BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 04

READT 004/20

IN THE MATTER OF	charges laid under s 91 of the Real Estate Agents Act 2008
BROUGHT BY	COMPLAINTS ASSESSMENT COMMITTEE 409
AGAINST	WAYNE KEMP First Defendant
AND	MARINA SCOBLE Second Defendant
Hearing	8 December 2020, at Wellington
Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Appearances:	Ms C Paterson, on behalf of the Committee Mr A Darroch, on behalf of Mr Kemp and Ms Scoble
Date of Decision:	22 January 2021

DECISION OF THE TRIBUNAL

Introduction

[1] Complaints Assessment Committee 409 ("the Committee") has charged Mr Kemp and Ms Scoble with misconduct under s 73 of the Real Estate Agents Act 2008 ("the Act").

[2] The Committee alleges that Mr Kemp engaged in conduct that would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful, and is therefore guilty of disgraceful conduct under s 73(a) of the Act. The Committee alleges that Ms Scoble wilfully or recklessly breached her obligations under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), and is therefore guilty of misconduct under s 73(c)(iii) of the Act. In the alternative, the Committee alleges that she engaged in conduct that constituted seriously incompetent or seriously negligent real estate agency work and is therefore guilty of misconduct under s 73(b) of the Act. In the further alternative, the Committee has charged Ms Scoble with unsatisfactory conduct under s 72 of the Act.

[3] Each of the defendants accepts that the evidence before the Tribunal establishes that they engaged in unsatisfactory conduct, but deny that their conduct is sufficiently serious to amount to misconduct under any of the provisions of s 73 of the Act.

Facts

[4] The charges relate to the defendants' failure to disclose to the purchaser of a property in Mt Victoria, Wellington, that a party wall between the property and an adjoining property posed a risk of collapsing in an earthquake ("the party wall issue"). The party wall issue had been identified by a structural engineer engaged by an earlier prospective purchaser and disclosed to the defendants.

[5] The key facts were not in dispute. The defendants are licensed salespersons engaged at Mike Pero Real Estate Limited ("the Agency"). They have worked together in real estate as business partners for many years, using a joint email address.

[6] In 2012, while working at another agency, the defendants marketed and sold the property. A prospective purchaser expressed concerns about the party wall to Mr Kemp, and told him that an engineer had advised that it would cost about $50,000 to fix the party wall if it required strengthening. Ms Scoble does not recall this conversation. Mr Kemp made enquiries with the vendor at the time, who advised that he was not aware of any issues with the wall. Mr Kemp did not make any further enquiries. The property was bought in March 2012 by the trustees of a trust, who engaged the defendants in February 2015 to market the property for sale.

[7] Prospective purchasers (Mr and Mrs H) made an offer to purchase the property in March 2015, conditional on a satisfactory builder's inspection report ("the conditional offer"). The builder's report noted the presence of "Dux Quest" plumbing, and a potential safety risk posed by the party wall, and recommended further inspection by a plumber and engineer. In relation to the party wall issue, the report noted that:

> The wall dividing [the property and the adjoining property] is of brick construction, this may pose a risk in the event of a large earthquake, I recommend seeking the advice of a structural engineer to determine whether any strengthening works may be required.

[8] The solicitors for Mr and Mrs H sought an extension to the confirmation date of the conditional offer, noting the need to undertake further enquiries regarding "the safety of the party wall", as well as in respect of the "Dux Quest" plumbing.[1]

[9] On 27 March 2015, Mr and Mrs H received preliminary advice from an engineer that the party wall appeared to lack seismic strengthening, and would potentially pose a risk to life due to the wall potentially collapsing in an earthquake. The engineer confirmed this advice in writing the next day, and Mrs H communicated the advice to Ms Scoble, who in turn communicated it to Mr Kemp. Mrs H included the comment that the party wall was a "risk to life" when speaking with Ms Scoble.

[10] Mr and Mrs H's solicitors wrote to the Agency on 30 March 2015 cancelling the conditional offer, on the grounds that the building report was not satisfactory. The solicitors' letter was received by the Agency's head office, which uploaded it to the

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[1] In a decision issued on 21 August 2020, the Committee found the defendants guilty of unsatisfactory conduct in relation to non-disclosure of the presence of "Dux Quest" plumbing at the property. That decision is subject to an appeal to the Tribunal.

Agency's Central Relationship Management ("CRM") system, accessible by licensees at the Agency, including the defendants.

[11] The defendants informed one of the trustee owners, Ms D, about the cancelled offer, and the reason for it. Ms D responded that the trustees had no knowledge of a party wall issue. Ms Scoble asked Ms D if she would be getting an engineer's report on the party wall, so that the defendants could respond to any questions from prospective purchasers. Ms D responded that a report would not be obtained.

[12] The defendants did not make any further enquiries regarding the party wall issue, and did not take any steps to enquire into the existence of any written report by the engineer engaged by Mr and Mrs H, or to obtain a copy of the builder's report they had obtained. Further, at no stage did either of the defendants check the Agency's CRM system in order to obtain any further information regarding the cancellation of the conditional offer.

[13] The defendants discussed whether they were required to disclose the party wall issue, and the cancelled conditional offer, to prospective purchasers. They made a joint decision not to make any disclosures about the party wall issue, unless directly asked about it. They continued to market the property following Mr and Mrs H's cancellation.

[14] In April and May 2015, Mr Stephen Beath and his partner were shown through the property by Mr Kemp. Mr Kemp did not make any disclosure regarding the party wall issue during these visits. On 11 May 2015, Mr Beath emailed the defendants, advising that they would be putting an offer to the vendors, and asking for information as to re-piling, re-wiring, re-plumbing and roofing work on the property. He also asked if there were any "other important disclosures we should know of as a buyer".

[15] Mr Kemp's response provided information as to re-piling, re-wiring, plumbing and roofing work, and included a statement that "the partition wall between properties is of brick construction as per the era of the home". Mr Kemp recommended that Mr Beath obtain a builder's report on the property which would "give you a good overview" as to the condition of the property and work done on it.

[16] Mr Kemp did not disclose the concerns expressed as to the party wall, or that a conditional offer had earlier been cancelled following advice from an engineer and builder as to the risk posed by the party wall.

[17] Mr Beath and his partner made an offer on the property in June 2015, which was accepted. The sale was settled in June 2015.

[18] After he moved into the property, one of Mr Beath's neighbours told him about the party wall issue. He sent an email to the defendants, asking if they were aware of any issue with the party wall. They responded that they were "certainly not aware of any issues with the [party] wall as it is a standard for a home of this era" and that "our owners also were not aware of any issues – so not sure what the neighbour is on about".

[19] Mr Beath sent the defendants a further email on 30 September 2016, in which he said that he had been advised that a "buyer [in 2012] had an engineer's report done on the party wall" of the property, which found that there were significant structural issues with it which would cost an estimated $50,000 to remedy, and that they had also been advised that the defendants were "aware of the issue, despite you denying any knowledge when we asked you specifically about it". The defendants responded that this was "news to [them]".

[20] In March 2017, Mr Beath obtained a detailed seismic assessment of the party wall. This recorded that the party wall posed a very high risk to life, and required strengthening work.

Burden and standard of proof

[21] The Committee has the onus of proving the charges against each defendant. Pursuant to s 110 of the Act, the Tribunal must be satisfied that the charge is proved on the balance of probabilities.

Licensees' obligations as to disclosure

[22] Rules 6.4, 10.7, and 10.8 of the Rules set out licensees' obligations of disclosure to prospective purchasers (included in the definition of "customer" in the Rules):

> 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.
>
> 10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to underlying defects, a licensee must either–
>
> > (a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or
> >
> > (b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.
>
> 10.8 A licensee must not continue to act for a client who directs that information of the type referred to in rule 10.7 be withheld.

[23] We accept Ms Paterson's submission that a licensee's disclosure obligation under r 10.7 is triggered at the point where it "would appear likely to a reasonably competent licensee that land may be subject to a hidden or underlying defect". That is, it is not required that a licensee knows that there is a defect in the property; it is sufficient that it appears likely to a reasonably competent licensee that a defect may exist.

[24] In its decision in *Bellis v Real Estate Agents Authority (CAC 1907)*, the Tribunal referred to earlier decisions setting out the general principles as to licensees' providing information to prospective purchasers, including when that advice is based on information provided by vendors.[2] Those principles may be summarised as follows:

[a] Licensees must make every effort to know the product they are selling.

[b] Licensees have an active role in conveying information about a property to a prospective purchaser, and must be cognisant of that role and carry it out to the best of their ability. If asked about particular aspects of a

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2 *Bellis v Real Estate Agents Authority (CAC 1907)* [2020] NZREADT 41, at [38]–[40]. See also *Donkin v Real Estate Agents Authority* [2012] NZREADT 44, at [8]–[9]; *Tesar v Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 18 at [38], [39], and 42]; *Fitzgerald v Real Estate Agents Authority (CAC 20007)* [2014] NZREADT 43; *McCarthy v Real Estate Agents Authority (CAC 20007)* [2014] NZREADT 94; *Masefield v Real Estate Agents Authority (CAC 301)* [2015] NZREADT 30, *Kek v Real Estate Agents Authority (CAC 409)* [2019] NZREADT 26, at [35]-[36]; and *Eade v Real Estate Agents Authority (CAC 1903)* [2020] NZREADT 37, at [71]-[72].

property, licensees are obliged to make proper enquiries, or to advise the prospective purchaser that they do not know the answer, and that the prospective purchaser should obtain appropriate advice.

[c] An "innocent" misrepresentation or provision of incorrect information will constitute a breach of r 6.4, and may amount to unsatisfactory conduct.

[d] Licensees cannot simply pass on information from a vendor to prospective purchasers. Prior to any positive representation being made or information being passed on, licensees should at least have taken some precautions to check the veracity of the representation or information.

[e] Licensees cannot rely on having acted merely as a conduit from vendor to purchaser in order to absolve themselves from responsibility for a misrepresentation.

[f] Where licensees are conveying information provided by a vendor, the licensee must make it clear that the licensee is not the source of the information, that it comes from the vendor, and that it has not been verified. In certain cases, licensees should also recommend that the prospective purchaser seek professional advice.

[25] In the present case, in order to comply with their disclosure obligations, the defendants were required either to obtain confirmation from the vendors, supported by evidence or expert advice, that there was no potential risk of the party wall collapsing in an earthquake, or to ensure that prospective purchasers were informed that there was a risk of the party wall collapsing in an earthquake, so that they could themselves seek expert advice if they so wished.

[26] The defendants accepted that they failed to make adequate disclosure and/or to make further inquiries about the party wall issue. They accepted that their conduct fell below the accepted standard, by a considerable margin, but submitted that their approach was based on an erroneous understanding that the concerns about the party wall related to a "potential or possible risk" because it had not been assessed directly

by an engineer, and therefore did not need to be disclosed, and prospective purchasers would be protected by a recommendation that they seek their own building report. They accepted that this was a fundamental error.

[27] Rule 10.7 is in clear terms. In the present case, Mr and Mrs H's cancellation on the grounds that the party wall posed a risk of collapse in an earthquake provided grounds from which "it would appear likely to a reasonably competent licensee" that the property "may be subject to hidden or underlying defects". We find that the circumstances of the cancelled conditional offer in 2015 (which included an engineer's assessment that the party wall posed a potential safety risk, and Mrs H's statement that that party wall was a "risk to life") squarely engaged the defendants' responsibilities under r 10.7 to disclose the possible issues with the safety of the party wall, and to ensure that they complied with r 6.4.

[28] Mr Kemp's and Ms Scoble's decision that they did not need to disclose the party wall issue because they did not have actual knowledge of an actual defect with the party wall, or of the existence of a negative report from an engineer, was contrary to their obligations under the Rules. The acknowledgement that this was a fundamental error was properly made.

[29] We find that the defendants failed to comply with their obligations in two key respects: they relied on the vendors' assertion that they were not aware of any issues with the wall, without any evidence or expert advice in support of the assertion, and they failed to disclose the party wall issue and the circumstances leading to the cancelled conditional offer to prospective purchasers (including Mr Beath). They failed to take any steps to investigate the party wall issue beyond asking the vendors, notwithstanding that they could have checked the Agency's CRM system for information about the cancelled conditional sale, or asking for a copy of the report obtained by Mr and Mrs H.

[30] The recommendation that Mr Beath obtain a building report fell well short of what was required under the Rules, as without being informed of the potential significant risk, prospective purchasers were not in a position to appreciate the need to obtain their own specialist advice, should they wish to do so. Further, the

recommendation to Mr Beath of a building report was made on the basis that it would give him a "good overview" of the property. We accept Ms Paterson's submission that this was disingenuous in circumstances where the defendants had knowledge of a potentially serious defect.

The charge against Mr Kemp under s 73(a) of the Act

Relevant statutory provision

[31] Section 73(a) of the Act (disgraceful conduct) provides that a licensee is guilty of misconduct if the licensee's conduct:

> … would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful;

Submissions

[32] Ms Paterson submitted that the evidence established that Mr Kemp engaged in disgraceful conduct, in that his conduct involved a serious departure from the standards reasonably expected of a licensee.

[33] She submitted that Mr Kemp was clearly on notice, potentially from as early as 2012, as to the party wall issue, after he was told of advice obtained by a prospective purchaser from an engineer. Mr Kemp did not disclose the issue to prospective purchasers when marketing the property in 2012, and did not make any enquiries beyond the then owners.

[34] Ms Paterson further submitted that Mr Kemp's conduct was not confined to a failure of disclosure, or to make enquiries, but included withholding information from Mr Beath, and an apparent lie to Mr Beath:

[a] Mr Kemp advised Mr Beath that the party wall was of brick construction, as per the era of the home, but (despite a specific request for information of important disclosures) withheld information that concerns had been expressed as to its structural integrity and that the conditional sale had been cancelled;

[b] Shortly after settlement, when Mr Beath specifically asked Mr Kemp if he were aware of issues with the party wall, Mr Kemp denied knowledge of any issues, despite being aware of the concerns expressed in 2012, and the circumstances of the cancellation of the conditional sale in 2015. She submitted that Mr Kemp's response was deliberately misleading, and was inconsistent with the defendants' earlier decision to disclose the party wall concerns if directly asked about it;

[c] About one year after settlement of the sale to Mr Beath, Mr Kemp said that it was "news to us" that a prospective purchaser (in 2012) had identified serious issues with the party wall.

[35] Ms Paterson submitted that the totality of Mr Kemp's conduct in having been made aware of the party wall issue when marketing the property in 2012 and again when marketing it in 2015, failing to undertake further enquiries and failing to comply with his disclosure obligations, then misrepresenting the position as to the party wall to Mr Beath, elevated it into the category of disgraceful conduct.

[36] Mr Darroch submitted that Mr Kemp did not have actual knowledge of an actual defect with the party wall, or of the existence of a negative report from an engineer. He submitted that this lack of actual knowledge distinguishes this situation from others where a licensee has been found guilty of disgraceful conduct.

[37] He referred to cases where findings of disgraceful conduct had been made, where a licensee unlawfully transferred funds to himself from an employer's trust account, then fled the country to avoid criminal charges;[3] a licensee told a prospective purchaser that a previous offer on a property had fallen through for financial reasons when he knew that a building report had identified a number of defects;[4] and where a licensee purchased a property which had had moisture ingress issues which had been remediated, then re-sold the property through another agency without disclosing the existence of the issues, a report of those issues, or the remediation.[5]

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3 *Complaints Assessment Committee 412 v Grewal* [2019] NZREADT 52.
4 *Complaints Assessment Committee 409 v Cartwright* [2018] NZREADT 23.
5 *Complaints Assessment Committee 403 v Mansell* [2019] NZREADT 59.

[38] He submitted that cases where disgraceful conduct is found usually involve an element of dishonesty, and there was no dishonesty in the present case. He submitted that the party wall issue was not ignored, but acknowledged that the defendants' response was inadequate.

Discussion

[39] As his Honour Justice Woodhouse held in *Morton-Jones v Real Estate Agents Authority*, the critical enquiry in a charge under s 73(a) of the Act is whether the conduct is "disgraceful".[6] That is, would it be reasonably regarded by agents of good standing, or reasonable members of the public, as disgraceful?

[40] We find that Mr Kemp was made aware of concerns regarding the party wall when marketing it in 2012, and that he was made aware of the reason why Mr and Mrs H cancelled the conditional offer in 2015. However, we are not satisfied that even taking into account the matters put forward by the Committee regarding his later communications with Mr Beath, the Tribunal should make a finding of disgraceful conduct against Mr Kemp.

[41] Mr Kemp's responses to Mr Beath were made from his and Ms Scoble's joint email, and must be considered as having been made by both of them. We have concluded that Mr Kemp's having been made aware of the party wall issue in 2012 does not provide grounds for making a distinction between Mr Kemp's conduct and that of Ms Scoble.

[42] At the hearing of the charges, the Tribunal raised with counsel the question of the Tribunal's jurisdiction, in the event that it was not satisfied that a finding of disgraceful conduct should be made. The Tribunal has jurisdiction under reg 13 of the Real Estate Agents (Complaints and Discipline) Regulations 2009 to amend a charge:

> **13 Amendment or addition of charge**
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> (1) At the hearing of a charge, the Disciplinary Tribunal may, of its own motion or on the application of any party, amend or add to the charge if the Tribunal considers it appropriate to do so.

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6 *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804, at [29].

(2) The Disciplinary Tribunal must adjourn the hearing if it considers that the amendment or addition would–

(a) take the person charged by surprise; or

(b) prejudice the conduct of the case.

[43] Both Ms Paterson and Mr Darroch submitted that it is open to the Tribunal in the present case to amend the charge against Mr Kemp. Mr Darroch submitted that it would be appropriate to amend the charge to one of misconduct under s 73(b) of the Act, and that the amendment was agreed to. In the light of that submission, it was not necessary to adjourn the hearing, and we will consider the appropriate finding against Mr Kemp together with that against Ms Scoble.

The charges against Ms Scoble under ss 73(c)(iii) and 73(b) of the Act

Relevant statutory provisions

[44] Section 73(c)(iii) of the Act provides that a licensee is guilty of misconduct if the licensee's conduct:

consists of a wilful or reckless contravention of–

…

(iii) regulations or rules made under this Act

[45] Section 73(b) of the Act provides that a licensee is guilty of misconduct if the licensee's conduct:

constitutes seriously incompetent or seriously negligent real estate agency work

Submissions

[46] Ms Paterson submitted that Ms Scoble was aware of the concerns about the party wall issue, and the circumstances under which Mr and Mrs H cancelled their conditional offer. She submitted that Ms Scoble heard directly from Mrs H that the party wall posed a risk to life, due to the risk of it collapsing in an earthquake. She submitted that in the circumstances, a reasonably competent licensee in her position would have appreciated that the party wall was potentially defective, and that this triggered disclosure obligations under r 10.7.

[47] She submitted that Ms Scoble (and Mr Kemp) had ample opportunity to make the necessary disclosure, but despite being on notice of the potential serious risk, and having turned their minds to whether disclosure was required, they deliberately chose not to. She further submitted that they did not recommend that Mr Beath seek professional advice about the party wall.

[48] Ms Paterson submitted that serious red flags would have been evident as a result of the cancelled conditional offer and their knowledge of the circumstances of the cancellation. She submitted that it was incumbent on Ms Scoble to make further enquiries, but she did not do so, and did not take any steps to confirm that the information provided by the vendors (that they were not aware of any issues) was correct, or to check the Agency's CRM system, or to seek further information as to the builder's and engineer's reports. She submitted that Ms Scoble's failures were properly seen as either a wilful or a reckless contravention of their obligations under the Rules and thus misconduct under s 73(c)(iii) of the Act.

[49] Ms Paterson further submitted that if the Tribunal does not find that Ms Scoble wilfully or recklessly breached her obligations, her conduct nevertheless displayed a serious level of negligence or incompetence, amounting to misconduct under s 73(b) of the Act. In particular, she submitted, this was not a case of an isolated error or judgment, but rather involved multiple fundamental errors on Ms Scoble's part, and a serious departure from acceptable professional standards.

[50] Mr Darroch submitted that Ms Scoble's lack of actual knowledge of an actual defect in the party wall distinguished the present case from others where misconduct has been found by the Tribunal. He submitted that there was nothing in the appearance of the party wall to indicate a defect, and that there are many houses of the same age and type, which would all be at risk in an earthquake.

[51] He submitted that the defendants did not ignore the issue, as they had discussed it, and made some inquiries. He submitted that the recommendation to Mr Beath to obtain a building report was a proper attempt to "travel through" the issue after the vendors refused to obtain an engineer's report.

[52] Mr Darroch further submitted that the defendants have spent the last two years reflecting on the matter, and now understand their approach was completely wrong. He submitted that they have not tried to walk away from the issue, or avoid its consequences, but have co-operated with the investigations and acknowledged that their conduct was unsatisfactory, at a high level.

Discussion

[53] As recorded earlier, we find that no distinction should be made between Mr Kemp and Ms Scoble. They were both working on the same transactions, they shared an email address, and they had access to the same information. We are not satisfied that Mr Kemp or Ms Scoble deliberately, or recklessly, acted contrary to rr 6.4 and 10.7. Rather, the decision not to disclose the party wall issue was the result of a fundamental error as to the nature of the obligations set out in the Rules.

[54] However, those obligations have been in the Rules for many years and, as noted earlier, have been explained and applied in many Tribunal decisions.[7] We reject the defendants' submission that the fact that they did not have actual knowledge of an actual defect absolves them from culpability. Their obligation under r 10.7 was clear. They were aware of the party wall issue: that is, that the party wall was at risk of collapse in the event of an earthquake. That triggered their obligation to disclose it.

[55] The defendants had been told that the engineer's opinion was that it was a risk to life. Yet they did not take any steps to make any further enquiries beyond asking the vendors if they were aware of the issue, and they accepted the vendors' response in the absence of any supporting evidence and the vendors' refusal to obtain an engineer's report. In the circumstances, Mr Kemp's and Ms Scoble's decision that they did not need to disclose the party wall issue was a serious departure from acceptable standards, and can only be regarded as seriously incompetent or seriously negligent real estate agency work, and thus misconduct under s 73(b) of the Act. In the light of that finding, it is not necessary to consider whether a finding of unsatisfactory conduct should be made under s 72 of the Act.

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7 See, for example, the decisions listed at fn 2.

Orders

[56] We find both Mr Kemp and Ms Scoble guilty of misconduct under s 73(b) of the Act.

[57] Counsel are to confer and advise the Tribunal's Case Manager if a hearing is required as to penalty, or if the matter may be determined on the papers.

[58] 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