**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2020] NZREADT 08**

**READT 027/19**

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| IN THE MATTER OF | a charge laid under s 91 of the Real Estate Agents Act 2008 |
| BROUGHT BY | COMPLAINTS ASSESSMENT COMMITTEE 413 |
| AGAINST | ROBYN BOND<br>Defendant |
| Hearing: | 18 February 2020, at Auckland |
| Tribunal: | Hon P J Andrews, Chairperson<br>Ms C Sandelin, Member<br>Mr N O'Connor, Member |
| Appearances: | Mr M Hodge and Ms A-R Davies, on behalf of the Committee<br>Ms E Harrison, on behalf of Ms Bond |
| Date of Decision: | 25 February 2020 |

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**DECISION OF THE TRIBUNAL**
**(Finding of misconduct and penalty)**

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## Introduction

[1] Complaints Assessment Committee 413 has charged Ms Bond with misconduct under s 73(a) (disgraceful conduct) of the Real Estate Agents Act 2008 ("the 2008 Act"). In the alternative, the Committee submitted that if the Tribunal were not satisfied that she was guilty of disgraceful conduct, it could find Ms Bond guilty of misconduct under s 73(b) of the 2008 Act (seriously incompetent or seriously negligent real estate agency work).

[2] In a joint memorandum filed in the Tribunal on 21 November 2019, Ms Bond pleaded guilty to disgraceful conduct or seriously negligent conduct in the alternative.

[3] The Tribunal is required to determine whether Ms Bond is guilty of misconduct under s 73(a) or s 73(b) of the 2008 Act, and to determine what penalty should be imposed.

[4] Ms Bond did not attend the hearing. Ms Harrison advised the Tribunal that Ms Bond agreed to the hearing proceeding in her absence.

## Facts

[5] At the relevant time, Ms Bond was engaged by Safari Real Estate Ltd ("the Agency"). In October 2008, Ms Bond was both vendor and listing salesperson for her own property in Upper Hutt. She advertised it as being in "excellent exterior condition".

[6] Ms Bond entered into a conditional agreement for sale and purchase in January 2009. The prospective purchasers commissioned a pre-purchase building report, which was provided in early February 2009 ("the Realsure report"). The Realsure report identified material weathertightness risks at the property, and the prospective purchasers cancelled the agreement for sale and purchase. They provided Ms Bond's solicitor with a summary of the Realsure report.

[7] Ms Bond was told that the prospective purchasers had cancelled the agreement for sale and purchase because of weathertightness risks, but she was not given a copy

of the summary of the Realsure report, or the report itself. Ms Harrison advised the Tribunal that Ms Bond was not aware that her solicitor had a summary of the report.

[8] Ms Bond contacted Realsure to ask why the property had not passed the inspection. She was told that Realsure did not disclose reports to vendors, and was advised to arrange for a building inspection. In June 2009, Ms Bond engaged New Zealand House Inspection Company to prepare a building inspection report ("the NZHIC report"). The NZHIC report did not disclose any weathertightness risks at the property, but included a number of caveats, for example:

[a] its inspection was not an invasive moisture test, but rather a limited visual inspection, and did not include an assessment of latent or hidden defects;

[b] the external cladding appeared to be good but the inspector had been "unable to sight";

[c] the report did not cover any building suffering from leaky building syndrome;

[d] it was not a specialist weathertightness report; and

[e] the report did not assess compliance with the New Zealand Building Code, including the Code's weathertightness requirements.

[9] From February 2009 onwards, Ms Bond continued to market the property as being in "excellent exterior condition".

[10] During June and July 2009, Ms Bond held open homes at the property, attended by the eventual purchasers ("the complainants"). Ms Bond did not advise the complainants that the property had failed a pre-purchase building inspection because of weathertightness risks, or advise them of the existence of the Realsure report. Further, Ms Bond represented to the complainants that apart from two minor leaks (which she said would be fixed before settlement) there were no other leaks in the property that she knew of.

[11] The complainants entered into a conditional agreement to purchase the property on or about 30 July 2009. They obtained a builder's report before making the agreement unconditional. The purchase was settled in late September 2009.

[12] It subsequently became apparent to the complainants that the property suffered from significant weathertightness defects. Judgment was entered in their favour in the Weathertight Homes Tribunal in the sum of $479,550, in respect of losses they suffered.

**Conduct occurring before the Real Estate Agents Act 2008 came into force**

[13] The 2008 Act came into force on 17 November 2009. The conduct admitted by Ms Bond occurred before that date. Accordingly, s 172 of the 2008 Act applies:

> **172 Allegations about conduct before commencement of this section**
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> (1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or the Tribunal is satisfied that,–
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> (a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under that Act in respect of that conduct; and
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> (b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 2008 in respect of that conduct.
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> (2) If, after investigating a complaint or hearing a charge of the kind referred to in subsection (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or of misconduct in respect of conduct that occurred before the commencement of this section, the Committee or the Tribunal may not make, in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred.

[14] The Tribunal summarised the approach set out in s 172 in its decision in *Complaints Assessment Committee 10026 v Dodd*, as being:[1]

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

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

[c] If the answers to (a) and (b) are yes, then a penalty may be imposed under the 2008 Act, but it may only be a penalty which could have been imposed in relation to that particular conduct under the 1976 Act.

[15] In the present case, pursuant to her plea of guilty to misconduct, Ms Bond has admitted that her conduct as described in paragraph [10], above constituted breaches of rr 13.1 and 13.13 of the Rules of the Real Estate Institute of New Zealand ("the REINZ Rules"), of which she was a member by virtue of her licence under the 1976 Act. These Rules provided:

> 13.1 Members shall always act in accordance with good agency practices, and conduct themselves in a manner that reflects well on the Institute, its members, and the real estate profession.
>
> 13.13 A member must be fair and just to all parties in negotiations and in the preparation of all forms and agreements, and protect the public against unethical practices in connection with real estate transactions.

[16] Ms Bond's conduct was also regulated by the Fair Trading 1986 which was, as Mr Hodge put it, "one of the key regulatory touchstones for the conduct of licensees prior to the 2008 Act coming into force". Section 9 of the Fair Trading Act provided:

> **9 Misleading and deceptive conduct generally**
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> No person shall, in trade, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

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1 *Complaints Assessment Committee 10026 v Dodd* [2011] NZREADT 01.

[17] Ms Bond accepted that her conduct could have been complained about, and been the subject of a charge, under the 1976 Act. The conduct has not been "dealt with" under that Act. Accordingly, s 172(1) of the 2008 Act is satisfied.

**Does Ms Bond's conduct amount to unsatisfactory conduct or misconduct under the 2008 Act?**

[18] In the light of Ms Bond's admission of misconduct, the Tribunal needs only to consider whether she is guilty under s 73(a) (disgraceful conduct) or s 73(b) (seriously incompetent or seriously negligent real estate agency work) of the 2008 Act.

*Submissions*

[19] Mr Hodge submitted that Ms Bond's conduct would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful. He acknowledged that the "standards of the day" (that is, as at 2008/2009) have to be applied in determining whether Ms Bond's conduct was "disgraceful", and that obligations of fair disclosure to purchasers were given much more focus in the 2008 Act, and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. He accepted that before the 2008 Act came into force, it was a lot less clear as to what was required in order to comply with the obligation to be "fair and just" to (in particular) purchasers.

[20] He submitted that by the standards of the day, Ms Bond's conduct was disgraceful:

[a] She was on notice of weathertightness risks at the property: she knew that prospective purchasers had cancelled their conditional agreement on the grounds that the property had weathertightness risks disclosed in the Realsure report, a summary of which had been sent to her solicitor. He submitted that Ms Bond had shown a startling lack of inquiry in failing to ask her solicitor for a copy of the summary of the Realsure report.

[b] She subsequently commissioned her own building report which did not disclose any weathertightness risks, but included multiple disclaimers in

which it was made clear that it was not a weathertightness specialist report and did not involve invasive moisture testing.

[c] When marketing the property, she not only failed to disclose that it had failed a pre-purchase inspection because of weathertightness risks, she made positive representations that it was in "excellent exterior condition", and that apart from two small leaks (which would be fixed) there were no other leaks that she knew of.

[21] Mr Hodge submitted that it was negligence at the level of being disgraceful to make these representations against the background of the concerns raised in the Realsure report, and the fact that the NZHIC report had not substantively addressed those concerned. He submitted that her conduct displayed indifference and an abuse of the privilege of being a licensee.

[22] While Ms Bond had accepted the charge of disgraceful conduct, it was common ground between parties that this was a matter for the Tribunal to decide whether the facts proved misconduct under s 73(a) of s 73(b) of the 2008 Act. Ms Harrison referred to the following:

[a] The REINZ Rules did not provide for any specific duty of disclosure to prospective purchasers, and awareness of weathertightness issues, and remediation of those issues, was at a much lower level than it is now. The obligations of disclosure are much clearer, and more onerous, under the 2008 Act and the Rules.

[b] Ms Bond was first licensed in March 2008, so at the time her property was on the market, was inexperienced. Ms Harrison submitted that Ms Bond was relatively unsupervised, although (as advised by her manager) she advised the complainants to get their own building reports, which they did.

[c] While Ms Bond marketed the property and conducted the open homes, negotiations with the complainants were handled by the Agency – which also did not disclose the Realsure report.

[d] Ms Bond did not know that her solicitor had a summary of the Realsure report. She submitted that this was why Ms Bond asked Realsure for a copy of the report. She then commissioned a report from NZHIC because they did not place any restrictions on the distribution of their reports. She did not understand the effects of invasive moisture testing, so overlooked the fact that the NZHIC report did not consider weathertightness issues directly.

[e] She herself had had no concerns as to weathertightness of the property during the time she lived there, and she disclosed issues that she knew about.

[f] While accepting that she knew that the Realsure report had found weathertightness issues, Ms Bond's failure to advise the complainants was the result of a general laxness, not dishonesty.

[g] The complainants received a payment of compensation pursuant to a confidential agreement following the proceedings in the Weathertight Homes Tribunal, which included a component paid by Ms Bond.

**Discussion**

[23] We accept that the fact that Ms Bond asked Realsure for a copy of its report supports her contention that she was not aware that her solicitor had a copy of the summary of the report.

[24] We have concluded that Ms Bond's conduct is properly seen as being seriously incompetent or seriously negligent real estate agency work, but not to the level of constituting disgraceful conduct. We find Ms Bond guilty of misconduct under s 73(b) of the 2008 Act.

**Penalty**

[25] Pursuant to s 172(2) of the 2008 Act, the Tribunal may only impose a penalty that was available under the 1976 Act.

[26] It was common ground that under the 1976 Act, the only available penalties were cancellation or suspension, and a monetary penalty of up to $750. Pursuant to s 99(1) of the 1976 Act, the Real Estate Agents Licensing Board could cancel a salesperson's "certificate of approval", or suspend the licensee, but only if the salesperson had been convicted of a crime of dishonesty, or if the salesperson was "of such a character that it is, in the opinion of the Board, in the public interest that the certificate of approval be cancelled or the salesperson suspended". As applied by the courts,[2] s 99(1) of the 1976 Act created an extremely high threshold. We were referred to instances of conduct which appear to have been more serious than Ms Bond's where it was held that the character test for cancellation or suspension was not met.[3]

[27] Mr Hodge acknowledged that the character test for cancellation or suspension was not satisfied in this case. Accordingly, under the 1976 Act, which must be applied, neither cancellation nor suspension is available.

[28] With respect to a fine, Mr Hodge referred us to the case of *Real Estate Agents Authority (CAC 10017) v Miller*,[4] where a licensee was the vendor and listing licensee of his own property in Wanaka. The property was marketed as having "stunning views", and the licensee failed to disclose to the purchasers that he knew of development plans for building on a playing field in front of the property that might affect the view. The Tribunal ordered the licensee to pay a fine of $750.

[29] Mr Hodge also referred to *Real Estate Agents Authority (CAC 20006) v England*,[5] where a licensee, again selling his own home, represented to a prospective purchaser that he was not aware of any weathertightness issues at the property. He provided the prospective purchaser with a pre-inspection report that stated that the property did not have weathertightness issues, but failed to mention or provide to the prospective purchaser an earlier pre-inspection report which identified high moisture readings at the property and recommended remedial action (which he had only

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2 See *Sime v Real Estate Institute of New Zealand (Inc)* HC Auckland M73/86, 19 August 1986.

3 For example, *Sime, Davis v Real Estate Institute of New Zealand (Inc)*, HC Auckland, CIV 2008-404-7408, 1 May 2008, *Kumandan v Real Estate Agents Authority* [2013] NZHC 1528, and *Real Estate Agents Authority (CAC 20006) v England* [2013] NZREADT 97.

4 *Real Estate Agents Authority (CAC 10017) v Miller* [2013] NZREADT 31.

5 *Real Estate Agents Authority (CAC 20006) v England* [2013] NZREADT 97.

partially undertaken). The Tribunal observed that "the only practical penalty option available" to it was a fine of $750, and made an order accordingly.

[30] We are in the same position as the Tribunal was in, when determining penalty in *Miller* and *England*, where a fine of $750 is the only practical penalty option available to us. We are satisfied that it is the penalty that must be imposed in this case.

**Orders**

[31] We find Ms Bond guilty of misconduct under s 73(b) of the Real Estate Agents Act 2008.

[32] Ms Bond is ordered to pay a fine of $750. Payment is to be made to the Authority within 20 working days of the date of this decision.

[33] 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.

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Hon P J Andrews
Chairperson

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Ms C Sandelin
Member

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Mr N O'Connor
Member