2013, Mrs Ogilvy conducted a pre-settlement inspection and the complainants took possession of and moved into the property on 29 November 2013. At this stage the further garage construction had begun at 53 Forrester Drive, but not on the second storey above that garage.

[15] On 18 December 2013, the complainants noticed that construction had started on a second story at 53 Forrester Drive. They spoke to that neighbour, Mr Keate, who explained that he was building a second storey on the double garage. This was the first time that the complainants had heard of a second storey being built.

[16] As a result of the construction to that neighbouring property, the complainants' views of the water from the property have been significantly impacted.

A Summary of Evidence Adduced to us

Witnesses for the Prosecution

[17] Mrs Rosie Ogilvy. Mrs Ogilvy is one of the complainant purchasers and she gave detailed evidence of her communications with the defendant licensee in the course of the purchase transaction. She and her husband came to Tauranga from Auckland on

25 August 2013 to look at residential properties because her husband's employer was relocating its business from Auckland to the Waikato and Mr and Mrs Ogilvy decided to live in the Bay of Plenty where Mr Ogilvy had grown up.

[18] Accordingly, on that day they viewed 42 Forrester Drive with Ms Dunham. Mrs Ogilvy stated they felt compelled to buy that property because of its stunning view and they made that clear to Ms Dunham and emphasised how important the view was to them and they said Ms Dunham understood and agreed with them. Mrs Ogilvy said that Ms Dunham did not then mention that she was aware of a neighbour's building plans which would impact on the water views they had admired.

[19] Mrs Ogilvy said that, during that viewing, Ms Dunham mentioned that the vendors of the property were *"family members"* but she did not say that they were her parents.

[20] Negotiations took place and, in the course of those on 28 August 2013, Ms Dunham advised Mr and Mrs Ogilvy that she had another prospective buyer who wanted to put in a written offer. By 30 August 2013 Mr and Mrs Ogilvy had despatched their signed offer to Ms Dunham and that seems to have been accepted by the vendors that day. Accordingly, Mr and Mrs Ogilvy returned to Tauranga the next day, 31 August 2013, for a building inspection which seems to have been effected by Mr Ogilvy's father who is a builder, and Ms Dunham also attended.

[21] Mrs Ogilvy states that, during that visit, she recalled a discussion in which Ms Dunham mentioned to her and her husband that the neighbour across the road on the waterfront had plans to build something and pointed to where that would be. Because no such building extension had yet started, Mr Ogilvy responded that due to the minimal size of the neighbour's property which remained available, the neighbour was only likely to be building a single storey garage. Mrs Ogilvy observed that Ms Dunham did not correct that statement to tell them that a two storey building was being constructed which would impact the views from the complainants' property.

[22] Mrs Ogilvy said that, during that visit, her father-in-law confronted Ms Dunham, apparently after noting family photographs displayed at the property, that she was in fact the daughter of the vendors; and Ms Dunham acknowledged that was so. Mrs Ogilvy added:

> *"4.6 While she had previously told us that the vendors were her family members, she had not said or provided us with any written disclosure that they were her parents."*

[23] Mrs Ogilvy stated that on 28 November 2013 she travelled from Auckland to Tauranga to meet Ms Dunham for the pre-inspection, as she put it, and that when she arrived at the property she saw that further construction work had been undertaken by the neighbour. Mr and Mrs Ogilvy moved into the property the next day.

[24] On 18 December 2013 Mrs Ogilvy was shocked to see construction start on a second storey on that waterfront neighbouring property across the street from them. She then stated:

> *"6.2 I went over and spoke to the neighbour who was surprised we knew nothing about the project. He advised me that he had emailed Ms Dunham when 42 Forrester Drive was first marketed so she could advise prospective purchasers of his plan as the view would be significantly impacted.*

> *6.3 My favourite view was that of the reserve on the Maungatopu Peninsula across the water, which I could see seated in the corner of the sunroom. With the construction across the street that view is now gone."*

[25] Under cross-examination, Mrs Ogilvy emphasised that on 30 August 2012 she knew nothing of the building work proposed by the neighbour but had ascertained that the agent was *"related"* to the vendors.

[26] A point pursued in cross-examination of Mrs Ogilvy by Mr Hunt was whether the agent told Mrs Ogilvy about the proposed building work on the 31 August 2012 because the agent insists that she told that to Mrs Ogilvy on 25 August 2012. Mrs Ogilvy said that, somehow or other, on that day 31 August 2012 she and Mr Ogilvy thought that the proposed building works would be a double garage at ground level. It was put to Mrs Ogilvy that the agent then told her of that further proposed building work (at the neighbour's place across the road) and said *"this is going to impact on your harbour view"*. Mrs Ogilvy said the agent did not tell her that or anything at all about the view. Mr Hunt pressed her that she was told by the agent that day that the neighbours were adding a garage and another level above it. Mrs Ogilvy disputes that. At that time no such building works had started. The Ogilvys were not concerned because Mr Ogilvy was of the view that at the relevant space on the neighbours' property only a single storey garage could be put, but he was mistaken in that respect.

[27] Mrs Ogilvy accepts that on 31 August 2013 the licensee told her and Mr Ogilvy that the neighbour was going to build something at a particular spot on the neighbours' property.

[28] Mrs Ogilvy made it clear that the complaint from Mr and Mrs Ogilvy is that they were deceived by the licensee into believing that only a single storey garage was being built by the neighbour when the licensee knew that a second storey was being built on top of that and the existing double garage.

[29] Mrs Ogilvy said that the fact that the licensee had merely said to them that the vendors were *"related"* to her, or that she was *"a member of their family"* was not their complaint and that issue arose out of the Authority's investigation.

[30] Mrs Ogilvy also made it clear to us that she simply wants the licensee held accountable so that other people are not deceived and that they (the complainants) did not complain to seek compensation, although they would be pleased to get compensation if possible.

[31] In re-examination it was clarified that, in the course of a discussion in the carport of the property purchased by the complainants on 31 August 2013, the licensee said to Mr and Mrs Ogilvy that there was going to be some building work by the neighbour on his property, and that she pointed to the particular spot; and Mr and Mrs Ogilvy responded that it looked as if there was going to be a double garage or carport built at a single level and that the licensee simply responded *"oh that is right, probably"*.

[32] We record that we assess Mrs Ogilvy as an honest and credible witness.

The Evidence of Mr W Ogilvy

[33] Mr J W Ogilvy the other complainant then gave evidence-in-chief which, not surprisingly, was very similar to that given by his wife. He said that on 18 December 2013,

when they realised that construction had started on a second storey above the double garage on the neighbours' property, his wife, having spoken to the neighbour, rang Ms Dunham and in the course of that he Mr Ogilvy, also spoke to Ms Dunham who said to him *"I had no idea what they [Mr and Mrs Keate] were doing. That's news to me"*. He then completed his typed evidence-in-chief as follows:

> *"4.4 I told Ms Dunham the neighbour had provided us with copies of his email correspondence with her which indicated that she was well aware of the two storey build plans before we had viewed the property. I also told her that she had failed to disclose the build plans to us. She went silent. I advised her we would be communicating with her through our lawyers"*.

[34] Mr Ogilvy was cross-examined in detail by Mr Hunt who emphasised that, when Mr Ogilvy observed that the addition could only be at a single storey level, the licensee did not correct that view but Mr Ogilvy asserted that the licensee then said the extension would not impact on the view being acquired by Mr and Mrs Ogilvy.

[35] Mr Ogilvy said that advice from the defendant about the building extension was given to him on 31 August 2013 during the building inspection by his father who is a builder. He said that it was mentioned very casually by the licensee who said it would not impact on the view. Mr Ogilvy denied that the licensee told him that the neighbour was adding a garage with another level on top of it. He seemed to be saying that the licensee did not refer to a garage being built but to *"building works"* being due to take place at a particular point on the neighbours' section and that the licensee did not make it clear that there was to be a double garage with another storey on top of it.

[36] Mr Ogilvy said he had a very clear recollection of his discussions at material times and what was said to him by the licensee. He said he had mistakenly assumed that the amount of land available for building works would only permit a single storey double garage. Mr Ogilvy is a project manager and a builder by trade. He assumed that the neighbour would need to get consents from neighbours especially if views were to be affected but Mr Ogilvy was not aware of Council building code requirements in Tauranga. It seems to be clear that, at material times, Mr Ogilvy knew that the neighbour proposed a building project but not its nature, size, or height; and simply assumed it would not affect the views of the property acquired by him and his wife.

[37] Mr Ogilvy made it clear that he is rather irate that the licensee did not provide the plans for him to check nor mention there would be another level on the building project. He does not accept that the licensee had no idea what was to be built when she had discussions with him and his wife. He feels she should have made it clear to them that the view was going to be curtailed.

Ms S Van Oyen

[38] Ms Van Oyen was a licensed salesperson between 1997 and 2000 in the Wellington area and she and her partner became interested in 42 Forrester Drive, Tauranga, in August 2013. She thought it had a *"beautiful outlook"* but was not told at her viewing that the neighbours across the street planned to build a second storey on their garage which would impact on the water or harbour view from the property. She said that, had she known that, it *"would have been a big put off"*. She did not pursue that property because she and her partner did not like its stairs.

Mr W Ogilvy

[39] Mr W Ogilvy, of Tauranga, is the father of the husband complainant and is a builder of more than 40 years experience.

[40] He said that on 30 August 2013 his son telephoned him to say that the son and his wife had purchased 42 Forrester Drive, Tauranga, subject a building certification clause and they wished him to attend the property to conduct a building inspection the next day. Accordingly, he met his son and daughter-in-law at the property on 31 August 2013, and the licensee also attended.

[41] He said that during the visit he recalled being on the deck of the property with the licensee and there was no obvious construction at that point of the further garage on the property across the street. He recalled the licensee saying to him that those owners were only building a garage and that she did not mention that a second storey was to be added above that garage. He added that such a second storey would significantly impact on the water views from the property.

[42] Mr W Ogilvy also said that, during that visit, he saw photographs of the licensee in the lounge and from them he realised that she had a close family connection to the vendors. Accordingly, he then confronted the licensee as to whether she was the daughter of the vendors and she admitted that to be so. He later told his son and daughter-in-law about that. Under cross-examination by Mr Hunt, he explained that there was not a confrontation about the issue between him and the licensee but rather just a question from him with which the licensee agreed.

Evidence from Mr J R E Keate

[43] Mr Keate and his wife own the said property across the road at 53 Forrester Drive, Welcome Bay, Tauranga. Mr Keate stated how he had obtained Tauranga City Council approval for the construction of the said double garage with a second storey over it and over the existing garage. Apparently, the upstairs portion was to be a granny flat for his mother. Initially he had not contacted any neighbour about the building plan because no neighbour consents were required.

[44] However, in August 2013 he noticed that 42 Forrester Drive was for sale and he realised that his building plans would compromise the views of Welcome Bay from 42 Forrester Drive. He said to us that, if he was prospective purchaser of number 42, he would expect to be informed of plans across the street which might compromise the view; so he therefore decided to disclose his plans to Ms Dunham as the real estate agent marketing the property in order that she could inform prospective purchasers.

[45] Accordingly, at 11.12 am on Friday 2 August 2013, he emailed Ms Dunham to advise her of his building plans. He was then unaware that she was the daughter of the vendors. He said that at 6.10 pm that day Ms Dunham replied to his email and advised that she planned to adjust the marketing to avoid shots of the view over his property. She also said that she would disclose his plans to interested parties and she asked him for an artist's impression or a building plan with dimensions of the extension he was going to undertake at the property. She also asked if she could collect a copy of his plans so she could inform interested parties.

[46] Mr Keate continued his evidence stating that, at 7.19 am on Monday 5 August 2013, he emailed the licensee and advised that if she was passing his workplace at 32 Malreme

Street, Tauranga, to feel free to call in so he could give her the relevant plan, but he did not receive any further communication from her nor did she ever call in to collect the plans as he had offered. He added that construction of the project started on 11 November 2013. He said he was surprised on 18 December 2013 when Mrs R Ogilvy came over to his property to speak to him and he realised she knew nothing about the garage extension with its upper floor.

Evidence from Ms K L Taylor

[47] Ms Taylor is also a licensed salesperson at L J Hookers in Tauranga and is a colleague of Ms Dunham. Ms Taylor said that at material times their branch, the Pyes Pa branch held regular informal sales team meetings and she attended one of these in a caravan at 42 Forrester Drive in early August 2013. She recalled the water views from the property and said she was totally unaware of the plans of the neighbour to build a second storey above his garage and did not recall Ms Dunham mentioning that at any of the sales team meetings at that time.

[48] However, she conceded in cross-examination by Mr Hunt that she did not have a buyer interested in being taken to the property and that, in the course of team meetings, there might be as many as 130 listings referred to over an hour and a half and she would generally endeavour to listen to them all.

Evidence from Ms S M Millman

[49] Ms Millman and her partner viewed the property with an agent from L J Hookers on 4 September 2013. She thought the property had great views. She and her partner were told the property was already under contract. They bought elsewhere on Forrester Drive on 15 October 2013. They were shocked to later see the two-storey building being built across the street from the property because they could see there would be an impact on its water views. She said that neither she nor her partner were told anything about that building when they viewed 42 Forrester Drive. It was put to Ms Millman by Mr Hunt that, perhaps, she did not recall all the information given to her when she viewed the property.

Evidence from Mr G M Gallacher

[50] Finally, there was general evidence from Mr G M Gallacher, a senior investigator at the Real Estate Agent Authority. He also identified a number of the written exhibits. He detailed providing the licensee with a copy of the complaint of Mr and Mrs Ogilvy on 12 August 2014 and her various responses to that. We note that included in the licensee's written response of 10 September 2014 is a copy of the Agency Transaction Report in which is a handwritten comment *"I told the purchaser that the home across the road is adding a storey. They were fine with it. 31-8-13."*

[51] Mr Gallacher also observed that the sale and purchase agreement does not disclose either Ms Dunham's relationship with the vendors or anything about the neighbour's planned building now in issue with an expected impact on the property's water view.

The Evidence of the Defendant Licensee

[52] Ms Dunham has worked in real estate as a salesperson for over 23 years without previous disciplinary issues. She generally covered the above facts and emphasised that, when she attended a campaign for the property with other L J Hooker sales persons on 1 August 2013 and arranged a signboard to be put on the property that day, she was

unaware of any planned building work at 53 Forrester Drive or of its potential effect on the property.

[53] She stated that on Friday 7 August 2013 she received the said email message from Mr Keate and, as a result, met very soon that day with her manager to discuss whether changes should be made to the property's marketing to take into account the potential impact on the views from the property and to review its asking price. That led to her making immediate changes to the marketing material for the property. She discussed that development with her parents that day also. They had been unaware of Mr Keate's specific intended alterations but had understood that the Keates were intending to carry out some alterations to their home.

[54] The defendant said that she replied to Mr Keate on 2 August 2013:

> *"8. … to thank him for his immediate contact and to reassure him that I was treating the issue with urgency. I informed him that I had altered the marketing to avoid shots of the view over his property and that I would be disclosing his building intentions to all interested parties. I asked whether Mr Keate could send me further visual details or if I could collect a copy of his plans."*

[55] Other relevant extracts from the defendant's typed evidence-in-chief are as follows:

> *"11. There was a lot of buyer interest in the property which was evident in open home attendances and in general enquiries. Overall there were about eight serious prospective purchasers. I advised all interested buyers who viewed the property and who showed more than a passing interest that the owners of 53 Forrester Drive were adding onto their home. I informed buyers once I ascertained that they were genuinely interested – not necessarily during our initial contact. I did not go into the view loss details with other buyers if they viewed the home with me and they were not interested for another reason.*
>
> *12. All interested buyers then had the opportunity to investigate the building issue at 53 Forrester Drive further, or to ask me to investigate it further if it concerned them. None of the potential buyers, including Mr and Mrs Ogilvy, requested a copy of the Keates' plans. If any buyers had requested the plans, I would have promptly collected them from Mr Keate's office for them.*
>
> *13. While marketing the property, I attended regular L J Hooker sales meetings with other agents. In the course of those meetings, I verbally raised that the view in the direction of 53 Forrester Drive would be changed by the Keates' intended alterations. I am aware that Naomi Gray and Karen Taylor have stated in their briefs of evidence that they do not recall me mentioning the Keates' alterations at sales meetings but I am confident that I did, in keeping with my usual practice to raise any changes that affect marketing the property. Generally the sales meetings discuss all office listings of approximately 200 properties over about a 1 to 1.5 hour period so it is challenging to remember every detail of all properties discussed.*
>
> *…*
>
> *16. I do not specifically recall that the Ogilvys expressed to me that the view was important to them at their 25 August 2013 viewing but I did gain the impression that they were enthusiastic about the property in general, including the view.*

Once I had established that the Ogilvys were genuinely interested at their initial 25 August 2013 visit, as with all other interested buyers, I advised them that the owners of 53 Forrester Drive were adding on to their home. I told the Ogilvys that I was not entirely sure of the Keates' detailed intentions but that it was definite that they would lose the view in the direction straight out from the sunroom and that was not negotiable. I made it clear to the Ogilvys that the Keates' alterations would directly block that portion of their view but that good views would remain either side of the Keates' property.

17. *I informed the Ogilvys at the 25 August 2013 viewing that I understood that the Keates were definitely adding to their property and at a minimum, going up a level over the garage. I did not tell the Ogilvys that the Keates were only building a single storey garage or otherwise give them that impression. I explained to the Ogilvys generally that views from the property change all the time depending on who is subdividing, building, cutting down trees or letting their trees grow. I did not say or otherwise leave the Ogilvys with the impression that a one storey garage was being built across the road.*

18. *At the 25 August 2013 viewing I recall that I stood in the lounge with Mrs Ogilvy and informed her that the view from there would change and that the entire road changes all the time. I also recall standing in the lounge on 25 August 2013 with Mr Ogilvy and informing him that he would lose the view out the front as I pointed out the front conservatory."*

[56] The defendant seemed to be saying that at the visit of Mr Ogilvy senior to the property on 31 August 2013 she, the licensee, had another discussion with Mrs Ogilvy about the changed view.

[57] The defendant asserts that she told all interested purchasers, including the Ogilvys, that the vendors were her family. She said she may have used the description *"relations"* as well as *"parents"* at times but that she intended to make her relationship clear. She added that she thought that would be clear because there were at least eight large photographs of her spread throughout the property including her wedding photographs. She continued as follows:

"24. I especially recall standing in the dining room discussing with either one, or both, of the Ogilvys – a large framed photo of me sitting under a tree in my wedding dress. I do not recall my exact words but I am sure it was to state that the vendors were not just my relatives, but my parents. I said that this makes no difference to my ability to market this home – or words very similar to this.

25. *LJH had an office policy manual in place that set out licensees' obligations under sections 134 to 139 Real Estate Agents Act 2008. I was aware of the office policy manual but I believe I overlooked giving the Ogilvys written disclosure that the vendors were my parents in addition to my oral disclosure of this information.*

26. *The Ogilvys signed Consent by Purchaser Prior to Entry into Contractual Document 30 August 2013* ***[BD, tab 10].*** *In keeping with my prior advice to the Ogilvys that the vendors were my parents, that document included the statement:*

> *Relationship Disclosure I/We acknowledge that any relationship that may exist or existed between the vendor (or any party associated with the vendor) and the agent, was disclosed to us prior to entering into and signing the Agreement for Sale and Purchase …*

27. I acknowledge that I wrote the phrase "Nil to disclose" under the "Further Disclosures" section on the Consent by Purchaser Prior to Entry into Contractual Document 30 August 2013. I overlooked recording our discussions in writing about the changed view or about the fact the vendors were my parents in that section. Due to our extensive oral discussions about these points, I did not appreciate there was any question at that stage about them and saw them as non-controversial issues."

[58] Later in her evidence the defendant stated:

"34. As set out above, I filled out LJH's standard office checklist form 3 September 2013 ***[BD, tab 14]****. In keeping with my discussions with the Ogilvys, outlined above, I recorded under:*

> ***VENDOR WARRANTIES AND/OR DISCLOSURES***
>
> *I told purchaser that the home across the road is adding a storey. They were fine with it 31-8-13*

I am aware that the Ogilvys alleged to the Complaints Assessment Committee that I retrospectively altered this statement. I strongly deny that. The notes are as I wrote them on 31 August 2013, after the Ogilvys' building inspection visit. As I have said previously in my brief, along with other detailed background information about the property and the neighbourhood, I discussed the Keates' building alterations in detail with the Ogilvys on 25 August 2013, including the issue that the Keates were adding a level over the garage.

35. In answer to some queries that Mrs Ogilvy had made, on about 23 November 2013 I emailed Mrs Ogilvy and let her know that construction had begun on the waterfront at the Keates' property. The Ogilvys later wrote back and acknowledged my email. I can no longer locate copies of this correspondence.

36. Settlement occurred on the scheduled date, 29 November 2013.

…

38. I maintain that I did not put any pressure on the Ogilvys to purchase the home in light of plenty of other interest. While, by oversight, I did not make written disclosure that the vendors were my parents, I made this clear orally. I disclosed the changed view frankly, both in immediate marketing changes and in open discussions with the Ogilvys."

[59] In further oral evidence-in-chief, Mrs Dunham seemed to be putting it that under s 136 of the Act it was only necessary to disclose that she was a *"related party"* to the vendors and that L J Hookers practice is to simply state that she was working for a *"relative"*. She said that if the Ogilvys had indicated they were concerned about possible building at Mr Keate's property, she would have looked into it and probably put a condition in the agreement for sale and purchase to allow that to be investigated.

[60] Mrs Dunham was extensively cross-examined by Ms Paterson as counsel for the prosecuting Authority. Ms Paterson put it to the defendant that she had got herself into a conflict situation. The defendant responded *"perhaps"*. It was put to her that the neighbours' building work was a major matter in terms of the property's views and that she, Mrs Dunham, had been told about it by Mr Keate and she had access to his plans. She admitted that she never went and collected the plans although she easily could have and said she would have if any prospective purchaser had requested to see them. Of course, Ms Paterson put it to her that how could people request plans when they do not know the plans exist. Mrs Dunham responded: *"Yes in hindsight it would have been good practice"* to have had the plans and disclosed them to a prospective purchaser.

[61] Later in her cross-examination, Mrs Dunham said that the effect of the building work on the view was on her mind but she only mentioned it to prospective purchasers if they were focused on the glorious view from the property. That led to Ms Paterson to put it to Mrs Dunham *"So you were aware of the building work which would happen and you were deciding person by person whether to disclose that"*. Mrs Dunham seemed to be maintaining that she disclosed the existence of the building plans to Mr and Mrs Ogilvy on Sunday 25 August 2013 because she could see the view meant much to them. She seemed not to reply to a pressing question from Ms Paterson that the plans were not mentioned by Mrs Dunham to the Ogilvys as early as 25 August 2013. It was then put to her that why did she need to mention the neighbours' building work to the Ogilvys on 31 August if she had mentioned it earlier. Mrs Dunham did not seem to recall doing that on 31 August 2013.

[62] It was put to the defendant licensee that on 25 August 2013 she had merely told the Ogilvys that she was related to the vendors. The defendant did not seem to recall Mr Ogilvy senior putting it firmly to her on 31 August 2013 that she was their daughter.

[63] Ms Paterson put it to the licensee that in using the word *"relations"* and, in general, she had been a bit *"cute"*. A little later in her cross-examination the defendant admitted that, at least up to 29 August 2013, she had never offered to obtain plans of the neighbours' proposed building work for Mr and Mrs Ogilvy and it was put that that was because she had simply not mentioned likely building work to them.

[64] The defendant now clearly admits that she should have put her relationship with the vendors in writing and that was necessary to comply with the Act. She says she does not deny making a mistake in that respect.

[65] It was put to Mrs Dunham by Ms Paterson that she deliberately did not tell the Ogilvys she was a daughter of the vendors; or that there was soon to be some building work on Mr Keate's property. Mrs Dunham denied both those accusations.

[66] The defendant, whom we assess as intelligent, seemed to shrug off any criticism of her conduct other than that she should have put in writing that she was a relative of the vendors.

[67] The defendant seemed to be saying that on 31 August 2013 she made it clear to Mrs Ogilvy on a number of occasions in separate conversations that the property was going to lose part of its wonderful view to building work being undertaken by Mr and Mrs Keate. It was put to her that she had not mentioned that prior to 31 August 2013 but she simply kept responding *"I disagree"* meaning she had told Mr and Mrs Ogilvy of these matters prior to 31 August 2013.

[68] The agreement for sale and purchase was formalised on 3 September 2013. There is no dispute that, by then, Mr and Mrs Ogilvy knew that the vendors were the parents of Mrs Dunham but that had not been put in writing. Mrs Dunham seemed to be insisting that she was never required to do more than say that the vendors were *"relations"* or *"relatives"* of her.

[69] Later in her cross-examination, the licensee seemed to be saying that Mrs Ogilvy had not comprehended the advice given by her well prior to the completion of the purchase contract (on 3 September 2013) explaining the nature of the building work to be carried out by Mr Keate and its effect on the views from the property. She insisted that Mrs Ogilvy had simply not *"absorbed what I told her"* and that she had told the complainants that they would lose their view.

[70] Mr Paterson put it to the licensee defendant that she had mentioned the building work to be done by the neighbours but did not tell Mr and Mrs Ogilvy the full story and allowed them to mislead themselves and, furthermore, the defendant could have made the plans available to Mr and Mrs Ogilvy. The defendant responded *"With hindsight, I would do the business differently"*. She continued on to again say that, if she had realised how significant the view was to Mr and Mrs Ogilvy, she would have put a condition in the agreement for sale and purchase giving them time to check out what effect the proposed building work by Mr Keate would have on the property's view.

[71] Four other witness briefs were filed for the defendant but there is no need to cover the content of those.

The Case for the Prosecution

Charge one – failure to disclose extent of planned building works

[72] The Committee submits that the evidence clearly establishes that the defendant failed to disclose to the complainants that the building works proposed by Mr Keate included the addition of an extra storey that would obstruct the property's water views; and that was a breach of Rule 6.4 of the 2012 Rules which reads:

> *"6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client."*

[73] The Committee submits that the element of wilfulness or, at a minimum recklessness, has also been established such that the defendant's conduct amounted to misconduct because:

[a] When marketing of the property began, the defendant was told in no uncertain terms that the proposed construction would obstruct the property's water views;

[b] The defendant was invited to collect Mr Keate's building plans, so that they could be shown to prospective purchasers. She did not do so;

[c] The water views were clearly an important feature of the property for the complainants. Mr and Mrs Ogilvy were clear in their evidence that the water views were important, and that they commented on the views during their viewing of the property with the defendant. There is no way that the defendant could have failed to realise the importance of the views to the complainants;

[d] In the context of dealing with prospective purchasers (the complainants) who were clearly very enthusiastic about the property's views, there is no way that the defendant could have forgotten to mention such important information as the building works planned by Mr Keate.

[74] The complainants were both clear in their evidence that, during a conversation which took place in the car-port area of the property, the defendant stated that the waterfront neighbour had plans to build something. When Mr Ogilvy speculated that the work was likely to involve a single storey garage, she did not correct him.

[75] Mr Ogilvy accepted that he made a mistake in initially thinking that the work had begun when the conversation took place. In the Committee's submission, that is inconsequential because the fundamental points were unchallenged, namely:

[a] That the conversation took place between Mr and Mrs Ogilvy and the defendant;

[b] That it took place in the car port area of the property on 31 August;

[c] And most importantly, that it was the defendant who initiated that conversation and directed the complainants' attention to the neighbouring property.

[76] When the complainants were advised by Mr Keate, after construction on the upper storey of the garage had begun, that he had told the defendant about his plans, Mrs Ogilvy telephoned the defendant about it, but was so upset that the telephone had to be handed to Mr Ogilvy to speak to the defendant. Mr Ogilvy confronted the defendant, who initially denied that she knew about the neighbour's building work, and then went silent when she was advised that Mr Ogilvy had spoken to the neighbour. Unsurprisingly, the conversation was a heated one.

[77] The Committee submits that the defendant's evidence in relation to this issue was unreliable and ought to be set aside because:

[a] In her brief of evidence, the defendant stated that she advised the Ogilvys' in some detail about the intended construction at Mr Keate's property. Yet the Ogilvys were both very clear in their evidence that there was absolutely no mention of proposed building works during their first viewing of the property;

[b] Under cross-examination, the defendant stated that there were numerous issues that the Ogilvys were concerned about to do with the property, yet there is no mention of any such concerns in any of the documentary evidence available or in her own brief of evidence;

[c] In her brief of evidence the defendant stated that she only spoke to Mrs Ogilvy during the 31 August building inspection. Yet, under cross-examination, the defendant insisted that she disclosed the proposed building works on four occasions to the Ogilvys. In addition to being inconsistent with her brief of evidence (and not having been put to either of the complainants in cross-examination), the prosecution submit that explanation is simply not credible; and that it is not credible that four disclosures in the manner described by the defendant could result in the complainants being taken by surprise when the construction ultimately commenced some months later;

[78] It is submitted for the Committee to be very clear from the evidence that the Ogilvys were taken by surprise when construction of the upper storey began. It is put that surprise is simply not consistent with either the version of disclosure set out in the defendant's brief of evidence, nor with her assertion under cross-examination that she disclosed the building works issue to the Ogilvys on four occasions. It is also put that the complainants' evidence is entirely consistent with the documents (such as the disclosure form noting *"nil to disclose"* and the lack of any mention of numerous concerns on the part of the complainants relating to other issues with the property).

[79] The Committee submits that we ought to disregard the defendant's evidence as lacking credibility, being inconsistent with the documentary evidence, and, in any event, highly unlikely having regard to the complainants' (unchallenged) surprise when they learnt about the extent of the building works.

[80] The Committee submits that the evidence of Mr and Mrs Ogilvy was consistent and clear and establishes a failure to disclose by the defendant which was either wilful or at least reckless, having regard to the fact that the defendant knew exactly what the plans entailed; yet had taken no steps to obtain the plans or offer them to the Ogilvys for their own inspection.

[81] Counsel for the prosecution submits that the defendant's assertion that it was up to prospective purchasers to ask for the plans is simply not sufficient to discharge her duties as a licensee, particularly, in circumstances where she had not even informed the prospective purchasers that the plans existed.

[82] The Committee submits that the evidence establishes misconduct on the part of the defendant with respect to her breach of Rule 6.4 by failing to disclose the extent of Mr Keate's planned building work to the complainants.

Breach of ss 136-137: failure to disclose relationship with vendors

[83] Section 136(1) and (3) read as follows:

> *"**136 Disclosure of other benefits that licensee stands to gain from transaction***
>
> *(1) A licensee who carries out real estate agency work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee, or any person related to the licensee, may benefit financially from the transaction.*
>
> *…*
>
> *(3) The licensee must make the disclosure required by subsection (1) before or at the time that the licensee provides the prospective party with any contractual documents that relate to the transaction."*

[84] Section 137 shows that a licensee's parents are related to that licensee for the purposes of s 136.

[85] Ms Paterson noted that the defendant accepts that she merely made oral disclosure to the Ogilvys of her relationship to the vendors. Accordingly, Ms Paterson submits that a finding of unsatisfactory conduct must follow.

[86] However, Ms Paterson then submits that the defendant's conduct was more serious than unsatisfactory conduct and, in fact, amounts to misconduct. It is put that this was not a mere oversight whereby written disclosure was not provided but verbal disclosure was made; rather, the defendant failed to make clear that she was the vendors' daughter, instead only verbally referring to the vendors as *"relations"* or *"family members"*.

[87] It is submitted for the Committee that we should be cautious before accepting the defendant's evidence in relation to this issue as the complainants were clear that the defendant disclosed only that the vendors were *"relatives"* or *"family members"*.

[88] In her brief of evidence the defendant stated that:

> *"I told all interested purchasers, including the Ogilvys, that the vendors were my family. I made the Ogilvys aware of this from their first visit and later repeated it to them in the course of open discussions. I may have used the description "relations" as well as "parents" at times but I intended to make the relationship clear to them".*

[89] In contrast to that, the defendant asserted under cross-examination that she told the Ogilvys that the vendors were her *"immediate relations"*, something which she had not stated previously. She then stated that she had omitted to mention the parental relationship because she did not consider that she was obliged to do so in order to comply with her obligations as a licensee. That is inconsistent with her brief of evidence. Further, it is inconsistent with her assertion that she simply forgot to obtain written disclosure of what had already been disclosed verbally. The prosecuting Committee submits that we should find that the defendant's evidence lacks credibility.

[90] Rather, the Committee submits that we should accept the Ogilvys' clear evidence that the defendant:

[a] Advised them that the vendors were *"relatives"* or *"family members"* but did not disclose the existence of any relationship closer than that;

[b] Acknowledged that the vendors were her parents on 31 August when Mr Ogilvy senior asked her whether that was the case; and

[c] That no written disclosure was ever provided of the relationship.

[91] The Committee invites us to prefer the evidence of Mr and Mrs Ogilvy, and find that the defendant was well aware of her obligation with respect to providing written disclosure of the parental relationship, but that she did not do so. Ms Paterson submits that amounts to misconduct.

[92] Counsel for the Committee submits that the evidence establishes that the defendant wilfully or recklessly breached Rule 6.4 of the Rules and ss 136-137 of the Act, so that she is guilty of misconduct with respect to each of the charges before us.

The Stance of the Defendant

[93] Mr Hunt filed detailed submissions but, as he put it orally at the hearing, the defendant licensee maintains that, at all material times, she had told Mr and Mrs Ogilvy that there would be a second storey on the extra garage being built by the neighbours and that would run on over the existing garage of the neighbours. Accordingly, Mr Hunt puts it that issue is simply one of credibility for us to decide.

[94] On the other issue, Mr Hunt submits that the defendant has from the outset admitted that it was unsatisfactory conduct on her part not to disclose in writing her relationship as a daughter of the vendors, but the Committee would not accept that as simply a matter of unsatisfactory conduct and maintain it to be misconduct. Mr Hunt submits that the failure was simply an oversight and did not involve recklessness or negligence.

[95] Put another way, the defendant denies misconduct saying that she disclosed the building work to the complainants by making immediate changes to the marketing material for the property and in the course of open discussions with them; and that she orally informed them that the vendors were her parents and it was only by oversight she did not make that disclosure in writing in terms of requirements of ss 136 and 137 of the Act.

[96] As Mr Hunt put it, there are two issues in this case:

[a] Has there been a failure to properly disclose the neighbouring building work amounting to either unsatisfactory conduct or misconduct; and

[b] Was the failure to disclose in writing the relationship between Mrs Dunham and the vendors deliberate or reckless so as to amount to misconduct.

The Neighbouring Property Construction

[97] Mr Hunt also puts it that at the heart of this issue is a credibility contest involving what Mrs Dunham volunteered about the building work, what Mr Ogilvy said, and whether Mrs Dunham omitted to say anything in response. He noted that the Ogilvys assert they stated that they assumed there would be a single level garage which did not affect the view; but that Mrs Dunham says she told the Ogilvys that the Keates were definitely going up a level over the garage and that this would definitely impact the view over the Keates' property. He submits we might take into account the following:

[a] As soon as she became aware from Mr Keate of the impact on the view she consulted with her manager, Craig Wilson;

[b] As a result of that discussion she immediately made changes to the marketing material, in particular the photographs depicting the view;

[c] The Ogilvys agree that Mrs Dunham raised the neighbours' building works with them. However, they assert that she did not state that the building works would impact on the view, but the only reason Mrs Dunham would need to raise the issue with the Ogilvys was because the works impacted the view. Mr Hunt put it that it would make no sense for her to have changed the photographs then raise the issue with the Ogilvys without mentioning the works impacted on the view. He referred to the defendant saying under cross-examination she would not have mentioned the building works if they were not impacting the view;

[d] Mrs Dunham's transaction report was completed by her on 3 September 2013, well before there were any issues raised by the Ogilvys in December 2013. That records: *"I told purchaser that the home across the road is adding a storey. They were fine with it. 31-8-13."* Ms Hunt submits this is compelling contemporaneous evidence that the Ogilvys were told that the building works involved adding a storey;

[e] Mrs Dunham continued to mention the building works in later correspondence with the Ogilvys;

[f] Mrs Dunham explains she did not get the plans from Mr Keate as she was not specifically asked for them by any interested purchaser;

[g] The evidence of Linda Burrows shows that Ms Dunham did mention the impact of the building works to other L J Hooker salespeople.

[98] Mr Hunt submits that evidence can be contrasted with the evidence of the Ogilvys and we should take into account the following:

[a] The Ogilvys' complaint dated 23 July 2014, their interview with Mr Gallacher dated 6 September 2014, and their response to Mrs Dunham dated 25 September 2014 all complain that Mrs Dunham failed to respond or provide further information when Jared Ogilvy said he thought there would be a single level garage; but Jared Ogilvy stated that he made that comment because of the construction he saw at the Keates' property; and that could not be correct as construction did not start until November 2013;

[b] Both Rosalie and Jared Ogilvy's briefs contained an explanation about why Jared mentioned a single level garage which was different to that contained in prior statements they had made. Their briefs refer to the size of the site being the reason Jared assumed there would be a single level garage. However (Mr Hunt puts it) that had not been mentioned as a reason for him commenting on the single level garage in the complaint, the interview or the response; and the response states that the Ogilvys had not thought about the size of the property in relation to the space available, which is directly contrary to what they assert in the briefs. In particular, the response contains the statement: *"If we had thought about it, we would never have imagined that a two storey building could be built in that amount of property space."*

[c] Jared Ogilvy says that, in a conversation with Mrs Dunham on 18 December 2013, she said: *"I had no idea what they were doing. That's news to me"*; but that is inconsistent with known facts, in particular the disclosure of the building works in August 2013 and a number of subsequent discussions about them.

[99] Mr Hunt emphasises that the central feature of the Ogilvy complaint has always been that Jared mentioned there would be a single level further garage and that Mrs Dunham failed to correct that assumption. He submits that, given the importance of that conversation, the context is crucial to assessment of credibility; in that regard the Ogilvys have given quite inconsistent explanations as to why Jared mentioned the single level garage; and that there are good reasons to question the reliability of the Ogilvys' recollection that Jared mentioned a single level dwelling because:

[a] Jared's initial recollection of there being building works across the road at the time he mentioned the single level dwelling itself shows his recollection is not accurate;

[b] The fact that they changed their account in the briefs casts doubt on what they say happened;

[c] In cross-examination, Jared explained that he had thought about what happened when preparing his brief which led him to recall events correctly; but it is implausible to suggest he had a better recollection of events late in 2015 than he had in July and September 2014;

[d] They now say it was the size of the available land that led Jared to assume there would be a single level building, but that is not consistent with what they say in the response;

[e] In cross-examination, Jared said that he mentioned the single level garage only after Mrs Dunham had mentioned there would be building works across the road. It seems unlikely he could accurately assume the Keates were building a garage based on so little information. The more plausible evidence is that Mrs Dunham had mentioned a garage, along with another level.

[100] Mr Hunt submits that Mrs Dunham should not be held responsible for Jared's wrong assumption and that, if the view across the top of the Keates' property was so important to his wife, he should have looked into the issue in more detail by asking Mrs Dunham more questions, asking for the plans, or approaching Mr Keate. Additionally he should have realised that, given the district plan permitted buildings up to 9 metres across the road, that they could not assume any given view would remain for them to enjoy.

[101] Mr Hunt observes that there is an issue about the timing of disclosure made by Mrs Dunham (of the proposed building work by Mr Keate). She says it was made on both 25 and 31 August 2013. The Ogilvys say it was 31 August only. It is submitted by Mr Hunt that the timing is not crucial as the contract was not binding until 2 September 2013. As Mrs Dunham explained, the contract could have included a clause allowing them to fully investigate the neighbour's building works if that is what the Ogilvys wanted as a result of disclosure on either 25 or 31 August 2013.

Unsatisfactory Conduct/Misconduct

[102] Mr Hunt submits that on any analysis Mrs Dunham's conduct does not amount to wilfully or recklessly contravening the professional conduct and client care rules.

[103] In this respect, he submits that Mrs Dunham's conduct differs in a number of key respects from the facts and resulting legal findings in *CAC v Miller* [2013] NZREADT 31:

[a] In *Miller*, we were not required to consider whether the agent's conduct was wilful or reckless under s 73(c). The misconduct finding in *Miller* was for disgraceful conduct under s 73(a) and seriously incompetent or seriously negligent real estate agency work under s 73(b);

[b] Unlike the undisputed position that there was at least some discussion between Mrs Dunham and the Ogilvys about the neighbour's building work, in *Miller*, the agent:

[i] Intentionally did not disclose the extensive view changes at all;

[ii] Had specific building plans in his possession and chose not to disclose them;

[iii] Actively misled the purchaser that the mountain view at issue would not be encroached upon in response to the purchaser's direct question as to whether there were any building plans for the area;

[c] The agent's total withholding of building work information in *Miller* is in marked contrast to the Ogilvys' acceptance that Mrs Dunham raised the neighbour's building works with them;

[d] Even taking the credibility issue as to the extent of disclosure between the parties into account, Mrs Dunham's changes to the marketing material and raising the building work with the Ogilvys, fall far short of wilful and reckless conduct under s 73(c).

Relationship with Vendors

[104] The prosecution maintains that Mrs Dunham's failure to disclose her relationship with the vendors in writing is misconduct. Mr Hunt submits that submission is unsustainable having regard to the following:

[a] Mrs Dunham's wedding photo appeared in numerous locations throughout the house and were noticed by Mr Bill Ogilvy. Mrs Dunham had a discussion with her mother prior to marketing the house and insisted that the photos remain. It is put that none of that is consistent with a deliberate or reckless breach of s 136;

[b] Mrs Dunham says she simply overlooked the need to disclose the relationship in writing. She accepts that amounts to unsatisfactory conduct but does not accept it is misconduct;

[c] The Ogilvys agree that Mrs Dunham disclosed the family relationship at the first inspection on 25 August 2013. It was again discussed with Mr Bill Ogilvy at the inspection on 31 August 2013. Again that is not consistent with a deliberate concealing of the relationship which, it is submitted, would be necessary for a misconduct finding;

[d] In completing a transaction report, Craig Wilson checked with Mrs Dunham whether she had disclosed to the Ogilvys that the vendors were her parents. He then wrote: *"The purchasers were informed that the vendor is Tanya's parents"*;

[e] Mr Hunt submits that, overall, a finding of misconduct there would need to be a deliberate or reckless concealment of the relationship which triggered s 136; but the evidence shows that the relationship was disclosed; and the fact that it was not disclosed in writing is something that Mrs Dunham concedes was unsatisfactory;

[f] Mr Hunt emphasises that the prosecution attempted to make an issue of the fact that on 25 August 2013 Mrs Dunham did not disclose that the vendors were her parents; but puts it there is nothing in s 136 which requires the precise nature of the relationship to be disclosed; and in any event that was undoubtedly known to the Ogilvys by 31 August 2013.

Decision

[105] Section 72 of the Act defines *"unsatisfactory conduct"* and reads 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."*

[106] Section 73 of the Act defines *"misconduct"* and reads 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."*

[107] Broadly, we agree with Ms Paterson's submissions for the prosecuting Authority. We take the view that the defendant licensee has misled the Ogilvys in that the defendant knew from the neighbour (Mr Keate) precisely what building work was to happen and would or should have known the effect of that on the view from the property. Nevertheless, she remained silent when the complainant Mr Ogilvy misled himself and his wife as to the likely effect of any such building work. She had the plans available and could easily have provided them to Mr and Mrs Ogilvy as prospective purchasers. In that respect she was seriously negligent, wilful or reckless in not sorting out that issue for the complainants.

[108] With regard to the other issue of breach of s 136, the defendant herself admits a breach of that section because she did not disclose her relationship with the vendors in writing. In fact, for a while she rather cutely put their relationship in a general way as simply being related rather than that she was their daughter. Indeed, she was rather cute in letting the Ogilvys mislead themselves over the view.

[109] Under s 136, the licensee was required to disclose in writing that her parents might benefit financially from the transaction. It would probably have been adequate to disclose that a *"person related to her"* (to use the words of s 136(1)) might benefit financially. In

this case, the defendant claims compliance with s 136 from having disclosed that she (the agent) was related to the vendors. All in all, that would have been compliance with s 136 had it been set out in writing for the complainants.

[110] We observe that the defendant licensee is full of self confidence that she has not failed the complainants or the industry in any way. She takes the view that she informed the complainants of the proposed building work by the neighbours and she told them she was related to the vendors.

[111] In terms of credibility based on our experience in endeavouring to decide such an issue, we prefer the evidence of Mr and Mrs Ogilvy. They made it clear to the defendant on 25 August 2013 that the views from the property were stunning and important to them. It seems to us to have been seriously negligent of the defendant to fail to disclose that she had plans outlining the building work proposed by Mr and Mrs Keate because they expected it to abrogate from the view of 42 Forrester Drive.

[112] In terms of Charge 1, the defendant breached Rule 6.4 by withholding the information in those plans either wilfully or recklessly. Also, that conduct would reasonably be regarded by agents of good standing, or by reasonable members of the public as disgraceful.

[113] On 31 August 2013 the defendant told the Ogilvys that there was to be building work undertaken by Mr and Mrs Keate on some spare land which the defendant pointed out and, although Mr Ogilvy opined that only a single storey garage could be built on that spot, the defendant did not correct him when she knew, or should have known, the project was to be two storeys. We assess Mr and Mrs Ogilvy as honest witnesses.

[114] We take into account such matters as the evidence from the Agency Transaction Report which, of course, conflicts with the evidence of the complainants as does the evidence of the defendant.

[115] It seems to us that the defendant licensee has misled the Ogilvys by not explaining to them that the building work to be undertaken by Mr and Ms Keate would comprise two storeys and would affect the view from number 42 Forrester Drive. Although the Ogilvys had jumped to a wrong conclusion that only a single storey garage would be built, the defendant knowing that was incorrect withheld information which, at least in fairness, should have been provided by her to Mr and Mrs Ogilvy.

[116] All this meant that when they signed and committed to the purchase on 3 September 2013, the Ogilvys knew of the building works but not of their extent or effect on the view from the property they were acquiring.

[117] Accordingly we find Charge 1 proved in that the defendant has wilfully or recklessly contravened Rule 6.4. There has been misconduct on her part as we have covered above.

[118] The second charge is based on a breach of s 136 of the Act. Although it was extracted from the defendant (with prompting by Mr Ogilvy senior) prior to the signing of the contract by Mr and Mrs Ogilvy that the defendant was the daughter of the vendors, there has been unsatisfactory conduct by the defendant in that she failed to disclose in writing that persons related to her, namely her parents, would benefit financially from the sale of 42 Forrester Drive. She simply did not bother to make that disclosure in writing and as we have said was rather cute as the way in which she revealed her relationship to the

vendors. Indeed she has breached all four limbs of s 72 of the Act. However we find that conduct does not amount to misconduct on the facts of this case. Accordingly, we find that charge 2 fails but that the alternative of unsatisfactory conduct has been proved in terms of the breach of s 136.

[119] Our major concern in this case is that this is another example of people buying a property with wonderful views in good faith but based on misleading information from the real estate agent so that they have not purchased the type of property they had expected.

[120] For the reasons we have covered above, we consider there has been misconduct at a concerning level. The prosecution bore the onus of proof and the standard of proof is the balance of probabilities.

[121] Accordingly the matter of penalty needs to be addressed. This can be done either on the papers or at a further hearing. We direct the Registrar to arrange, in the usual way, a directions hearing by telephone with our Chairperson to arrange a timetable towards dealing with penalty.

[122] 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

_____
Mr G Denley
Member

_____
Ms N Dangen
Member