

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2017] NZREADT 3**

READT 021/15

UNDER THE REAL ESTATE AGENTS ACT 2008  
IN THE MATTER OF OF A CHARGE LAID UNDER SECTION  
91 OF THE REAL ESTATE AGENTS ACT  
2008  
BETWEEN THE COMPLAINTS ASSESSMENT  
COMMITTEE (CAC 304)  
AND JOHN BRYAN FOREMAN  
Defendant

Hearing: At Auckland on 16/17 November 2016

Tribunal: Ms K Davenport QC – Deputy Chairperson  
Ms C Sandelin – Member  
Mr G Denley – Member

Appearances: Ms K Lawson-Bradshaw for Complaints Assessment Committee  
Mr T Rea and Ms C Eric for Mr Foreman

Decision: 26 January 2017

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**DECISION OF THE TRIBUNAL**

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[1] Mr Foreman is a real estate agent from Albany, near Auckland. He is facing a charge relating to the 2011 sale of his family home at Glenelg Road, Red Beach. The purchasers of the property (the Parkers) complained that Mr Foreman was aware of a number of defects with the property which he should have disclosed to them prior to their purchase of the property. Mr and Mrs Parker's complaints primarily related to leaks and water ingress problems with the property.

[2] After an investigation the Complaints Assessment Committee charged Mr Foreman with the following charge :

### **Charge**

Complaints Assessment Committee 304 (Committee) charges the defendant with misconduct under s 73(c)(iii) of the Real Estate Agency Act 2008 (Act) in that his conduct consists of a wilful or reckless breach of Rule 6.4 and/or Rule 6.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (Rules):

### **Particulars**

1. The defendant was vendor, as one trustee of the Albany Family Trust, of a property at 40 Glenelg Road, Red Beach (Property), sold to Bernard and Susan Parker (Complainants) in February 2011. The defendant also acted as the licenced salesperson on the transaction, on behalf of the vendor trustees/trust.
2. Prior to entering into the agreement for sale and purchase of the Property, the defendant:
  - (a) Withheld information that should, by law or fairness, have been provided to the Complainants, and/or
  - (b) Failed to disclose known or likely defects to the Complainants.
3. Particularly, the defendant failed to advise the Complainants that the property was subject to significant moisture ingress problems.

[3] The charge requires the CAC to establish that Mr Foreman wilfully or recklessly breached Rule 6.4 and Rule 6.5 of the Real Estate Agents Act (Professional Conduct and Client Care Rules) 2009.

[4] These rules provide that an agent should not withhold information that should by law or fairness have been provided to the purchasers (R 6.4) and that an agent must disclose known or likely defects to the purchasers (R 6.5).

[5] Evidence was given for the Complaints Assessment Committee by Mr Gallacher, (the investigator for the Complaints Assessment Committee),<sup>1</sup> Mr Parker and Mr Murray Harman.

[6] Mr Harman is a builder who carried out works on the Glenelg Road property while it was owned by Mr and Mrs Foreman.

[7] The house at Glenelg Road was architecturally designed and consisted of two wings, with a middle span which bridged a 3 – 3.5 metre gully. This central span of

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<sup>1</sup> This evidence was admitted by consent.

the house was supported by steel poles/beams which went down into the gully. The gully had a stream running through it. The property is also densely covered in trees.

[8] Mr and Mrs Foreman had lived in Glenelg Road for 8 years. During this time they carried out some minor maintenance repairs and a major alteration where they constructed a new garage and storeroom adjacent to the entrance portico and the existing garage. Mr Murray Harman was engaged to carry out the work to the property when the garage was constructed. He also came to the property to carry out a moisture assessment and to install insulation.

[9] There were four main areas of complaint by the Parkers:

- In the new garage they discovered areas of staining and efflorescence on the blocks of the new garage wall. This was covered up by a shelving unit which was the only piece of furniture that Mr and Mrs Foreman left in the house.
- On the floor of the living room when the carpet was lifted they discovered that the floor was rotten and had been covered up with what looked like an old oven tray. There was another tray or metal sheet covering a further rotten section of the floor midway along the north eastern wall of the lounge.
- The steel posts under the lounge, over the stream, were rusted through and had been bogged and painted over.
- Mr Parker also complained of flooding in the old garage and portico, rot in the joists under the kitchen deck area which had been painted over, and that two windows were out of alignment with corresponding rot to the timber.
- They also complained that the house smelt damp.

[10] The Foremans' deny that they concealed any defects. Mr Foreman says that when he and his wife acquired the house in January 2003 that they properly maintained the house. They realised that they needed to paint the steel beams and the house to keep them waterproof, and did so.

[11] Mr Foreman's evidence is as follows:

- Between 2004 and 2006 he painted the entry hall, lounge, study, interior walls of the old garage, the walls in the master bedroom and a second bedroom. He says during this time he noticed no water staining or other problems other than some spots of efflorescence of the back left wall in the old garage.
- In 2005 he removed a planter from the north west exterior wall and then painted the wall to tidy it up.
- In mid 2006 a painting company, North South Properties Services Limited [NSPS], were engaged to paint the exterior of the house. Although Mr Foreman assisted, he says at no time did this company inform them of any moisture issues or other problems with the surfaces being painted.
- In 2005 Mr Harman was engaged to install polystyrene insulation panels to the underside of the floorboards in the kitchen and dining room. This area is supported by the steel beams. Mr Foreman reports that Mr Harman did not inform him of any problem with the beams or the property during the insulation process.
- Mr Foreman said he also painted the six steel support post beams located under the dining room, kitchen and first bedroom in 2005 and 2008. He said he brushed these posts with a wire brush, gently sanded them to remove any loose paint and then painted over the existing paint with Resene Rust Arrest Red Oxide to prevent rust. He said he did not see at any time bogged sections (as Mr Parker claims), rust or any other problems with these posts and says if he had done he would have immediately had any issue investigated.
- In 2005 to 2006 Mr Harman was engaged to construct a new garage and storeroom. The flat roof of the old garage was also replaced. Mr Foreman says that he had noticed efflorescence<sup>2</sup> at the back of the old garage and he discussed it with Mr Harman who said it was likely to be caused by earth collapsing through the scoria, possibly blocking the drainage coil which ran alongside the old garage. Mr Harman said what needed to be

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<sup>2</sup> Salts produced by ground water penetrating the concrete.

done was that earth needed to be dug back at the rear of the carport and the drainage coil checked and cleared and the area refilled with scoria. Mr Foreman says Mr Harman was authorised to do these repairs.<sup>3</sup>

- However, a problem was encountered during the construction when the digger operator contracted to dig out some of the soil said he was unable to complete the works as the bank behind the garage was too steep for the digger to dig the whole length of the building site as Mr Harman had suggested. However, Mr Harman agreed to hand dig the area to ensure that the two drainage coils (from the old garage and the new garage) met.
- Mr Foreman noticed that during construction of the new garage that there was a damp area on the wall of the new storeroom at the junction of the old and new structures. He asked Mr Harman about it, who said it was likely due to a poor connection of the drainage coil pipes between the old and new garages and he would check this and remedy it. Mr Foreman said that he subsequently checked this and the damp patch was no longer there. He confirmed with Mr Harman that he had repaired this area.

[12] After the garage extension was completed the Foreman's decided to tile the area in the carport and the entry to the house and the old garage and they asked Mr Harman to raise the level of the floor of the new garage and the storeroom by 50mm in line with the intended new tiling. Mr Harman therefore installed a waterproof plastic skirting around the base of the old garage to a height of 150mm to provide for the 50mm tiles and 100mm skirting to be fitted. However, the tiling work was never carried out.

[13] Mr Foreman agreed that in some incidents of heavy rain water would come down the driveway and under the roller door of the old garage and form small puddles in the front entry and carport. He said that this was not of concern to he or his wife.

[14] In 2007 Code Compliance was obtained for the garage extensions.

[15] Mr Foreman then painted the exterior and interior of the new garage and said he found no moisture issues.

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<sup>3</sup> See defendants bundle of documents page 6.

[16] About a year later, ie. 2008 the Foreman's installed shelving in the new storeroom which were left behind on the sale of the property. It was behind this unit that Mr Parker found the efflorescence. Mr Foreman says that he believed that Mr Harman had addressed the dampness issues in the garage and storeroom and they were not aware of any further issues. They said that if they had been aware they would have had Mr Harman back to fix the issue.

[17] In 2007, on Mr Harman's recommendation, they engaged Hibiscus Roofing Company Limited to replace roofing sections over the entry, lounge, laundry and master bedroom. When this was done the fall of the previously flat roof was corrected and insulation was installed. Mr Foreman says that during the time of this installation there was some damage to the ceiling which was fixed by a builder and painted by Mr Foreman.

[18] In 2007 builders were engaged to replace the large high window on the eastern wall.

[19] In about 2007 Mr Foreman believed that they would have to sell the property because of his ill-health. Mr Foreman then engaged a friend, William Irvine, to test the property for weathertightness. Mr Irvine tested the property using an invasive moisture meter and reported that there were slightly elevated moisture readings in the second bedroom window and in the corner of the hall/master bedroom at floor level. These were readings of moisture of slightly over 20%. The remainder of the property was in the normal range of under 20%. Mr Foreman says that he repaired these areas and checked for the source of the moisture at the hall/master bedroom. He found a gap between the plaster and timber junction. He cleaned and dried it, applied a filler, under-sealant and top coat of paint. He did some repairs to the exterior of the property, the second bedroom and master bedroom around this time with a little sealer and paint.

[20] The property was put on the market in January 2009 and it did not sell. It was relisted for sale in 2010. Mr and Mrs Parker became interested in the property in February 2011. They viewed the property, discussed the house with Mr Foreman who told them about the replacement of the roof, installation of the batts and the garage extension and his painting. Mr Parker did raise weathertight concerns with Mr Foreman. Mr Foreman said that he told him that the Hardy Board cladding system needed to be regularly repainted and the system was reliant on paintwork to

be weathertight. He advised Mr and Mrs Parker to obtain a pre-purchase building inspection report. They did this. Their offer of \$740,000 was conditional upon a satisfactory building report.

[21] This report was obtained from Leak Detectives. After having the report done Mr Parker produced a list of the works that needed to be done by Mr Foreman before settlement. Mr Foreman asked Mr Harman to undertake the necessary repairs.

[22] When Mr Harman came to the house he also carried out his own invasive moisture meter testing works. The works that were carried out at Mr and Mrs Parker's request were detailed in Mr Foreman's statement. The only evidence of importance to the charge against Mr Foreman is the request for repairs to the lounge window. A thermal anomaly had been reported by Leak Detectives at this point. Mr Foreman says that he and Mr Harman found a chip at the bottom of the window, lifted a corner of the carpet near this chip and saw a water stain on the sill. Mr Foreman subsequently repaired the chip. Mr Foreman says that Mr Harman subsequently tested the area with his invasive moisture meter and the reading was within the normal range.

[23] This evidence is important because Mr Harman's evidence on this point is different. Mr Harman says that he did not just lift a corner of the carpet, he pulled the carpet right back and at that time he was able to see the rot on the floor and the metal plate covering the floor. However, Mr Harman agreed under cross examination that the first (and only time) he saw the plate and rot was with Mr Parker when he saw both. This would support Mr Foreman's evidence. Mr Foreman denied he had ever seen any rot. He said that once all the work identified by the Parkers had been done he was satisfied he had complied with all his obligations.

[24] With respect to the Parkers complaint Mr Foreman says:

- He never noticed any damp smell at the property. He assumed when this was mentioned by Mr Parker that it came from the carpets which were cleaned on 16 June (the day before settlement).
- He only ever saw water staining in the lounge window sill area when Mr Harman lifted a corner of the carpet. He thought it was due to a leak from a chip in the window. He says he never saw any rotten floor.

- The shelving unit was left in the storeroom as he did not need it.
- He wasn't aware of any failure in the damp proofing of the new garage because while he had identified a problem at the time of construction he had understood that this had been corrected by Mr Harman. A Code Compliance Certificate was subsequently issued by the Council.
- As far as Mr Foreman was concerned the garage did not flood, just a small amount of water entered under the roller door.
- Mr Foreman denied being aware of any rot to the timber in the lounge or on the floor. Mr Foreman said that while the Leak Detectives building report referred to a potential leak based on non-invasive moisture meters; Mr Harman's invasive moisture meter reading did not show any problem. Mr Harman had said it was likely due to a false reading.
- Mr Foreman said that if there were major moisture issues then he wasn't aware of them. He did not conceal or fail to disclose any issues from Mr and Mrs Parker.
- Neither his wife nor he had bogged, sealed or painted over any areas in the house to cover up the moisture ingress issues. He denied that there were any hidden issues or failure to disclose the issues to the Parkers.
- Finally, he denied that Mr Harman returned to the property between the construction of the garage and the repair work done in the (2006) Leak Detectives report in March 2011.

[25] Mr Foreman also called evidence from Mr Steven King the Director of North South Properties Limited who painted the walls and barge boards of the exterior of the house. Mr King said that at no time did he see any indication of any water ingress.

[26] Mrs Foreman confirmed that while she wasn't involved with the maintenance of the property she had never noticed any damp smell. She said she hadn't noticed any or been told by her husband of any problems with the property and was unaware of any issues with it.



[27] Evidence was also given by Mr William Irvine who was the flooring contractor who carried out the invasive moisture testing in 2006 – 2007 for the Foremans'. He said he checked the property and said that there were no significant areas of concern apart from the two areas – one in the second bedroom and the other in corner of the hall. He said he didn't recall exactly what the readings were but remembered that they were very high. Mr Irvine told the Tribunal that in his view, the house wasn't a "problem house". He said words to the effect that you could tell problem houses from the damp smell.

[28] Mr John Rinkin's evidence was given by consent. He was a manager for Hibiscus Roofing and he confirmed that the roofing was carried out on the property in accordance with Mr Foreman's evidence.

[29] Mr Parker said that between 2011 and 2013 he and his wife have undertaken a number of works to redress the problems as follows:

- Replacing rotting wood discovered on the deck capping and the base of the master bedroom door trim.
- Repairing areas filled with sealant and painted over.
- Fixing an area at the bottom corner of the exterior of the wall of the sliding windows where there was a rectangular piece of additional flashing set in place with sealant and painted over.
- Replacing the steel support posts as they had been filled with a bog filler (such as used on boats) and rusted and these had to be replaced to maintain the integrity of the beams.
- In summer 2012 Mr Parker noticed a mushroom the size of an old 50c piece growing on the windowsill. He pushed a screwdriver into the windowsill and it disappeared into a void. The corner of the windowsill had crumbled away completely. He said that every windowsill he investigated after this had been bogged. He found extensive areas of rot and rusted out sections at the base of the steel support between window.

[30] Mr Parker said that the remedial works had cost approximately \$61,000.

[31] Mr Harman gave evidence for the Complaints Assessment Committee. He says that he made a number of visits to the property. He corrected his brief of evidence to say that his second visit to the property was in 2006 when he built the garage extension and that his first visit has been to install insulation. He also said that he made a third visit in 2009-2010 when he assessed the faults prior to Mr Foreman putting his property on the market. His fourth visit was to do the moisture readings as a result of the Leak Detectives report in 2011, to undertake repairs.

[32] Mr Harman's evidence about what happened in 2006 is consistent with Mr Foreman's. Under cross examination Mr Harman agreed that the reasons that the digger had not dug out the existing drainage in the existing garage was because the land was too steep. He agreed that he did dig out the nova-coil drainage as best he could and waterproofed the new garage blocks. He denied that he did any work to stop the leak and said that the only work that he had did was to join the two drains together. He accepted that Mr Foreman would have had no reason to believe the repairs were not made to the garage area.

[33] Mr Harman said he put the waterproof flashing tape in the garage as a remedial measure to prevent water from moving into the existing garage, but accepted under cross examination it was as a preparation for tile laying.

[34] The third area of difference is the one which is of most relevance. Mr Harman claims that he visited the property in 2010 to assess the leaking and faults identified by Mr Foreman after Mr Irvine's report. The Foremans' deny this and say he did not come in 2010 (but did come in 2011). They deny that Mr Harman ever showed a rotting floor in the lounge to Mr Foreman.

[35] Mr Harman briefs says that he hooked up the carpet under the windows in the lounge area with a pocket knife in 2010. He says the particle board floor underneath looked soft and flaking and was crumbling like "weetbix" and there was a hole in the floor. He said that this showed there was a moisture issue which was significant enough to have broken down the structural integrity of the floor. He said the rot needed to be cut out and replaced. His evidence was that he told Mr Foreman of this finding and what needed to be done. Mr Harman said Mr Foreman asked him what to do and Mr Harman told him that he needed to cut out the floor and investigate the joist underneath. He said Mr Foreman did not instruct him to do the work. In his

view the musty smell that Mr and Mrs Parker complained of in the bedroom under the lounge was because of the rotting joists.

[36] Mr Harman said he returned in March 2011 to do the repair works requested by Mr and Mrs Parker and did his own invasive readings with a timber moisture meter. He said that the readings he took didn't raise any concerns with him. He said he looked at the upstairs sliding window that would not shut. He formed the view that it looked like there was rot in the joist in the area where repairs had been previously attempted. He said he did not discuss this with Mr Foreman.

[37] His final visit was in 2013 to remedy some works for Mr and Mrs Parker.

*Submissions of the parties*

[38] Counsel for the Complaints Assessment Committee submitted that the Tribunal's decision will turn on its findings with respect to the evidence of Mr Murray Harman and the defendant. They submitted that if the Tribunal accepts the evidence of the defendant or does not find his knowledge of the damage has been proven on the balance of probabilities then the charge should be dismissed.

[39] The Complaints Assessment Committee pointed to the following facts which they submit established that Mr Foreman knew of the damage to the house:

- (i) The photographs of the tray and the plate on the floor of the lounge show that the person who placed the tray and plate over the damage on the floor was trying to hide it. They submitted it is likely that the same person placed and, as the complainants did not place the trays logically it must have been the previous owner(s), either Mr Foreman or someone who lived in the property previously.
- (ii) The REAA submitted that Mr Harman's evidence is persuasive and he had no reason to make up a memory of seeing a hole in the floor of the lounge near the window and damage to an area of the floor in the corner by the window.
- (iii) Mr Harman gave evidence that when he returned in 2013 he found the same hole that he had been shown by the defendant had been covered up with a baking tray. He later saw a white plate in the corner of the

window in the same place as he recalled seeing damage to the floor with the defendant. Mr Harman, despite not recalling under cross examination the exact time when he had seen the two sections of lounge floor damage with the defendant, remained firm that he had seen a hole in the floor by the lounge window with the defendant. He confirmed this had been covered by a baking tray which had not been there previously. Further, he had seen the damage at the corner of the floor of the lounge by the window with the defendant and that this corner (when viewed in 2013), was covered with a white plate which had not been there previously.

- (iv) The Committee also submits that Mr Harman has no reason to make up a memory of seeing these two areas of damage because on neither account was he ever instructed to do the repairs.
- (v) The Committee finally submits that if the Tribunal accepts that the defendant saw the damage then it must follow that he was aware of the defects that should have been disclosed and that an inference can be made that he was also the person who placed the baking tray over the hole and the white plate over the damage to the lounge floor.
- (vi) Finally the CAC submit that Mr Foreman was aware of the moisture damage in the lounge which he should have remedied or disclosed to the Parkers. In not disclosing the damage or remedying it he wilfully and recklessly breached Rule 6.4 and 6.5 of the Rules.

#### *Submissions for Mr Foreman*

[40] Counsel for Mr Foreman submits that Mr Harman gave inconsistent and contradictory evidence and made numerous concessions.

[41] In summary these are:

- (i) Mr Harman was in error about the date on which he first worked at the property, forgetting this first visit, which is relevant to the reliability of his evidence.
- (ii) Mr Harman did not see any rust on the steel support posts under the house while installing the underfloor installation and acknowledged that

the spray filler could have been applied to the post any time in the 30 years prior to the Foremans' ownership of the property.

- (iii) Mr Harman conceded that the drainage works were not done, not because of costs considerations as he had first said but because of the site difficulties with the digger. He did not recall any discussion about hand digging the drains. However, Mr Harman acknowledged that the efflorescence in the garage was cosmetic only and was not a concern of any significance. He accepted that Mr Foreman would have believed that the problem had been fixed.
- (iv) Mr Harman conceded that contrary to his brief of evidence the waterproof tape was installed in the garage because Mr and Mrs Foreman wanted to tile this area. This was a usual step for tiling and not an interim measure or a waterproofing measure.
- (v) With respect to the key issue of the rot in the lounge floor and the plate and identity of the person who put the oven tray over the rot, Mr Harman made numerous inconsistent or contradictory statements.
- (vi) Mr Rea submits it would be implausible if Mr Harman had noticed significant rot a year prior to his 2011 investigation that he would not have asked Mr Foreman about this.
- (vii) Mr Harman changed his evidence under cross examination from his brief of evidence. In his brief he said the hole that was covered by an oven tray had been screwed over it when he discovered this in 2012/2013. At the hearing he clarified that what he saw with Mr Foreman was the area in the corner of the lounge covered by a plate and he was not sure whether he saw the hole covered by the oven tray. Mr Rea submitted that these two pieces of evidence were directly contradictory. Mr Harman also conceded under cross examination that his recollection of timing might be incorrect and that it is likely that he saw only a damp patch in 2011 and his recollection of events has become muddled in the light of later events.

- (viii) Mr Harman accepted that it would be ludicrous for Mr Foreman to re-engage him in 2011 to carry out works required by the purchaser if he had covered up the rot in the lounge floor.
- (ix) Mr Rea also pointed to inconsistencies in Mr Parker's evidence including his assertion that the shelving unit left in the garage to conceal moisture was screwed to the wall.<sup>4</sup> Mr Parker conceded that he was not able to point to any direct evidence that Mr Foreman had knowledge of the defects but relied on circumstantial evidence. Mr Rea also submitted that the evidence of the other witness for the defence supported Mr Foreman's view that he was unaware of the defects of the property prior to a purchase by the Parkers. The only evidence Mr Rea submitted that there was which indicated Mr Foreman had knowledge of the defects was:
- Mr Harman's evidence that he saw an area of rot in the lounge floor with Mr Foreman and that when he later saw it with Mr and Mrs Parker it had been covered with the plate;
  - Mr Parker's evidence that a shelving unit was placed in front of a wall in the garage which had moisture issue; and
  - Mr Foreman's cleaning of the carpets on settlement day.

[42] Mr Rea submitted that none of these factors establish the charge and that Mr Harman's evidence is generally unreliable and should be seen as an attempt to distance himself from the defects in the property.

### **Discussion**

[43] The burden of proof is on the Complaints Assessment Committee to prove that Mr Foreman was aware of the defects or ought to have been aware that there was a risk of defects and then reported them to Mr and Mrs Parker. The standard of proof is the balance of probability.

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<sup>4</sup> The Tribunal comment that the photograph of the unit does not show how it was attached. There was an image of brackets screwed to the wall; but not with the units.

[44] The issue that the Tribunal have to determine is whether it more likely than not on the evidence before the Tribunal that Mr Foreman was aware of and covered up the defects within the property, particularly the water ingress problems and the rot in the lounge floor.

[45] The Tribunal have reached the conclusion that the charge has not been established on the balance of probabilities. The reasons that the Tribunal have come to this conclusion are as follows:

- Mr and Mrs Parker asked for and obtained a building report which included moisture testing of the property. There seems to be no doubt that Mr Foreman expedited the repairs requested and called upon Mr Harman to help him repair the property to the standard required by Mr and Mrs Parker. Mr Harman carried out further moisture testing. If Mr Foreman had been endeavouring to hide defects then it does seem unlikely that he would have been cooperative, friendly and open with the Parkers about the repairs and the need to obtain a building report. Further the Tribunal consider it unlikely that he would have engaged Mr Harman to do further invasive testing if he had been trying to conceal any defect with the property.
- If Mr Harman had visited the property and identified the “weetbix” like floor in the lounge in 2010 and then returned in 2011 to carry more moisture tests and repair damage then the Tribunal is not certain why he did not raise with Mr Foreman this issue or review again this significant area of rot. The sole purpose of his later visits was to identify and remedy any defects. Mr Harman could not give a reason why he did not follow this up.
- We do not accept Mr Harman’s evidence that he made a fourth visit in 2009/2010 to the property. We consider he may have confused the 2010 with the 2011 visit. Mr Foreman, a careful witness, would have a record of such a visit and likely the invoice for it. He did not have any such record. There also does not seem to be any reason why there would have been a visit at this time. The lifting of the carpet did take place but we find that this was in 2011 as part of the repairs required for the Parkers.

- In the Tribunal's view both Mr Foreman and Mr Harman agree that Mr Harman hooked up the carpet. Where they disagree is what they saw. The Tribunal presumes that Mr Harman, who was doing the lifting of the carpet, would not, when the house was about to be sold have lifted a large area of carpet as this would have been very damaging to the carpets. The area was being investigated because of the Leak Detectives' report – which had identified in this area increased moisture. There would have been no need to carry out any examination of this area in 2009/2010 as it had not been identified as an area of concern. We therefore conclude that it is most likely that Mr Foreman and Mr Harman investigated the lounge moisture in 2011. We do not find on the balance of probabilities that Mr Harman saw any large area of rot when the carpet was pulled back. Even though Mr and Mrs Parker had purchased the property by then we have concluded that Mr Foreman would have repaired any defect had he seen it.
- Mr Foreman had an invasive moisture test carried out in 2007. Mr Parker had one carried out in by Leak Detectives in 2011 and Mr Harman carried one with his invasive moisture testing shortly after the Leak Detectives report in 2011. None of these reports identified significant problems with the property. They identified some small areas of concern which Mr Foreman immediately addressed. If there was a significant problem with leaking then it seems likely that one or more of these reports would have identified concerns. However the fact that none of them did suggests that there were no problems to disclose or that Mr Foreman should have been aware of.
- Both Mr Parker and Mr Foreman were pedantic and careful witnesses. Mr Foreman's records of the work that he had done on the property were very good and are likely on balance to be more reliable than Mr Harman's records which were scanty. Mr Harman's recollection of times and events was also much more unreliable no doubt because he is being asked to revisit one house amongst many he worked on. Mr Foreman on the other hand only had concerns about his own house and his recollection may be more reliable.



- The Parkers did not give Mr Foreman the opportunity to examine the defects before they were repaired so there was no independent corroboration from any expert for the Foreman's of the extent of the repairs or damage which they carried out.
- The care that Mr Foreman took to check and then remedy defects lead the Tribunal to conclude that he would have not hidden a defect, if one had been known to him. The Tribunal consider that he would have identified the defect and had Mr Harman repair it.
- These facts all lead the Tribunal to conclude that the CAC have not established on the civil burden of proof that Mr Foreman hid known defects or failed to advise of potential defects.

[46] The Tribunal therefore conclude that Mr Foreman has not breached Rule 6.4 and 6.5 of the Client Care Rules 2009 in that he was neither aware of any actual defects nor was he reckless as to whether or not there were hidden or underlying defects which should in fairness have been advised to Mr and Mrs Parker.

[47] In reality from the established evidence there was no information that should have been provided to the Parkers other than perhaps the information that the garage wall had leaked at one point in 2007. However, Mr Foreman believed that Mr Harman had fixed this. The Tribunal do not consider that this was deliberately concealed by the Foreman's and the fact that the shelving was left behind in front of it does not necessarily support the concealment of known defects. The Foreman's believed that Mr Harman had fixed the leaking and the invoice produced shows that he was paid for this.

[48] Further the test for misconduct - a reckless or wilful breach requires evidence to a high standard. As set out in the Supreme Court decision of *Z v CAC* [2007] NZSC 45 the standard is the civil standard of proof but the more serious the allegations the more evidence the Tribunal needs to be satisfied the charge is established.

[49] In *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804 the Court said at [29]:

[29] ... 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 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 work.

[50] On this analysis and by analogy the test as to whether the conduct under s 73(c) has been established also requires the Complaints Assessment Committee to establish reckless or wilful conduct to a high standard. For the reasons set out above the Tribunal does not find that this high standard has been established.

[51] The Tribunal therefore dismiss the charges against Mr Foreman.

[52] The Tribunal draw to the parties’ attention s.116 Real Estate Agents Act 2008.

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**Ms KG Davenport QC**  
Chairperson

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**Ms C Sandelin**  
Member

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**Mr G Denley**  
Member