

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 16

Reference No: READT 021/2021

IN THE MATTER OF

Charge laid under s 91 of the Real Estate
Agents Act 2008

BROUGHT BY

**COMPLAINTS ASSESSMENT
COMMITTEE 1901**

AGAINST

KC
Defendant

Hearing in Rotorua on 22 June 2023

Tribunal:

D J Plunkett (Chair)
C A Sandelin (Deputy Chairperson)
G J Denley (Member)

Appearances:

Counsel for the Committee:

E Mok, N Sirisamphan

Counsel for the Defendant:

J Waymouth

DECISION
Dated 03 July 2023

INTRODUCTION

[1] KC, the defendant, is a licensed real estate salesperson under the Real Estate Agents Act 2008 (the Act). The charges concern a property (the property) sold to NT (the wife) and WT (the husband), collectively the purchasers.

[2] The defendant has been charged by Complaints Assessment Committee 1901 (the Committee) with misconduct under s 73(a) of the Act (disgraceful conduct), or alternatively with misconduct under s 73(b) (seriously incompetent or seriously negligent work).

Particulars¹

1. Prior to 29 March 2019 when they sold it to the [purchasers], the defendant and her husband owned the property.
2. In the six months prior to the [purchasers] taking possession, the property was burgled twice within two weeks.
3. On 19 January 2019, the defendant showed [the purchasers] and their son around the property. During this visit, [both the purchasers] asked the defendant whether the property or area was safe. The defendant responded that it was, and that her family had lived in the house for 10 years and they had loved it, and the only reason they were selling was to build a new house in the same area.
4. The defendant did not inform the [purchasers] about the two burglaries.

[3] It is contended that knowingly giving an untruthful answer to the question about the safety of the property or area, constitutes conduct which would reasonably be regarded as disgraceful.

[4] The defendant denies both charges.

[5] There is a lengthy procedural history to these charges. To the extent relevant, it is recorded that on [date], the Committee found the defendant to have breached r 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) and to have engaged in unsatisfactory conduct on the basis of her failure to mention the two burglaries. The Committee also found the defendant to have breached s 136 of the Act (failure to disclose in writing her financial interest in the transaction) and

¹ As amended on 22 June 2023.

that this was also unsatisfactory conduct. In a penalty decision issued on [date], it censured or reprimanded the defendant (it does not say which), fined her \$2,000 (\$1,000 for each breach) and ordered her to pay costs of \$1,395 to the purchasers.

[6] The liability decision of the Committee was upheld by the Tribunal (differently constituted from the current panel) on [date]. It left open an appeal by the purchasers and a cross-appeal by the defendant against the Committee's penalty orders. This was because the Tribunal referred back to the Committee consideration of whether misconduct charges should have been brought against the defendant in relation to the non-disclosure of the burglaries.

[7] On [date], the Committee referred these misconduct charges to the Tribunal.

BACKGROUND

[8] At the relevant time, the defendant was a salesperson at TS Ltd, trading as CS (the agency).

[9] The property, which is in [City], was owned by the defendant and her husband.

[10] There were two burglaries at the property in August 2018.

[11] The property was placed on the market through the agency with the manager of the agency, also licensed under the Act, who was one of the listing agents.

[12] In January 2019, the purchasers read an online advertisement and approached the manager. They were informed that the defendant, a colleague, was the vendor. The defendant subsequently contacted the purchasers to arrange a viewing. They viewed the property with the defendant on 19 January. At this viewing, the disputed conversations took place concerning the safety of the property and/or area.

[13] On 25 January 2019, the purchasers signed a conditional sales and purchase agreement to buy the property for \$540,000. The salespersons identified in the agreement were the manager and another person. The manager provided the purchasers with a congratulatory notice setting out important dates and other helpful information leading to settlement.

[14] There was a second viewing by the purchasers on 6 February 2019, also with the defendant. They had with them the employer of one of the purchasers and his wife.

[15] The sale became unconditional on 12 or 18 February 2019. Settlement then occurred on 29 March 2019 and the purchasers duly entered into possession.

[16] There was an attempted break-in at the house on 12 May 2019 while the husband and the couple's son were in the house.

Complaint to the Authority

[17] The purchasers made a complaint to the Real Estate Agents Authority (the Authority) against the defendant on [date].

[18] It was alleged that when the purchasers went to view the house, the wife asked the defendant whether the house was safe. She answered it was very safe and she had lived there for 10 years and never had any issues.

[19] The purchasers said they had been shaken by the "Big Lie" that it was a "fully safe house". They had been deliberately misled and deceived. There had been a break-in, but luckily the husband and their son were unharmed.

[20] In a telephone call with the Authority's facilitator on [date], the wife repeated that when she viewed the property she asked the defendant whether the house was safe. The defendant replied that she had lived there for the last 10 years and that it was a safe house in a safe area, and she never had any issues. When viewing the property a second time, the defendant said the neighbours were good.

[21] On [date], the husband sent an email to the Authority. He said their son [(age)], who is hearing impaired and has special needs, stayed at home during the day while they worked fulltime. It was because of their son's condition that they enquired about the safety of the house on numerous occasions. Their son was absolutely traumatised by the attempted break-in, which had stressed them all. They had spent about \$5,000 to date on security measures including a dog. Prior to moving to New Zealand, there had been an attempted break-in at their home [overseas].

[22] On [date], the defendant provided her response to the Authority. She advised that the manager was unable to facilitate an inspection due to surgery. An inspection was therefore arranged by the defendant and took place on 19 January.

[23] According to the defendant, it was in her son's bedroom that the wife asked if it was a good area. She replied that they love it, that the kids can walk to school and it is a few minutes from town. They had lived there for about 10 years and the only reason they were leaving was that they had bought a section and her husband was a builder. It did not even enter her mind to tell the purchasers about the two burglaries some six months previously. Due to the length of time, it was not at the top of her mind. The

burglaries had no effect on her family. Prior to those burglaries, nobody had broken into their home. They had never had any concerns for safety.

[24] The defendant said it was the manager who took the husband through the offer documentation on 23 January 2019 and left it with him.

[25] In her response, the defendant referred to the second visit to the property on 6 February 2019. In answer to a comment from the employer's wife that it was a nice location, the defendant said she loved it being close to town and the school, and they loved that side of town.

[26] A further email from the defendant to the Authority on [date] advised she was not the selling agent, she received no commission and she was not named in any marketing material. She was not present in any negotiations or the signing of the sale and purchase agreement.

Evidence given to the Tribunal

[27] The Committee called the following witnesses.

NT

[28] There is a brief of evidence ([date]) from the wife, who also gave oral evidence.

[29] The wife says in her brief that she saw the property advertisement and phoned the identified agent, the manager, who disclosed that the property was owned by her colleague, the defendant. The latter phoned her and a viewing was arranged.

[30] At the viewing on 19 January 2019, while on the deck off the lounge room and after having looked at the entire house, she asked the defendant, "Is this house safe?" She told the defendant they were concerned about safety because their son has special needs and would be left alone at times. She apologised to the defendant for asking the question more than once, since safety was always her concern. The defendant replied that the house was safe as she had been living there for 10 years and never had any issues, adding that the kids played in the garden. The wife was very comforted.

[31] They visited again with her employer and his wife. She asked the defendant about the neighbours who replied that they were "lovely people". She did not ask on this visit about whether the area or house was safe. At none of the viewings was the manager present.

[32] They relied on what the defendant had told them about the safety of the property. They were very persistent about this because of a horrific home invasion [overseas]. They had moved to New Zealand to be safe and because of their son.

[33] In the afternoon of 12 May 2019, while the wife was at work, an intruder was at the house. Her husband and son were there. The incident was reported to the Police, who had attended the property before she arrived home. They have spent money on a security door, lighting, cameras and an alarm system on the advice of the Police. They have also fenced the whole property.

[34] They were shocked about what had happened. They no longer feel safe in the house. It has had a big impact on their family life. Their son is now traumatised and afraid. It has caused an immense amount of pressure and distress. If she had known about even one previous break-in, she would never have bought the property.

WT

[35] There is a brief of evidence ([date]) from the husband, who also gave oral evidence.

[36] The husband and his wife met the defendant at the property. While they were on the deck and before entering the property, he asked her the same question that his wife asked, "Is the house safe?" The defendant replied that it was, explaining that she had lived there for 10 years, the kids played in the garden and they never had any issues.

[37] On their return visit, the husband asked the defendant about the neighbours and she said they never had any issues and the neighbourhood was a good one.

[38] The husband explained that their son has an impairment and hearing loss. He cannot leave the home without assistance. Because of his needs, it is very important that they live in a property in an area that is safe.

[39] On 12 May 2019, a man in a hoodie on the deck threw a door stopper at him, smashing a glass panel on the door. The intruder ran away. As a result, their son had become completely traumatised and they are all feeling stressed. They have spent over \$30,000 on security.

[40] They believed they were purchasing a safe house, based on what the defendant told them. This was a very important issue for the whole family.

Suzanne Johnston

[41] There is a brief of evidence ([date]) from Suzanne Johnston, a regulatory compliance manager at the Authority. Ms Johnston outlines the investigation process and produces the key documents from the Committee's investigation.

[42] The Tribunal also heard from the defendant.

KC

[43] There is a brief of evidence ([date]) from the defendant, who also gave oral evidence.

[44] The defendant has been a licensed salesperson for 11 years. She says she and her husband had owned the property for approximately nine years. The listing salespersons were the manager and another person at the agency. She did not receive any commission or fee from the sale. It was her belief that she was acting only as the vendor at all times. She managed the viewings as a favour to her colleagues, the listing agents.

[45] It was the manager who asked her to take the purchasers through the property. The manager could not do so for medical reasons and the other salesperson was on annual leave. In her mind, she was acting in a personal capacity as a vendor aiding the real estate agent.

[46] The defendant says that towards the end of the visit, there was a general discussion in her son's bedroom. The husband asked, "Is it a good area?" She replied, "We love it". She discussed how happy they were in that area and that it was the reason why they had bought a section down the road. The house was located in a good area. The defendant mentioned the local amenities to the purchasers. The property was close to the workplaces of both NT and WT, her own children walked to school and she (the defendant) would go for runs through the forest close by. The words "safe" and "safety" did not feature in the conversation. It did not even enter into her mind to tell them of the two burglaries. She answered the questions honestly and truthfully.

[47] According to the defendant, by the time of the second viewing, the purchasers had prepared an agreement for sale and purchase through the manager. It was conditional and as the conditions were being satisfied, they asked if they could come through the property again. They did so with the wife's employer and his wife. She told the employer and wife that she liked the area, particularly the forest. There was no

discussion about neighbours, though she recalled that on one occasion, the purchasers did ask about the neighbours.

[48] The defendant told the Tribunal she was never asked at any time specifically about safety. Nor was she ever informed of the son's special needs or of the home invasion [overseas] or that safety was important to them.

[49] In her brief of evidence, the defendant explains the nature of the two burglaries in August 2018. As for the first burglary, they did not know it had happened until sometime afterwards as there was nothing apparent showing the house had been broken into. There was no damage. They lost some cash and technology items. The second burglary was by youths, something the Police said was happening in the area at the time. It was not an ongoing matter. The Police knew who the offenders were. Access was gained by smashing a window. Again, they lost small technology items.

[50] The defendant told the Tribunal that the burglaries had no impact on the family. They were a nuisance. They did not change her mind about the area.

CHARGES

Jurisdiction and principles

[51] The Committee has brought a charge of misconduct against the defendant. Misconduct is defined in the Act:

73 Misconduct

For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—

- (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
- (b) constitutes seriously incompetent or seriously negligent real estate agency work; or
- (c) consists of a wilful or reckless contravention of—
 - (i) this Act; or
 - (ii) other Acts that apply to the conduct of licensees; or
 - (iii) regulations or rules made under this Act; or
- (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

[52] The Tribunal may regulate its procedures as it thinks fit, though it is subject to the rules of natural justice.²

[53] The Tribunal may receive any document or information that may, in its opinion, assist it, whether or not that document or information would be admissible in a court.³ Subject to that and other matters, the Evidence Act 2006 applies.⁴

[54] The Committee has the onus of proving the charges. It is the civil standard of proof, the balance of probabilities, that is applicable.⁵ However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.⁶

[55] The charge of misconduct is framed as disgraceful conduct under s 73(a) of the Act. This has been considered by the High Court in *Morton-Jones*.⁷

[28] Charges 1, 2 and 3 alleged “disgraceful conduct”. On the meaning of this expression, the Tribunal referred to a Tribunal decision in *CAC v Downtown Apartments Ltd*.⁵ In that case the Tribunal said:

[55] The word disgraceful is in no sense a term of art. In accordance with the usual rules it is to be given its natural and popular meaning in the ordinary sense of the word. But s 73(a) qualifies the ordinary meaning by reference to the reasonable regard of agents of good standing or reasonable members of the public.

[56] The use of those words by way of qualification to the ordinary meaning of the word disgraceful make it clear that the test of disgraceful conduct is an objective one for this Tribunal to assess. See *Blake v Preliminary Proceedings Committee of the Medical Council of New Zealand*, [1997] 1 NZLR 71.

[57] The ‘reasonable person’ is a legal fiction of common law representing an objective standard against which individual conduct can be measured but under s 73(a) that reasonable person is qualified to be an agent of good standing or a member of the public.

[58] So while the reasonable person is a mythical ideal person, the Tribunal can consider, inter alia, the standards that an agent of good standing should aspire to including any special knowledge, skill, training or experience such person may have when assessing the conduct of the ... defendant.

² Real Estate Agents Act 2008, s 105.

³ Section 109(1).

⁴ Section 109(4).

⁵ Section 110.

⁶ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [101]–[102] and [112].

⁷ *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804.

[59] So, in summary, the Tribunal must find on balance of probabilities that the conduct of the ... defendant represented a marked or serious departure from the standards of an agent of good standing or a reasonable member of the public.

[29] Subject to one qualification I agree with that analysis. The qualification relates to the observation in [59]. It is a restatement of what is clearly expressed in s 73(a). In my opinion the restatement does not accurately reflect the words used. If the charge is under s 73(a) the critical enquiry is whether the conduct is “disgraceful”. Conduct which involves a marked and serious departure from the requisite standards must be assessed as “disgraceful”, rather than some other form of misconduct which may also involve a marked and serious departure from the standards. The point is more than one of semantics because s 73 refers to more than one type of misconduct. In particular, s 73(b) refers to “seriously incompetent or seriously negligent real estate agency work”. Work of that nature would also involve a marked and serious departure from particular standards; the standards to which s 73(b) is directed are those relating to competence and care in conducting real estate agency work.

[30] This is not to say that s 73(a) could not apply to work carried out by a licensee so incompetently or negligently as to amount to disgraceful conduct according to the s 73(a) tests. If the work was not real estate agency work, but the person doing the work was a licensee, the appropriate provision for a charge would be s 73(a). This is a point more fully discussed below when considering the appellant’s argument that the Act did not apply to his property management work.

⁵ *Complaints Assessment Committee (CAC 10024) v Downtown Apartments Ltd (in Liq)* [2010] NZREADT 6.

[56] The alternative charge of misconduct is framed in terms of seriously incompetent or seriously negligent real estate agency work.

[57] The High Court in *Brown* compares the gravity of misconduct in s 73 with unsatisfactory conduct in s 72:⁸

[21] The Tribunal’s finding was grounded on s 73(b). It concluded that Mrs Brown’s conduct constituted “seriously negligent real estate agency work”. It is worth observing that s 73 clearly focuses on actions which are at the upper end of misconduct by licensees. The four discrete subsections focus on conduct which is “disgraceful”, an adjective which carries with it a high degree of opprobrium; incompetent or negligent conduct which must justify the adverb “seriously”; contravention of statutory provisions, which must be “wilful or reckless”; and an offence (clearly a criminal offence) which must reflect “adversely” on a licensee’s fitness. Given s 73’s spread over this range of seriousness, the Tribunal was obliged to consider whether Mrs Brown’s conduct reached that level. It is also pertinent to observe that the types of misconduct specified in s 73 are qualitatively different. One would not expect an identical legal threshold to apply to all. Conduct which a reasonable member of the public would regard as disgraceful would obviously be qualitatively different from serious incompetence or wilful contravention of the Act.

[22] This touchstone of seriousness is reinforced when one examines the preceding section, s 72, which provides:

...

⁸ *Brown v Real Estate Agents Authority* [2013] NZHC 3309.

[23] A comparison with the subsections of s 73 is instructive. Conduct must fall short of the standard a reasonable member of the public might expect (no reference to agents of good standing, regarding conduct as being “disgraceful”). There must be mere contravention of the Act rather than qualifying conduct which is “wilful or reckless”. The incompetence or negligence need not be serious. And subs (d) returns to one of the limbs of s 73(a) – the conduct must be regarded as unacceptable by agents of good standing, rather than disgraceful.

[footnotes omitted]

[58] In *Jhagroo*, the High Court stated:⁹

[49] 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 assessed 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 considerable expertise and being able to draw on significant experience in dealing with complaints under the Act.

ASSESSMENT

Whether defendant undertaking real estate agency work

[59] The first issue is whether the defendant’s activities in arranging and conducting the two visits by the purchasers, in the absence of any other licensed agent, amount to “real estate agency work”, as required for the alternative charge of seriously incompetent or seriously negligent work (s 73(b) of the Act).

[60] Mr Waymouth submits that the defendant’s work does not fall under the statutory definition. She was not a listing agent and did not receive any commission. She undertook the work on behalf of herself and her husband, who were the vendors. Her work is indistinguishable from that of any other vendor requested by an agent to arrange and meet a buyer on site. If her husband undertook the same viewings, there could be no question it is not real estate agency work.

[61] There is a definition of “real estate agency work” in the Act:¹⁰

4 Interpretation

(1) In this Act, unless the context otherwise requires,—

...

real estate agency work or agency work—

(a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and

⁹ *Complaints Assessment Committee 20003 v Jhagroo* [2014] NZHC 2077.

¹⁰ Real Estate Agents Act, s 4.

- (b) includes any work done by a branch manager or salesperson under the direction of, or on behalf of an agent to enable the agent to do the work or provide the services described in paragraph (a); but
- (c) does not include—
 - (i) the provision of general advice or materials to assist owners to locate and negotiate with potential buyers; or
 - (ii) the publication of newspapers, journals, magazines, or websites that include advertisements for the sale or other disposal of any land or business; or
 - (iii) the broadcasting of television or radio programmes that include advertisements for the sale or other disposal of any land or business; or
 - (iv) the lending of money on mortgage or otherwise; or
 - (v) the provision of investment advice; or
 - (vi) the provision of conveyancing services within the meaning of the Lawyers and Conveyancers Act 2006
- (2) To avoid doubt, the sale, purchase, or other disposal or acquisition of shares comes within the definition of transaction in subsection (1) if, and only if, the shares entitle the holder to a licence that is registrable under subpart 6 of Part 3 of the Land Transfer Act 2017.

[62] The word “transaction” used above is itself defined:¹¹

transaction means any 1 or more of the following:

- (a) the sale, purchase, or other disposal or acquisition of a freehold estate or interest in land:
- (b) the grant, sale, purchase, or other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies):
- (c) the grant, sale, purchase, or other disposal or acquisition of a licence that is registrable under the Land Transfer Act 2017:
- (d) the grant, sale, purchase, or other disposal or acquisition of an occupation right agreement within the meaning of the Retirement Villages Act 2003:
- (e) the sale, purchase, or other disposal or acquisition of any business (either with or without any interest in land).

[63] The High Court in *House* stated that a narrow and literal approach to the definition of “real estate agency work” would be inappropriate.¹² The Court went on to state:

[50] This conclusion effectively treats the definition as applying to the overall task the agency is required to perform: once the relationship of principal and agent has been established anything (be it an act or omission) that is related

¹¹ Section 4.

¹² *House v Real Estate Agents Authority* [2013] NZHC 1619 at [45].

directly or indirectly to that work is liable to be within the definition. This accords with the pivotal nature of the definition in the scheme of the Act and its importance for the achievement of the statutory purpose.

[64] It seems clear to us that the activities of the defendant are caught by the statutory definition of real estate agency work. We agree with Ms Mok that in the context of a property being marketed for sale by the agency at which the defendant worked, she cannot realistically argue that she was acting solely as a vendor and not also as an agent on behalf of her colleagues. As Ms Mok points out, the inclusive paragraph (b) of the statutory definition catches work done on behalf of another agent.

[65] The defendant was carrying out work that would normally be performed by an agent. She arranged both visits, something a vendor would not normally undertake. While uncommon, a vendor could be present during a visit by prospective buyers and could point out features of the property, though this is usually done by an agent. If another agent had been present during the visits, the activities of the defendant (conducting the tour and discussing the features of the property or area) might properly be considered those of a vendor, but in this case the defendant undertook all the activities in the absence of another agent.

[66] We find that the conduct of the defendant is unarguably real estate agency work. It was plainly for the purpose of bringing about a transaction, as she accepted in her evidence. In terms of *House*, the defendant's services were related directly, let alone indirectly, to the work within the statutory definition.

[67] We agree with the earlier panel of the Tribunal that a licensed vendor conducting services on her (or his) own behalf complies with the definition of real estate agency work. Of course, in this case the defendant was also performing these services on behalf of another person, being her vendor husband.

Whether defendant asked about a safe house or good area

[68] The critical issue in this case is to determine what the purchasers asked the defendant during the first visit, whether she was expressly asked whether the house or area was "safe", or whether the house or area was "good".

[69] The evidence of both the wife and husband is that during that first visit one or both of them specifically asked the defendant whether the house and/or area was safe, using the word "safe". This occurred on the deck off the lounge room. It is the defendant's evidence that the husband and/or the wife asked her whether the area and/or property was "good".

[70] We found the evidence of both the wife and the husband not to be credible. There are discrepancies between them which are so fundamental that their narrative cannot be true.

[71] It is the evidence of the wife that it was her who asked the question about safety. Her husband was not present as he was looking around the house. She was on the deck with the defendant, having already been on a tour of the house. After asking the question (more than once), she did not go back through the house during that visit. She remained talking to the defendant on the deck. She was not aware of whether her husband asked the defendant the same question, but probably he did not.

[72] The husband told us that he and his wife both asked the question about safety. They were together on the deck with the defendant, before having gone through the house.

[73] The differences in their evidence are profound:

1. The wife says her husband was not present when she asked, whereas he says they were together.
2. The wife says she asked the question and she did not know whether he asked the same question, whereas he says they both asked the question (in each other's presence).
3. The wife says she had already been through the house (and did not go through again), whereas the husband says they viewed the house afterwards.

[74] Neither of them had an adequate explanation for the discrepancies. They cannot be explained by the effluxion of time, which is only four years. According to their evidence, the safety of the property was their focus given the circumstances of their son. In the intervening years, the complaint (especially the safety issue) will have been the subject of much of their thought. At the hearing, they were not being asked to recall an event four years previous for the first time. The explanation for the inconsistencies lies in their narrative about using the word "safe" being untrue, not muddled thinking some years later as to inconsequential details.

[75] We accept the evidence of the defendant that in her son's bedroom the husband and perhaps also the wife asked her if the area (and/or house) was good, not if the house (and/or area) was safe.

Whether the defendant is nonetheless guilty of misconduct

[76] Our finding that the defendant was asked only whether the area was good does not necessarily mean that she did not misconduct herself. After all, in answering the purchasers' question, she did not disclose the two burglaries only six months earlier.

[77] The Tribunal (differently constituted) on [date] upheld the Committee's conclusion that the defendant was accordingly guilty of unsatisfactory conduct under s 72(b) of the Act, on the basis that she had breached r 6.4 of the Rules:

6 Standards of professional conduct

...

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.

[78] It considered that a question about whether the house was in a good area called for the earlier burglaries to be revealed.¹³

[79] We agree that the burglaries should have been disclosed. At the very least, the defendant is guilty of unsatisfactory conduct. But is the defendant guilty of one of the more serious charges of misconduct?

[80] The question for us in assessing whether the defendant's conduct is disgraceful, is whether she knowingly omitted to disclose them. The previous panel did not deal with whether she lied to the purchasers, as that was the very matter it sent back to the Committee to consider whether the possibility of misconduct should be referred to the Tribunal.

[81] As we have found that the defendant was not expressly asked whether the house was safe, we dismiss the allegation that the defendant was deliberately untruthful. We accept her evidence that the burglaries were not at the top of her mind in answering a more general question about whether the area was good. She spoke about the amenities in the area and its convenience for employment, schooling and her pastime of running. We do not agree with Ms Mok's submission that the defendant's evidence (that the burglaries had no impact on her and her family) is implausible. Whether or not a reasonable person would not have discounted the burglaries as merely a nuisance, we find that she did so discount them. We found the defendant, on this point and generally, to be a truthful witness.

¹³ At [25].

[82] Given that we find the defendant did not deliberately fail to inform the purchasers of the earlier burglaries, her conduct could not be described as disgraceful. Overlooking the burglaries is not such a marked or serious departure from the standards as to warrant the opprobrium of disgraceful.

[83] However, the Committee advances an alternative charge, so could the defendant's omission amount to seriously incompetent or seriously negligent work and therefore misconduct under s 73(b)?

[84] Ms Mok contends the defendant was seriously negligent, as she was aware of the purchasers' focus on safety. Mr Waymouth accepts that it was unsatisfactory conduct, as the Tribunal previously concluded, but submits that it is not so serious as to amount to seriously incompetent or negligent work.

[85] We agree with Mr Waymouth, since we do not accept the purchasers' evidence that they informed the defendant of their son's situation or the incident [overseas] and hence their focus on safety. There was a "mere" contravention of the Rules or mere negligence, sufficient to amount to unsatisfactory conduct.¹⁴ The defendant negligently withheld information which in fairness should have been provided to the purchasers. There was an error of judgement.

[86] We do not though find the defendant's non-disclosure to be seriously incompetent or negligent, or to amount to a marked and serious departure from the standards, as against a departure from the standards. It is not misconduct, as understood by the Act. Unless we had found that the defendant had lied, her omission could not be described as at the upper end of misconduct, as required by *Brown* in order to fall within s 73.¹⁵ It is properly classified as unsatisfactory conduct.

Conclusion

[87] The Committee has not established on the balance of probabilities that the defendant was asked whether the house or area was safe. We find that the defendant was asked by the purchasers whether the area and/or house was good. In answering that question without revealing the earlier burglaries, the defendant carelessly overlooked informing them and did not deliberately deceive them. We agree with the earlier decision of the Tribunal that the defendant breached r 6.4 and is guilty of unsatisfactory conduct.

¹⁴ *Brown*, above n 9, at [23]; and *Jhagroo*, above n 10.

¹⁵ *Brown*, above n 9, at [21].

ORDERS

[88] The charges are dismissed.

[89] A separate Minute will be issued to deal with the appeal and cross-appeal against the Committee's penalty orders, left open by the previous panel of the Tribunal.

[90] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, setting out the right of appeal to the High Court.

PUBLICATION

[91] Having regard to the privacy of the parties, as well as the interests of the public in the transparency of the Tribunal, it is appropriate to order publication of this decision without naming the purchasers, the defendant or the agency.¹⁶

D J Plunkett
Chair

C A Sandelin
Deputy Chairperson

G J Denley
Member

¹⁶ Real Estate Agents Act, s 108.