

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 55 READT 011/17

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| UNDER | THE REAL ESTATE AGENTS ACT 2008 |
| IN THE MATTER OF | AN APPEAL UNDER SECTION 111 OF THE ACT |
| BETWEEN | CRESSIDA CLAIRE MAYSON SAYWOOD Appellant |
| AND | THE REAL ESTATE AGENTS AUTHORITY (CAC 409) First respondent |
| AND | BENJAMIN CARTWRIGHT Second respondent |
| AND | THERESA O’SULLIVAN Third respondent |

Hearing: at Wellington on 25 July 2017

Tribunal: Ms K Davenport, Chair
Ms N Dangen, Member
Mr G Denley, Member

Appearances: The appellant in person
Mr D La Hood and Ms E Fitzherbert for first respondent
Mrs K Parker and Mr W Abrie for second and third respondents

Decision: 13 September 2017

AMENDED DECISION OF THE TRIBUNAL

[1] In 2015 Cressida Saywood and her partner were to move from Invercargill to Wellington. In March 2015 they visited a property at 36 Standen Street, Karori, Wellington being sold by Harcourts (**the property**). The agent acting for Harcourts was Benjamin Cartwright. Ms Saywood and her partner liked 36 Standen Street and decided to make a tender. They put a tender in for the house which was conditional

upon the selling of their current home in Invercargill and a builder's report for the property. They were not successful in obtaining the tender. However, approximately two to three weeks later, Benjamin Cartwright contacted them again and asked if they were still interested in tendering for the property. They were told that the previous successful tenderer:

“[h]ad a financial breakdown and were not conditional on finance. I think they armrest using the build report as a way of getting out of the contract.”
(i.e. they had used the building report to get out of the agreement)

[2] Ms Saywood made further enquiries. She was told by Mr Cartwright that the previous tenderers had obtained a building report from RealSure Building Inspectors who were renowned for being “picky” and an organisation who would never approve a property. In fact, it turned out that the previous tender had fallen over because the purchasers were unhappy with the building report obtained and the defects identified. The previous tenderers did not give a copy of the building report to the agent, Benjamin Cartwright. Mr Cartwright told the vendor to obtain her own report to follow up on what had been discovered. He gave the same advice to Ms Saywood.

[3] Around the time Ms Saywood and her partner proposed to enter into a sale and purchase agreement for the property subject to a building report, the vendor of said property indicated her own intention to obtain a building report. The agent, Benjamin Cartwright, suggested that he would arrange for the vendor to get one building report and that she and Ms Saywood could each pay for half of the cost. The report was addressed to the vendor. It showed no significant concerns. Ms Saywood and her partner proceeded with the purchase. The sale was completed.

[4] After a short time, the Saywood family decided to undertake some repairs to their new property. Their first task was to replace a bathroom window. This could not be achieved as their builder discovered that the framing and timber around the window was rotten. Further surveying was done and it was discovered that there were extensive areas of rotten weatherboards and water ingress. When the Saywoods on-sold the property, they disclosed all of these defects and accordingly sustained a significant loss.

[5] Ms Saywood complained to the Complaints Assessment Committee (**CAC**) about Mr Cartwright. The CAC widened the complaint to include the listing agent — Ms O’Sullivan — and Harcourts (the agency).

[6] Ms O’Sullivan, as the listing agent, had been involved in the above events to a moderate extent. When she visited the property to list it before it was bought by Ms Saywood, the vendor had advised Ms O’Sullivan that some of the weatherboards had been replaced. This had not been detailed in the agency agreement. Further, Ms O’Sullivan had been advised by the first purchasers that there was a moisture or dampness problem downstairs at the property. Ms O’Sullivan questioned the vendor about this but the vendor denied it was an issue. This information was not passed on to Ms Saywood.

Summary of the judgment of the Complaints Assessment Committee

[7] The CAC found both agents guilty of unsatisfactory conduct under s 71 of the Real Estate Agents Act 2008 (**the Act**). They were censured and fined and Mr Cartwright was ordered to undergo further training.

(a) Mr Cartwright

[8] The CAC found that Mr Cartwright’s attempt to minimise the effect of the RealSure report (as noted above at [2]) allayed any concerns Ms Saywood may have had in respect of defects at the property. In this respect, the CAC found that Mr Cartwright did not exercise skill, care and competence and effectively misled Ms Saywood in breach of Rule 5.1 and Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (**the Rules**). The CAC also noted that although Mr Cartwright advised Ms Saywood and her partner to obtain their own builder’s report, he did not adequately alert them to potential defects at the property in breach of Rule 10.7.

[9] The CAC also found that Mr Cartwright’s actions in recommending that Ms Saywood rely on a building inspection and report commissioned by the vendor was unfair to Ms Saywood as it prejudiced any claim Ms Saywood had against the report

writer for a negligent inspection and report. The CAC held that this was a breach of Rule 6.2.

[10] Mr Cartwright had also failed to exercise skill, care and competence in not disclosing obvious defects in the property that he had noted upon viewing said property. This was a further breach of Rule 5.1.

[11] Ms Saywood further complained that Mr Cartwright sent her a blank agreement for sale and purchase for the property. She also noted that she and her partner were sent a blank Purchaser Consent form with a request from Mr Cartwright to sign it and send it back. The CAC found this to be a breach of Rule 9.9 which does not allow a Licensee to submit an agency agreement, sale and purchase agreement, or other contractual document unless all material particulars have been inserted into or attached to the document.

(b) Ms O'Sullivan

[12] In regard to Ms O'Sullivan's conduct, the CAC first made comments as to what she should have realised upon receiving information from the vendor concerning the replacement of weatherboards in the property. The CAC noted that the replacement of weatherboards could potentially be related to moisture or rot issues. In light of this, the CAC found that Ms O'Sullivan should have further investigated the issue and detailed the weatherboard replacement in the agency agreement so prospective purchasers' were notified of the issue. Her failure to do so constituted a breach of Rule 5.1 in that it showed a lack of skill, care and competence, and a breach of Rule 10.7 which requires a licensee to disclose known defects in a property to a customer.

[13] The CAC also found that Ms O'Sullivan should have advised the complainant and any other potential purchaser of the moisture or dampness problem downstairs at the property as identified in the building report obtained by the first tenderers. Ms O'Sullivan relied on the vendor's denial of a moisture problem, but she should have investigated further and given this information to prospective purchasers, including the complainant. The CAC found that this also constituted unsatisfactory conduct.

(c) Harcourts

[14] The complaint against Harcourts was dismissed.

(d) Penalty

[15] Ms Saywood made submissions in the CAC as to the loss suffered as a result of the unsatisfactory conduct of the Licensees. Ms Saywood sought compensation for her costs, including the following:

- cost of the retro-fitted double-glazed windows that were unable to be installed due to the severe rot problems (\$7,359);
- legal costs (\$9,335.87);
- quantity surveyor's costs (\$4,138.85); and
- cost for surveyor's estimate of the repair (\$1,380).

[16] In addition, when the property was on-sold the disclosure of the defects adversely affected its value, and Ms Saywood and her partner sustained a loss of \$185,500. Cumulatively, the total lost by Ms Saywood and her partner was therefore \$207,731. Ms Saywood sought full reimbursement for all the costs incurred.

[17] In their decision on orders, the CAC first discussed their orders regarding the censuring/fining of the Licensees. Mr Cartwright was censured and ordered to undertake further education. He was fined the sum of \$5,000. Ms O'Sullivan was also censured and ordered to pay a fine of \$3000.

[18] The Committee then looked at the request for costs or compensation. They examined the loss on the house, the cost of the double-glazed windows, legal costs and quantity surveyor costs. In respect of these, they found the six lawyer's invoices did not relate to the Committee's investigation and that both quantity surveyor invoices related to remediation of the defects.

[19] Furthermore, the CAC concluded that the Committee did not have the power to award compensation for loss suffered as a result of the negligent actions of a licensee. Instead, the CAC only had the power to order costs or expenses incurred in respect of the “inquiry, investigation or hearing by the Committee”. The Committee did note that there was a “specific and limited power” to make orders for compensation under s 93(1)(f) of the Act. Under s 93(1)(f), the CAC may order a licensee to “rectify, at his or own expense, any error or omission” or where it is not practical to rectify the error or omission, to take steps to provide relief from the consequences of the error or omission. The CAC held that compensation for a loss of value due to negligence by a licensee was not encompassed within this specific and limited power.

The Appeal

[20] Ms Saywood appealed this decision and the penalty decision.¹ Ms Saywood considered that the CAC had made an error and that, in fact, the conduct was so serious that it should have been misconduct.

[21] The issue the Tribunal must determine is whether or not the decision of the CAC should be overturned and a finding of misconduct substituted. The issues therefore for the Tribunal to determine are:

- (1) The proper approach on this appeal. The Tribunal must determine whether to consider the appeal *denovo* or, if the decision being appealed from is the exercise of a discretion, whether the Tribunal’s right on appeal is more limited.
- (2) The Tribunal must assess the evidence and determine, on the basis of the test that they are required to undertake, whether the actions were sufficiently serious so as to amount to misconduct.
- (3) Finally, the Tribunal will consider the penalties imposed to determine whether they were reasonable in all the circumstances.

¹ This is not completely clear from the notice of appeal, but after discussion with counsel the Tribunal have determined that it will consider an appeal on the question of penalty as well.

Approach on Appeal

[22] The Tribunal approach this appeal as a general appeal following the distinction between general and limited appeals set down in *Austin v Stichting Lodestar*.² Therefore, the Tribunal is able to substitute their own views for the views reached by the CAC.

Should the findings of unsatisfactory conduct be elevated to misconduct?

[23] The Tribunal emphasises that there is a significant difference between a finding of unsatisfactory conduct and one of misconduct. The difference lies in the degree of seriousness, culpability or inappropriate/disgraceful conduct of the Licensee. Some cases clearly fit into the definition of misconduct, such as instances of fraud, inappropriate sexual behaviour and lying to prospective purchasers.³ Other cases, such as this one, require a qualitative analysis of the evidence to see whether the conduct can be truly said to be serious enough to elevate it from unsatisfactory conduct to misconduct.

Ms Saywood's Submission

[24] It is always difficult for a layperson to prepare submissions for a legal Tribunal, but the Tribunal wish to commend Ms Saywood on the quality of her submissions. The brief summary that the Tribunal set out below is no reflection of the hard work that Ms Saywood has put into this appeal.

[25] Ms Saywood submits that Mr Cartwright and Ms O'Sullivan's actions fit the test of professional misconduct as set out in *Pillai v Messiter (No 2)*.⁴ She further submitted that the Licensees' actions were deliberate departures from accepted standards and would be regarded as disgraceful conduct under s 73A of the Act.

² *Austin v Stichting Lodestar* [2008] 2 NZLR 141 at [32].

³ For a case of fraud amounting to misconduct see *Azimi v REAA* [2014] NZREADT 69; for a case of inappropriate sexual behaviour towards a co-worker amounting to misconduct see *CAC v B* [2017] NZREADT 1 where the Tribunal noted that the defendant's conduct was "well over the threshold of 'disgraceful conduct'".

⁴ *Pillai v Messiter (No 2)* [1989] 16 NSWLR, 197.

[26] Ms Saywood referred to the Committee’s judgment against Ms O’Sullivan, where they noted that Ms O’Sullivan’s “*negligent acts underlying the findings of unsatisfactory conduct are close to being seriously negligent and her actions contributed to depriving the complainant of the opportunity to discover the defects*”. Ms Saywood also submitted that the CAC should have examined whether the two findings of unsatisfactory conduct in respect of Ms O’Sullivan could cumulatively be considered misconduct.

[27] With respect to Mr Cartwright, Ms Saywood submitted that the CAC considered the five findings of unsatisfactory conduct to be serious conduct and close to serious negligence. Ms Saywood also pointed to the fact that there was an element of dishonesty in Mr Cartwright’s behaviour reflected in the CAC’s orders against him. The CAC, in their penalty decision, ordered Mr Cartwright to undergo training by completing Unit Standard 23136 to demonstrate knowledge of misleading and deceptive conduct, and misrepresentation.

[28] Ms Saywood suggested that the Tribunal look at each of the Licensees’ behaviour in a cumulative manner, as set out in *REAA v Stephenson*,⁵ and determine whether the behaviour amounts to misconduct cumulatively.

[29] Ms Saywood submitted that the conduct of both agents is a marked departure from the standard expected of an agent of good standing and when coupled with the element of dishonesty, this amounts to misconduct.

Counsel for the Agents Submission

[30] Counsel for the agents submitted that the Committee had reached the right decision. Mrs Parker submitted that the Tribunal should consider the High Court decision of *Brown v REAA* to determine if the conduct is misconduct.⁶ She submitted that the Tribunal must look at the definition of misconduct under s 73 of the Act and determine whether or not each of the elements of s 73 are met. Mrs Parker rightly commented that the application of the section and its subsection are dependent on the

⁵ *REAA v Stevenson* [2003] NZREADT 56 at [51].

⁶ *Brown v REAA* [2013] NZHC 3009.

facts, and that the factual matrix varies widely across cases. She analysed a number of other decisions which she considered might be of assistance to the Tribunal.

[31] Mrs Parker argued that with respect to Mr Cartwright, the Licensee's conduct did not deliberately depart from accepted standards. While Mr Cartwright may have downplayed the significance of the RealSure report, he had never actually seen a copy, had no notice of significant issues with the property and had no concerns that there were issues with the property. In those circumstances, Mrs Parker submitted that the finding of unsatisfactory conduct should stand.

[32] With respect to Ms O'Sullivan, Mrs Parker submitted that the CAC made the correct finding of unsatisfactory conduct. While Ms O'Sullivan should have made further enquiries about the building report and passed that on, it is unclear what information she had actually received. One of the prospective purchasers had told the investigator that she could not recall exactly what she had told Ms O'Sullivan, other than they did not want to proceed with the sale because of the unsatisfactory building report, that she did not receive a copy of the RealSure report. While she did not advise Mr Cartwright that the purchasers had referred to moisture or dampness problems, she did make it clear that they had "crashed" their offer twice on the basis of a building report. She was then proactive in establishing whether or not the property had a moisture issue. She questioned the vendor and she recommended that the vendor engage in an independent building report and the building report which was obtained did not identify any problems.

[33] It is also an unfortunate fact that the impact of the conduct of the agent is not always reflective of the level of culpability of the agent. A simple careless error can result in loss and a more significant error can sometimes have minimal impact.

Tribunal's Analysis

[34] The Tribunal must analyse the conduct of the two agents to determine whether or not their actions would amount to misconduct.

[35] Before analysing this case in depth, it is helpful to refer to the Tribunal's previous cases where the context of the obligation on licensees to disclose property defects has been discussed with regard to houses that suffer from "leaky home syndrome". Previous cases where the precursor to Rule 10.7 (Rule 6.5 in the 2009 Rules) was discussed include *Lewis v REAA*,⁷ *Baker v CAC*,⁸ *REAA v Wallace*,⁹ and *REAA v Austin*.¹⁰ In *Lewis v REAA* we offered a summary of the relevant passages from these decisions. The below is a selection of these relevant passages that inform our approach in this case.¹¹

[36] In *Baker v CAC*, this Tribunal noted the following in the context of a claim against a Licensee for unsatisfactory conduct in the failure to properly inform and disclose information to purchasers of a house which suffered from leaky home syndrome:

[33] ... What causes the Tribunal considerable concern is the apparent belief by [the licensees] that so long as they suggest to a purchaser that a building inspector's report be obtained that is the limit of their obligation. While that one size fits all approach may have sufficed prior to 17 November 2009 when the Real Estate Agents Act 2008 came into force it no longer does. All three of [the licensees] have said they were well aware of the leaky homes syndrome in New Zealand and it would have been pointless for them to deny it. [...] In this case, [one of the licensees] was dealing with purchasers who would have no knowledge of this and were thus in no position to evaluate what were fairly obvious signs of the present and potential problems this property presented. [The actions of the licensee] indicate knowledge on her part that should have been divulged to the [purchasers] but was not.

[34] All three of the [licensees] agreed they were aware of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 but we find that difficult to understand when the evidence before us is so compelling.

⁷ *Lewis v REAA* [2015] NZREADT 9.

⁸ *Baker v CAC* [2011] NZREADT 19.

⁹ *REAA v Wallace* [2013] NZREADT 46.

¹⁰ *REAA v Austin* [2013] NZREADT 108.

¹¹ *Lewis v REAA* [2015] NZREADT 9.

[35] We note the commentary in (2010) 14 BCB 1 where the changes in the law introduced by the rules are discussed and where the following comment appears:

“Rules 6.4 and 6.5 impose a clear duty on agents towards purchasers in respect of leaky homes...

[...]

The agent breaches the Code of Conduct unless he/she either raises the leak issue with the vendor (and gets something approaching a vendor warranty that the property is not leaky); or raises the leak issue with the purchaser. A major intrusion into the caveat emptor principle has been enacted into the Code of Conduct by which real estate agents must operate. It is a dramatic change inserted in Rules (and not primary legislation), and clarified by a footnote to those Rules.”

[37] In *REAA v Wallace* we found a licensee guilty of misconduct for assuring a purchaser that a property had no leak issue, when he suspected from his experience that the property may be a leaky home. We noted that a question had been put to the licensee about the weathertightness of the property and that he gave a dismissive answer when he should have known that there was a real risk regarding the weathertightness of the home.

[38] In *REAA v Austin* the licensee failed to disclose a previous building report on the property, the fact that a previous sale had fallen over because of the building report or the fact that it could potentially be a leaky home due to the fact that it was monolithically clad. The licensee told the purchasers that it was a “*good property*”. We found that there had been a clear breach of Rules 6.4 and 6.5, and referred to previous decisions, such as *Baker v CAC*, in confirming the obligation is on the agent to be proactive in ensuring that potential purchasers have all necessary information.

[39] The only change between the precursor to Rule 10.7 in the 2012 Rules (Rule 6.5 in the 2009 Rules) is the standard to which a licensee is held. Under the 2009 Rules, the test for disclosure was when it appeared likely, on the basis of the licensee’s knowledge and experience of the real estate market, that land may be subject to hidden or underlying defects. Under the 2012 Rules, the test for disclosure

is when it appears likely to a reasonably competent licensee that there is a defect. This ensures that there is a consistent standard for disclosure of defects that all licensees can be held to.

[40] The Tribunal's powers on appeal are those contained in s. 111 Real Estate Agents Act. The Tribunal may confirm, reverse or modify the determination of the CAC. The CAC's powers include the power to refer a complaint to the Disciplinary Tribunal under s. 91. If the Tribunal upholds Ms Saywood's appeal it may determine to modify or reverse the CAC's decision by referring the complaint back to the CAC to consider whether to lay a charge.

Ms O'Sullivan

[41] Ms O'Sullivan is the listing agent. According to the CAC judgment her failings were in two areas:

- (a) First, she did not adequately question the vendor about the fact that she had replaced a couple of rotten weatherboards or investigate this further.
- (b) Secondly, she should have ensured that she advised the Saywoods of the fact that the previous sale had fallen over because of identified problems with moisture or dampness in the property. This would have alerted them to the defects and ensured that the purchasers were properly protected.

[42] In their decision on orders, the Committee said that Ms O'Sullivan's conduct was close to being seriously negligent, and that her actions contributed to depriving the complainant of the opportunity to discover the defects.

[43] Agents have an obligation to be aware of the potential for defects in any property and that defects relating to moisture and dampness are potentially the most difficult and serious. However, in order to prove misconduct on the part of an agent, the Tribunal has to conclude that it is more likely than not that there has been a "marked" or "serious departure" from acceptable standards.¹²

¹² *Downtown Apartments Ltd v REAA* [2010] NZREADT 6 at [50].

[44] Having carefully examined the evidence, the Tribunal do not consider that Ms O’Sullivan’s conduct reaches the serious level required for a finding of misconduct under any of the situations covered in s 73. The Tribunal do not consider that the conduct is disgraceful in so far as it refers to any character flaws, nor does it reach the standard of “seriously incompetent or seriously negligent real estate agency work, and it was not a reckless contravention of the Act or the Rules. The Tribunal consider the CAC’s analysis as to her level of culpability was correct.

[45] Even if the Tribunal were to consider the cumulative effect of Ms O’Sullivan’s breaches, the Tribunal finds that these breaches arise out of the same set of facts and thus would not cumulatively show a pattern of misconduct.

[46] The appeal in relation to Ms O’Sullivan’s charge is therefore dismissed and the CAC’s decision confirmed.

Mr Cartwright

[47] The Tribunal have reached a different view with respect to Mr Cartwright. In the penalty decision the Committee found that Mr Cartwright had written a letter of apology, and acknowledged that he failed to communicate the details of the defects and failed to appreciate that relying on the building report commissioned by another party was dangerous. He further acknowledged that sending a blank agreement for sale and purchase was a breach of his obligations, and that he had failed to alert the complainant of the real reason for the first tender not proceeding. As regards his conduct, the CAC noted he did not point out the physical defects in the property and that he had misrepresented the validity of the RealSure building report and the reason for the prior agreement failing by implying that the building condition “out” was used because of a problem with the potential purchasers obtaining finance. The Committee concluded that his breaches were serious.

[48] The conduct of Mr Cartwright was such that he allowed the inexperienced purchaser to believe there was no concern arising out of the RealSure report as he alleged that the RealSure inspector was unduly picky and fussy so there were no real issues. By suggesting that Ms Saywood and her partner share the cost of a new

building report with the vendor, he blurred the distinction between the vendor's wish to sell the property and his duty to ensure that the complainants were aware of all the potential defects.

[49] The Tribunal considers that the evidence shows that Mr Cartwright's conduct was either seriously incompetent, or seriously negligent real estate agency work in contravention of s 73(b) of the Act. Mr Cartwright's conduct could be viewed as seriously incompetent as he did not understand the implications of what he was doing. Mr Cartwright's conduct could also be viewed as seriously negligent in that he understood what he was doing but was more concerned with obtaining a sale to the detriment of the purchasers' interests.

[50] The test of professional misconduct as set out in *Pillai v Messiter (No 2)*, states that misconduct requires a “*deliberate departure from accepted standards*”, or “*such serious negligence as, although not deliberate, to portray indifference and abuse of the privileges which the company registration as a (legal) practitioner*”.¹³

[51] In this case, the Tribunal finds that Mr Cartwright demonstrated an indifference as to his professional obligations and appeared concerned only with ensuring the agreement for sale and purchase proceeded. Further, sending a blank agreement for sale and purchase to the purchasers may seem like a trivial matter, but is in fact serious as the agent's knowledge about appropriate clauses to insert into the agreement is lost and the parties are required to rely on their own expertise. This clearly adds to the overall negligence of the agent.

[52] In adopting the *REAA v Stephenson* approach (looking at each of the findings separately but then cumulatively), the Tribunal find that the behaviour demonstrated by Mr Cartwright is such that in its opinion it tips his conduct over into the level of misconduct, because it extended to every aspect of the transaction with the Saywood family and demonstrated a complete lack of understanding and even an indifference as to the potential and very serious consequences that flow from his conduct.

¹³ *Pillai v Messiter (No 2)* [1989] 16 NSWLR, 197.

[53] The Tribunal accepts that the agent did not have a copy of the RealSure report, but notes that he had been advised that the Wellington property had failed inspection because of building defects. His proper course of action should not have been to denigrate the building report company, but to have notified prospective purchasers that he was aware that the first purchase had failed because of a building report and that other purchasers needed to obtain their own independent assessment of the risk involved in purchasing the property. However, Mr Cartwright is clearly not responsible for any failure in the subsequent building inspector to identify and address the loss.

[54] In all cases there is a question of degree as to whether the conduct is on one side of the line or the other, but in this case we consider that the agent seriously failed the purchasers in the way that we have set out above. Therefore, the Tribunal allow the appeal and the Tribunal remit the case back to the CAC to consider this decision and to determine whether to draft charge a under s. 91 of the Real Estate Agents Act.

[55] The Tribunal draws to the parties' attentions the appeal provisions of section 116 of the Real Estate Agents Act 2008.

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Ms K Davenport QC
Chair

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Ms N Dangen
Member

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Mr G Denley
Member