BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2019] NZREADT 21

READT 046/18

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 409
AGAINST	DARREN JOHN BRADY Defendant

On the papers

Tribunal:	Hon P J Andrews, Chairperson Ms N Dangen, Member Ms C Sandelin, Member
Submissions received from:	Mr J Simpson, on behalf of the Committee Mr R J Hargreaves, on behalf of Mr Brady
Date of Decision:	23 May 2019

DECISION OF THE TRIBUNAL
(Charge and Penalty)

Introduction

[1] Mr Brady is a licensed agent, engaged at Southern Suburbs Realty Limited, trading as Harveys Real Estate Papakura. On 21 August 2018, Complaints Assessment Committee 409 charged Mr Brady and Mr Steven Ball (a licensed salesperson, previously engaged as a salesperson at Harveys) with misconduct under s 73(b) of the Real Estate Agents Act 2008. The charges were set down for hearing in Auckland for five days, from 1 April 2019.

[2] In his opening submissions filed on 20 March 2019, counsel for the Committee, Mr Simpson, sought leave to amend the charges by withdrawing the particulars of the charge against Mr Ball. The Tribunal has given leave for the particulars against Mr Ball to be withdrawn, and is not required to consider the charge against Mr Ball further.

[3] On 29 March 2019, counsel for the Committee and Mr Brady advised the Tribunal that they had reached a proposed resolution of the charge against Mr Brady. Counsel provided the Tribunal with an agreed summary of facts, and invited the Tribunal to exercise its power under s 110(4) of the Act to find Mr Brady guilty of unsatisfactory conduct under s 72 of the Act, on the basis of the summary of facts.

[4] The Tribunal is now required to determine whether Mr Brady should be found guilty of misconduct, as originally charged, or unsatisfactory conduct, and to make penalty orders. Submissions have been filed on behalf of the Committee and Mr Brady.

Facts

[5] The following is the agreed summary of facts:

> …
>
> 3. On or about 1 May 2015, Ivan Derrick entered into an agency agreement with Harveys to sell his property at [ ]. The listing agent was [Mr Ball].
>
> 4. [Mr Brady] and Mr Derrick were known to each other. Mr Derrick had previously worked as a real estate agent for [Mr Brady] at Harveys for several years during the early 2000's.

5. Between December 1996 and 1997, Mr Derrick had obtained consent from the Franklin District Council to build alterations to the property. These included a domestic garage with bedrooms, a lounge and a conservatory. These works were completed but Mr Derrick did not obtain a Code Compliance Certificate (CCC).

6. Mr Derrick has stated that he did not obtain a CCC as his priority was to look after his wife when her health deteriorated.

7. At the time of listing, Mr Derrick initialled clause 7 of the agency agreement which provides:

> 7. The owners hereby warrant and undertake that (with the exclusion of ____) where any work has been done or permitted to be done on the property (including additions, extensions and alterations to the property) by the Owners for which an authority, consent, permit or licence is required by law then an authority, consent, permit or licence was obtained for those works and such works were carried out in accordance with the same. If the property is on a Composite or Unit Title then such title is to the Owners best knowledge and belief free from defect (including additions, extensions and alterations to the property).

8. Mr Ball had primary responsibility for the listing. [Mr Brady] was not involved in the listing or marketing of the property apart from two progress meetings with Mr Derrick and Mr Ball. [Mr Brady] did not view the property.

9. An auction for the property was held at 6.00 pm on 23 June 2015 at Harveys' offices, [Mr Brady] was the auctioneer.

10. Earlier that day, Mr Derrick's solicitor had emailed Harveys requesting that a clause be added in the agreement for sale and purchase (cause 20), which provided:

> 20.0 The purchaser acknowledges that the purchaser has been made fully aware that aspects of the property may not comply with the current building code and/or that no Code Compliance Certificate has been issued in respect of certain works carried out. Accordingly, the vendor gives no warranty as to the same and as from the date of this agreement the vendor shall be under no obligation to the purchaser to achieve compliance or procure a Code Compliance Certificate nor liable for any expense, loss, or liability suffered by the purchaser in relation to such non-compliance and the purchaser agrees that the purchaser is purchasing the property in so far as the double garage and bedrooms and en suite areas are concerned on an "as is where is" basis. General Term 8.2 shall not apply to this agreement and the vendor warranties contained in General Terms 6.1, 6.2 and 6.3 of this agreement shall be read entirely subject to this clause and shall be deemed not to have been breached by the vendor.

…

12. [Mr Brady] became aware prior to the auction that this clause had been inserted.

13. [Mr Brady] met with Mr Derrick and members of his family [ ] in the boardroom prior to the auction for the reserve meeting. Mr Ball was in

the auction room greeting the bidders, and was coming in and out of the boardroom.

14. During the reserve meeting, Mr Ball informed [Mr Brady], Mr Derrick and his family that bidders would not be bidding due to clause 20 being inserted.

15. [Mr Brady] and Mr Derrick discussed whether clause 20 was necessary. [Mr Brady] explained that if the work had taken place prior to 1 July 1993 when the Building Act 1991 came into force, no CCC would be required and clause 20 could be removed.

16. Mr Derrick and his family were unclear of the exact date of the works and spent some time recollecting the details. [Mr Brady] left the boardroom on two occasions while the discussions continued.

17. After discussing with his family, Mr Derrick advised [Mr Brady] that:

(a) the building work was done in the "early 1990's" under the "old Act";

(b) the building work was done under a "permit". [Mr Brady] understood the Building Act 1991 to use the language of "consent" rather than "permit"; and

(c) the work had all inspections required and was done to a high standard.

(together, the Building Work Information)

18. Based on this discussion and the Building Work Information, [Mr Brady] suggested that clause 20 could be deleted because there was no requirement for a CCC to be issued. Mr Derrick agreed. [Mr Brady] ruled out clause 20 in the agreement and Mr Derrick initialled the change.

19. [Mr Brady] took no further steps to verify or confirm the verbal Building Work Information given to him by Mr Derrick:

(a) He did not seek to acquire any property documents which could confirm the date on which the building work took place.

(b) He did not attempt to contact [Mr Derrick's] lawyer to discuss the clause, nor did he recommend that Mr Derrick seek legal advice before the clause was removed.

20. [Mr Brady] went into the auction room and announced to those present that clause 20 had been deleted. The auction was then commenced. An agreement for sale and purchase with a purchase price of $782,000 was finalised with the purchasers in post-auction negotiations after the property passed in.

21. The Building Work Information was all incorrect, in that:

(a) The building work was done between 1996 and 2000, under the Building Act 1981.

(b) The building work was done under a building consent issued in December 1996 rather than a building permit.

(c) The work did not have a final inspection completed.

(d) The work was carried out by Mr Derrick himself, to a standard which could not be consented in subsequent attempts to obtain a CCC.

22. A week to 10 days after the auction, [Mr Brady] was contacted by the purchasers' solicitors who advised that the building work had been completed under a building consent granted by Franklin District Council in 1996.

23. The purchasers' solicitor also informed Mr Derrick's lawyer of the date of the building consent. Negotiations then proceeded between Mr Derrick's lawyer and the purchasers' lawyer in respect of Mr Derrick obtaining a CCC. An amount of $200,000 was retained in trust upon settlement pending the outcome of the CCC issue. [Mr Brady] was not involved in negotiations regarding the amount retained.

24. During the following period, [Mr Brady] and Harveys met with Mr Derrick on several occasions and provided assistance, including engaging a building certifier to assess what work was required to bring the property up to a consentable standard.

12. Mr Derrick was unable to obtain a CCC for the works. On 16 February 2017, an agreement was reached to release the $200,000 to the purchasers in finalisation of all matters. [Mr Brady] was not involved in negotiations regarding releasing this sum.

The charge

[6] The Committee alleged that Mr Brady's conduct constituted seriously incompetent or seriously negligent real estate agency work, in that he breached rr 5.1 and 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, by advising Mr Derrick to delete clause 20, without verifying any of the information given to him by Mr Derrick, as to the year the building work was done, or discussing the matter with Mr Derrick's solicitor.

[7] The Committee accepts that Mr Brady's conduct amounts to unsatisfactory conduct under s 72 of the Act, and that it is open to the Tribunal to make a finding of unsatisfactory conduct for a breach of rr 5.1 and 9.1. Mr Brady accepts the charge of unsatisfactory conduct for breach of r 5.1, but does not accept the charge of unsatisfactory conduct for breach of r 9.1

The alleged breach of r 5.1

[8] Rule 5.1 provides that "a licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work". In the light of Mr

Brady's admission that he breached r 5.1, it is not necessary to consider this element of the charge in detail.

[9] In the present case, when it appeared that the desirability of including clause 20 rested on when the building work was done on the property, a reasonably competent licensee should at least have asked Mr Derrick if he had any documents relating to the work, and where they were, asked Mr Derrick why it was that his solicitor had asked for the clause to be inserted, and suggested that the solicitor's advice be sought before striking out the clause which had been inserted at the solicitor's request. A reasonably competent licensee would also have made it clear to Mr Derrick what the consequences would be if his information as to the date the building work was done was in fact incorrect.

[10] We find that Mr Brady breached r 5.1 by not taking any steps to verify the information provided by Mr Derrick as to when the building work was done, or to recommend that Mr Derrick seek advice from his solicitor.

The alleged breach of r 9.1

Submissions

[11] Mr Simpson submitted that r 9.1 sets out a "core obligation", that is fundamental to the relationship between licensee and vendor.[1] He submitted that clause 20 was important in this case because it ensured that Mr Derrick would not be liable for the absence of any necessary building consents, once the property was sold. He submitted that the deletion of the clause had serious consequences for Mr Derrick, as it materially altered his position, and his obligations under the agreement for sale and purchase.

[12] Mr Simpson submitted that Mr Brady's advice to delete clause 20, without verifying the date the building work was done, or any attempt to contact Mr Derrick's solicitor, placed his client at serious risk (later realised). He submitted that deleting a protective clause such as clause 20 cannot be seen as acting in a client's best interests.

---

1 Citing the Tribunal's decision in *Complaints Assessment Committee 403 v Robb* [2017] NZREADT 39, at [43] and [48].

[13] Mr Hargreaves submitted that Mr Brady's conduct fitted more readily into a breach of r 5.1, rather than a breach of r 9.1. He submitted that if the information provided by Mr Derrick had been correct, Mr Brady would have been in breach of his duty under r 9.1 if he had not advised that clause 20 be deleted. This would have been because the presence of clause 20 limited potential bids to (effectively) the value of the land.

[14] He submitted that the only thing that turned Mr Brady's action in advising that clause 20 should be deleted from being an action in Mr Derrick's best interests into one that was not in his best interests was that the information Mr Derrick gave him was not correct.

Discussion

[15] Rule 9.1 provides that "a licensee must act in the best interests of a client and in accordance with the client's instructions unless to do so would be contrary to law".

[16] Mr Hargreaves' submissions fail to take into account that Mr Brady could not properly determine what would be in Mr Derrick's best interests regarding clause 20 until such time as he had verified the information Mr Derrick gave him. If there were verification that the building work was done before the Building Act 1991 came into force, then deletion of clause 20 may have been in Mr Derrick's best interests. If there were verification that the work was done after the Act came into force, Mr Derrick's best interests may have lain in clause 20 remaining.

[17] We accept Mr Simpson's submission that r 9.1 expresses a core obligation, and that it was important in this case. In the light of the risk of adverse consequences, it was in Mr Derrick's best interests to obtain verification as to when the building work was done before advising that clause 20 be deleted.

[18] We find that Mr Brady breached r 9.1 by advising Mr Derrick that clause 20 should be deleted, without verifying the information provided by Mr Derrick, or recommending that Mr Derrick seek advice from his solicitor.

Should Mr Brady be found guilty of misconduct or unsatisfactory conduct?

Submissions

[19] Mr Simpson submitted that an error of judgment or carelessness breaching acceptable standards will generally be unsatisfactory conduct. He submitted that on the basis of the agreed summary of facts, the threshold of serious incompetence or serious negligence is not met in this case, and that Mr Brady's conduct is more consistent with cases where there have been findings of unsatisfactory conduct.

[20] He submitted that Mr Brady's conduct in failing to verify the information provided by Mr Derrick, and not recommending that advice be obtained from Mr Derrick's solicitor, should be viewed against the fact that Mr Derrick gave him inaccurate information: that the building work was done in "the early 1990's", and that the work was done under a "permit", and had all inspections required. He also submitted that it was relevant that Mr Derrick had failed to disclose any consent issues when he entered into the Agency listing agreement.

[21] Mr Simpson also submitted that Mr Brady's conduct occurred in the context of an auction, where the vendors and prospective purchasers are locked into the terms of any agreement that is reached. He submitted that this highlighted the need to take care when deleting any protective clauses in the auction sale and purchase agreement. Against that, he submitted, Mr Brady had had a "relatively robust conversation" with Mr Derrick regarding the building work, and left the room on two occasions to allow Mr Derrick and his family to discuss the issue. He submitted that Mr Brady's failure was in not going far enough to verify information given by Mr Derrick. He accepted that Mr Brady's conduct was not intentional, nor borne from a complete failure to turn his mind to the consequences of the decision.

[22] Mr Hargreaves adopted Mr Simpson's submissions.

Discussion

[23] In his opening submissions for the Committee, Mr Simpson submitted that:

> … the following points of principle can be drawn … regarding a licensee's due diligence obligations:
>
> (a) Licensees must know what they are selling, to protect the vendor and to ensure that a purchaser is not misled;
>
> (b) Licensees cannot simply rely on unverified verbal information from a vendor;
>
> (c) Care needs to be taken when a licensee is proposing to amend the terms of a sale and purchase agreement; and
>
> (d) Once a licensee is on notice of an issue, there is an obligation to undertake further enquiries.

[24] We agree with that submission. In the present case, Mr Brady did not know when building work comprising a garage with bedrooms above had been done, he relied on unverified information provided by Mr Derrick, his advice to Mr Derrick was to amend the terms of a sale and purchase agreement, and he was on notice as to the potential consequences flowing from when the building work was done.

[25] Mr Brady was charged with misconduct under s 73(b) of the Act:

> **73 Misconduct**
>
> For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct–
>
> …
>
> (b) constitutes seriously incompetent or seriously negligent real estate agency work; …

[26] Counsel for the Committee and Mr Brady have both submitted that the Tribunal should find that he is guilty of unsatisfactory conduct under s 72 of the Act:

> **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 regulation 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.

[27] The Tribunal must determine whether Mr Brady's conduct was "*seriously* negligent or incompetent", or "negligent or incompetent".

[28] Mr Simpson referred us to the relevant High Court authorities as to the tests for determining whether conduct constitutes misconduct or unsatisfactory conduct. In *Complaints Assessment Committee 20003 v Zhagroo*, her Honour Justice Thomas said regarding s 73(b):[2]

> The words of s 73(b) must be given their plain meaning. Whether serious negligence or serious incompetence has occurred is a question to be answered in the circumstances of each case … the Tribunal is well placed to draw a line between what constitutes serious negligence or incompetence, or mere negligence or incompetence, the Tribunal having significant experience in dealing with complaints under the Act.

[29] Mr Simpson also referred us to the approach taken by his Honour Justice Woodhouse in *Wyatt v Real Estate Agents Authority*:[3]

> … Substantially less will be required to establish unsatisfactory conduct than will be required to establish misconduct. Beyond that, the words in s 72 should not, in my judgement, be over-refined by treating the words in s 72 on the basis that they have some technical meaning or by seeking synonyms for words which have natural meanings.

[30] The issue to determine is whether Mr Brady's breaches of his obligations were "serious". If they were, then the appropriate finding is misconduct under s 73, and the penalty determination will require an assessment of (among other things) the level of "seriousness" of the breaches. If the breaches were not "serious", then the appropriate determination is unsatisfactory conduct under s 72. However, the penalty determination will again require an assessment of the "seriousness" of the conduct.

[31] Mr Simpson referred us to three cases of findings of unsatisfactory conduct arising out of vendors' representations passed on to prospective purchasers.

---

2 *Complaints Assessment Committee 20003 v Zhagroo* [2014] NZHC 2077, at [49].
3 *Wyatt v Real Estate Agents Authority* [2012] NZHC 2250, at [49].

[32] In *Donkin v Real Estate Agents Authority (CAC 10057)*,[4] a property which had a separate one-bedroom basement flat was advertised as a "legal home and income", when it was not permitted as such. The listing salesperson (not Ms Donkin) had not checked the rating status of the property. The Tribunal observed that in the circumstances of that case, the salesperson should have ensured that proper enquiries were made as to the property, or made it clear to a prospective purchaser that the statement that the property was a "legal home and income" was a statement from the vendor, and needed to be independently verified, or clearly informed prospective purchasers that there might be issues regarding whether the property was a "legal home and income".

[33] In *Burn v Real Estate Agents Authority (CAC 20002)*,[5] there was a question as to whether a new deck attached to a residential property had received appropriate Council consent. The purchasers contended that they were told some five months after entering into an agreement for sale and purchase that the deck had not been consented. The Tribunal found as a fact that the purchasers had been told that the deck was non-compliant before they signed a conditional contract to buy the property. However, the Tribunal made a finding of unsatisfactory conduct against the licensee, on the basis that he should have obtained more information from the vendors as to the legal status of the deck, and addressed it with a suitably tailored condition in the agreement for sale and purchase, or referred the issue to the purchasers' solicitor.

[34] In *Grindle v The Real Estate Agents Authority (CAC 20004)*,[6] the licensee passed on to prospective purchasers milk production data for a farm property, provided to him by the vendors. The licensee had not verified the data. The licensee had asked the vendors for production figures from Fonterra, but the vendors did not provide them, and he had trusted the vendors (whom he knew). He admitted that he did not tell prospective purchasers that the production figures were unverified, and supplied by the vendors. The Tribunal upheld the Complaints Assessment Committee's decision that the licensee's conduct constituted unsatisfactory conduct under s 72 of the Act.

---

4 *Donkin v Real Estate Agents Authority (CAC 10057)* [2012] NZREADT 44.
5 *Burn v Real Estate Agents Authority (CAC 20002)* [2014] NZREADT 25.
6 *Grindle v The Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 85.

[35] In the course of its decision the Tribunal said:

> [42] Mr Grindle was aware of the importance of the production figures and knew that the figures he had been given by the vendor were unverified, he did not advise that to the complainants or to any other prospective purchaser. It was incumbent on him to do so … He should have made proper enquiries himself; or made it clear to any prospective purchaser that there may be an issue regarding the accuracy of the production figures and that [the] purchaser should obtain independent legal advice… None of those courses was pursued by the appellant. …

[36] In each of the three cases referred to, the "unverified information" was capable of having an impact on the price a purchaser was prepared to pay for the relevant property. In *Donkin*, the sale and purchase agreement was cancelled, as the prospective purchasers were not able to obtain finance (which was dependent on the property being a "legal home and income"). In *Burn* and *Grindle*, the sales proceeded. The purchasers in *Burn* completed the purchase knowing there was an issue as to the deck, but suffered a loss on re-sale. The purchasers in *Grindle* contended they paid considerably more for the property than they should have, on the basis of inaccurate milk production figures.

[37] The similarity between these three cases and the present case is that the licensee acted on information provided by the vendor, without obtaining independent verification of that information. In each case that had, or had the potential to have, a significant financial impact on the transaction concerned.

[38] We accept Mr Simpson's submission that the context in which Mr Brady's conduct occurred, a sale by auction, highlights the importance of compliance with the licensee's obligations. As he put it, vendor and purchaser would be locked into an unconditional contract. It was important to get the terms of the contract right.

[39] Further, Mr Brady's conduct involved deleting a clause that had been inserted into the auction sale and purchase agreement at the request of Mr Derrick's solicitor. While there is no evidence that Mr Brady was made aware of the insertion of clause 20 until the evening of the auction, we record the following course of events regarding clause 20:

[a] Harveys emailed the draft auction agreement to a legal executive (Ms Hudson) at the offices of Mr Derrick's solicitor (Mr Lucas) at 11.55 am on the day of the auction.

[b] Ms Hudson emailed Harveys at 12.29 pm (copied to Mr Derrick) asking it to verify (among other things) that any work done on the property had had proper consents obtained (and noting that if they had not, an "as is" clause would be required).

[c] Mr Lucas advised Ms Hudson at 1.50 pm that Mr Derrick had a permit for a garage and two bedroom, but no CCC.

[d] Ms Hudson emailed a "standard" "as is" clause to Mr Lucas at 2.47 pm (copied to Mr Derrick).

[e] Mr Lucas emailed the "as is" clause to Harveys at 3.04 pm (copied to Mr Derrick).

[40] There are, therefore, two factors in the present case that are absent in the three cases referred to us. First, in reliance only on Mr Derrick's oral information as to when the building work was done, Mr Brady deleted a clause that had been inserted into the auction sale and purchase agreement at the request of Mr Derrick's solicitor. Before doing so he did not seek the solicitor's advice, and did not recommend that Mr Derrick do so. Secondly, however, the vendor (whose complaint led to the charges being laid) was copied into, and was therefore aware of, the correspondence between his solicitor and Harveys. He was, therefore, aware that his solicitor considered the issue as to when the building work was done, and whether all necessary consents had been obtained, was important.

[41] We have concluded that we should find Mr Brady guilty of unsatisfactory conduct, rather than misconduct. We consider that Mr Brady's conduct, in the particular circumstances of this case, does not reach the threshold of "serious" negligence or incompetence, such as would require a finding of misconduct. However,

we also find that Mr Brady's conduct must be placed at the mid to upper level of the range of unsatisfactory conduct.

Penalty

Penalty principles

[42] The principal purpose of the Act is to "promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work."[7] The Act achieves these purposes by regulating agents, branch managers, and salespersons, raising industry standards, and by providing accountability through a disciplinary process that is independent, transparent, and effective.[8] Penalties for misconduct and unsatisfactory conduct are determined against the need to maintain a high standard of conduct in the industry, the need for consumer protection and the maintenance of confidence in the industry, and the need for deterrence.

[43] A penalty should be appropriate for the particular nature of the misbehaviour, and the Tribunal should endeavour to maintain consistency in penalties imposed for similar conduct, in similar circumstances. The Tribunal should impose the least punitive penalty that is appropriate in the circumstances. While there is an element of punishment, rehabilitation is an important consideration.[9]

[44] Section 110(2) of the Act sets out the orders the Tribunal may make by way of penalty. As may be relevant to the present case the Tribunal may:

[a] Make any of the orders that a Complaints Assessment Committee may impose under s 93 of the Act (these include censuring or reprimanding the licensee, and ordering the licensee to undergo training or education);

[b] Impose a fine of up to $15,000;

[c] Order cancellation or suspension of the licensee's licence;

---

7 Section 3(1) of the Act.
8 Section 3(2).
9 See *Complaints Assessment Committee 10056 v Ferguson* [2013] NZREADT 30, and *Morton-Jones v The Real Estate Agents Authority* [2016] NZHC 1804, at [128].

[d] Order that the licensee pay compensation of up to $100,000 to any person who has suffered loss by reason of the licensee's conduct.

Submissions

[45] Mr Simpson submitted that the penalty imposed must mark the conduct in a way that sends a message to the industry. He submitted that the relevant features of Mr Brady's conduct were his heightened obligation to act in the best interests of his client vendor, and not place him at risk, and the context of the auction sale, where the vendor and purchaser would be locked in to an auction sale and purchase agreement.

[46] Mr Simpson also submitted that the presence of clause 20, inserted at the request of Mr Derrick's solicitor, should have alerted Mr Brady to the possibility that Mr Derrick's information was not accurate, but Mr Brady did not take any (or sufficient) steps to verify it. He further submitted that Mr Derrick had in fact suffered substantial loss.

[47] Against that, Mr Simpson submitted that Mr Brady appeared to have had a "relatively robust" conversation with Mr Derrick, discussing the date of the building work. Thus, it could not be said that Mr Brady had not turned his mind to the potential risks of deleting clause 20. He also acknowledged that Mr Brady had co-operated with the Committee's investigation, and had indicated his acceptance of an alternative charge at an appropriate stage of the proceeding.

[48] Mr Simpson submitted that the appropriate penalty order would be to impose a fine. He submitted that Mr Brady's conduct was at a more serious level of unsatisfactory conduct than that considered in *Donkin*, *Burn*, and *Grindle*. He submitted that the fine should be in the range of $3,000 to $4,000.

[49] Mr Hargreaves submitted that many licensees would have acted in the same way as Mr Brady did, when given information by an experienced agent, about his own house. He submitted that the purpose of penalty is not to punish the licensee, and that an order for censure would have the desired effect of informing members of the

industry that in circumstances such as those facing Mr Brady, further diligence is required.

[50] Mr Hargreaves further submitted that if the Tribunal were minded to impose a fine, it should be at a level consistent with those imposed in *Burn* and *Grindle*.

Discussion

[51] In *Burn*, the licensee's conduct was assessed as being at a relatively low level. A fine of $2,000 was imposed. In *Grindle*, the licensee's conduct was assessed as being in the low to middle range of unsatisfactory conduct, and a fine of $1,000 was imposed, together with an order for censure. In *Donkin* an order was made for the licensee to make a payment to the complainant, for fees associated with entering into the agreement for sale and purchase which was later cancelled.

[52] As already discussed, there are some similarities in the circumstances of these three cases and the present case. But they are not on all fours and, as we recorded earlier, there are important distinguishing features which take Mr Brady's conduct to a higher level in the range of unsatisfactory conduct.

[53] We have concluded that the appropriate penalty is an order for censure, and a fine. We do not consider that it is necessary to make any other orders. In assessing the level of the fine, we have considered all of the circumstances of Mr Brady's conduct against the purposes of the Act, and the penalty principles set out earlier.

Orders

[54] We find Mr Brady guilty of unsatisfactory conduct under s 72 of the Act.

[55] We make the following penalty orders:

[a] An order for censure.

[b] An order than Mr Brady pay a fine of $3,500.00. The fine is to be paid to the Authority within 20 working days of the date of this decision.

[56] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

_____
Hon P J Andrews
Chairperson

_____
Ms N Dangen
Member

_____
Ms C Sandelin
Member