BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 9

READT 083/15

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	JI LI and JING GAO Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 408) First Respondent
AND	PAMELA RILEY and ANTHONY LOUGHRAN Second Respondents
Hearing:	17–20 October 2016, at Auckland (Written submissions received subsequently)
Tribunal:	Hon P J Andrews (Chairperson) Mr G Denley (Member) Ms N Dangen (Member)
Appearances:	Mr W Akel and Mr K Teague, on behalf of the Appellants Ms C Paterson, on behalf of the First Respondent Mr T Rea, on behalf of the Second Respondents
Date of Decision:	27 February 2017

DECISION OF THE TRIBUNAL

Introduction

[1] Ji Li and his wife Jing Gao ("the appellants")[1] have appealed against the decision of Complaints Assessment Committee 408 ("the Committee") dated 20 November 2015, in which the Committee decided not to enquire into their complaint against Ms Riley and Mr Loughran ("the licensees"). The complaint was in relation to the appellants' purchase at auction of a house at Hauraki, North Shore, Auckland ("the property"), in which Ms Riley was the listing agent and Mr Loughran was the auctioneer.

Nature of hearing

[2] The effect of the decision not to enquire into the complaint was that the Committee did not undertake any enquiry into the licensees' conduct. There was no dispute that the Committee had jurisdiction to decide not to enquire into the complaint.[2] As the Tribunal recently confirmed in *Dyall v Real Estate Agents Authority (CAC 403)*, an appeal against a committee's decision not to enquire is an appeal against the exercise of a discretion, and the Tribunal will only overturn the decision if the Committee made an error of law or principle, took irrelevant considerations into account, failed to take relevant considerations into account, or was plainly wrong.[3]

[3] In this case, by consent, the Committee's decision not to enquire into the complaint was reversed, and the appeal hearing proceeded as a *de novo* hearing on the merits of the complaint. In effect, counsel for the appellants, Mr Akel, assumed the role of satisfying the Tribunal that findings of misconduct under s 73 (b) or (c) of the Real Estate Agents Act 2008 ("the Act") should be made against each of the second respondents or, in the alternative, findings of unsatisfactory conduct. The Tribunal heard evidence from and on behalf of the appellants and the second respondents.

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1 Ji Li and Jing Gao will be referred to collectively as "the appellants", except where it is appropriate to refer to them separately

2 Under s 79 of the Act.

3 *Dyall v Real Estate Agents Authority (CAC 403)* [2016] NZREADT 41, at [28].

[4] If the Tribunal finds in favour of the appellants, it may confirm, reverse, or modify the Committee's decision.[4] That is, the Tribunal may:

[a] Decide that the Committee was correct to decide to take no further action on the appellants' complaint;

[b] Find that Ms Riley and/or Mr Loughran have engaged in unsatisfactory conduct; or

[c] Refer the matter back to the Committee for fresh consideration.

[5] The Tribunal on appeal does not have jurisdiction to make any order that was not available to the Committee. In particular, it cannot make a finding of misconduct. The Tribunal can only make such a finding if the matter has been referred back to the Complaints Assessment Committee, that Committee has laid a charge, and the charge has been heard by the Tribunal.

The appellants' allegations

[6] In summary, the appellants allege that:

[a] Ms Riley failed to disclose potential weathertightness issues and other building issues with the property, in that she

[i] did not adequately inspect the property, in particular the rear (south) wall of the extension to the house ("the south wall); and

[ii] did not advise the appellants that she had not adequately inspected the south wall.

[b] Mr Loughran made false representations and applied undue pressure on the appellants by falsely representing to them the price that another party was prepared to offer for the property, and the terms on which such offer

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[4] Section 110 of the Act.

would be made, and by putting time pressure on them. They allege that Ms Riley was a party to the false representation and undue pressure.

[7] By reference to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), the appellants contend that Ms Riley:

[a] failed to exercise skill, care, competence, and diligence (r 5.1);

[b] did not have a sound knowledge of the Act, regulations, and rules relevant to real estate agency work (r 5.2);

[c] did not comply with her fiduciary obligations to her client (r. 6.1);

[d] did not act in good faith and deal fairly with all parties (r 6.2);

[e] engaged in conduct likely to bring the industry into disrepute (r 6.3);

[f] misled the appellants and/or provided false information and/or withheld information (r 6.4); and/or

[g] (where it would appear likely to a reasonably competent licensee that the property may be subject to hidden or underlying defects) failed to obtain confirmation from her client, supported by evidence or expert advice, that the property was not subject to defect, or to ensure that the appellants were informed of any significant potential risk so that they could seek independent expert advice if they chose to do so (r 10.7).

[8] The appellants contend that Mr Loughran breached rr 6.2 to 6.4, 9.2 (engaged in conduct that would put the appellants under undue or unfair pressure and/or r 9.4 (misled the appellants as the the vendors' price expectations). As noted above, the appellants contend that Ms Riley was a party to the false representation and undue pressure.

[9] At the hearing, we heard evidence from both appellants, their son (Han Li), and a neighbour (Ms Horne). The appellants also called Mr Maiden (a building

consultant) and Mr Damerell (an estate agent) to give expert evidence. For the second respondents, we heard evidence from Ms Riley, Mr Loughran, Mr Fan, and Ms Rhodes (the Agency's branch manager). The second respondents also called Mr Nelligan (a consulting engineer) and Mr Keightley (an estate agent) to give expert evidence.

[10] We were also referred to marketing material and photographs taken before the sale, for the purposes of marketing the property, photographs taken by the appellants shortly after settlement, and photographs taken by the witnesses who gave expert evidence.

Factual background

[11] The appellants bought the property at auction on 7 March 2015. The property had been passed in with the appellants being the highest bidder, at $1.450 million. Following negotiations, they agreed to purchase it for $1.595 million.

[12] Ms Riley is a licensed salesperson at the Barfoot & Thompson Takapuna branch ("the Agency"). Ms Riley was instructed by the vendors (Mr and Ms Craig[5]) to appraise the property prior to marketing it. She inspected it in mid-December 2014 before preparing the appraisal. She found the house to be impeccably presented, and refurbished in a very tasteful style and to a high standard. The house was built in 1978 as a Lockwood house, and had been extended in 2001 by the addition of a living room, bedroom and bathroom. At some stage a mezzanine floor, accessed by a spiral staircase, was added.

[13] Ms Riley was shown around the property, both inside and out, before preparing the appraisal. She said she saw no signs of staining or water damage, or musty smells, or any other indications of possible dampness. Ms Riley was not shown, and did not view, the south wall. Access to that area was possible, but not easy. From one side it was from the top of a 940 mm high retaining wall then through an

[5] Ms Craig and a trustee were registered on the title as proprietors. Nothing turns on Mr Craig not being a registered proprietor. For convenience Ms and Mr Craig will be referred to collectively as "the vendors", except where it is appropriate to refer to them separately.

overgrown area of shrubs and trees. From the other side, it was from a neighbouring property, also through trees, and it was necessary to climb over a 1 m high fence.

[14] Ms Riley and the vendors signed an agency agreement on 9 January 2015. The agency agreement included a page headed "Barfoot & Thompson Disclosures" ("the disclosure form"). The disclosure form required the vendors to give a "leaks disclosure" by ticking a box answering "yes" or "no" to the following question:

> Is the client aware of any past or present water penetration issue(s) affecting the property and/or complex?

Ms Craig ticked the box indicating "no" and initialled it. Ms Riley said that neither Ms Craig nor Mr Craig informed her of any water penetration into the property.

[15] The disclosure form also provided for "other disclosures", including disclosure by the vendor regarding permits and/or local body consent:

> Is the client aware of any work completed which may have required permits/local body consent?

Ms Craig ticked the box indicating "yes". Ms Riley then wrote, and Ms Craig initialled:

> Vendor warrants CCC will be issued prior to the settlement date.

[16] The vendors advised Ms Riley that there were outstanding issues with work on the property, which had not yet been certified as compliant. The issues related to a window which had to be replaced, cedar cladding on an extension which needed to be replaced with new flashings installed, and a large concrete wall (part of the landscaping) which required footings to be inspected and approved.

[17] The disclosures form also provided for an "OSH declaration", as follows:

> Have any potential hazard(s) been identified to the client?

The box indicating "no" has been ticked, and initialled by Ms Craig

[18] The appellants were introduced to the property by Mr Francis Fan, a licensed salesperson at the Barfoot & Thompson branch at Milford. We note that while both

appellants have a reasonable command of English, they were able to talk to Mr Fan in Mandarin. While Mr Fan showed them around the property, the appellants accepted that he was not the listing salesperson (who was, as noted earlier, Ms Riley), and that he had had no dealings with the vendor. The appellants also accepted that Mr Fan relied on Ms Riley to advise him of any issues related to the property, and that he was not involved in the auction.

[19] The appellants were aware of the "leaky home problem", having bought a house in 1998 in a multi-unit block that had weathertightness issues. However, they did not have specialist knowledge of the issue.

[20] The appellants attended two Open Homes, on 22 February and 1 March 2015, conducted by Ms Riley. They were not shown the south wall, and they could not see it for themselves because of shrubs and trees on that side. They did not notice any obvious building defects when they went through the property. There were no indications of water getting into the home, or dampness. Ms Riley gave them two marketing brochures and they viewed an on-line marketing video in which Ms Riley presented the property.

[21] After the first Open Home, the appellants received a number of documents from Mr Fan. These included a copy of the LIM report for the property. The appellants noted that a Code Compliance Certificate ("CCC") had not been issued for certain work on the property. Mr Fan told them that the vendors would warrant that a CCC would be issued prior to settlement.

[22] There was a discussion about the CCC issues at the second Open Home. The appellants were told that the vendors would arrange for a CCC and a Code of Acceptance ("COA") to be issued before settlement of a sale. The issues related to replacement of a window at the rear of the mezzanine floor, replacement of cedar cladding and installation of new flashings on the northern side of an extension, and inspection of the footings of a large concrete wall, which was part of the landscaping.

[23] The appellants were also told that a clause would be added to the agreement for sale and purchase to cover the vendors' warranty concerning the CCC and the COA.

Neither Ms Riley nor Mr Fan referred to the south wall. In particular, the appellants were not told that Ms Riley had not inspected it.

[24] The appellants did not get a building inspector's report for the property. Their reasons were, first, that when a purchaser is interested in three or four properties, it is costly to obtain reports for every property. Secondly, they had been assured that the vendors were warranting that CCC and COA issues would be resolved before settlement. Thirdly, they had not been made aware of any other issues, or potential issues, or anything else that would give them concern as to the property.

[25] The auction started at about 2.00 pm on 7 March 2015. Before starting the auction Mr Loughran described the property. He said that the vendors warranted that the CCC and COA would be available at settlement. He did not say anything concerning weathertightness issues.

[26] The appellants were bidding against another couple. The other couple did not make any further bids after the appellants made a bid at $1.425 million. Mr Loughran then stopped the auction and took instructions from the vendors. He advised that the reserve price had not been reached and the property would be passed in.

[27] The appellants later bought the property for $1.595 million. Settlement occurred on 27 May 2015.

[28] The appellants moved into the property on 29 May 2015. They immediately noticed a strong mouldy smell and general dampness, which had not been present during the Open Homes or the auction. On walking around the house, they noticed water leaks under the skylight in a storeroom. Ji Li also saw, for the first time, the south wall. He said he saw "monolithic cladding", which he knew was a problem that caused weathertightness issues. The appellants informed Mr Fan, who advised them that the listing report in the Agency's internal information system gave no indication as to the cladding. At the hearing, Mr Fan described the south wall as looking "awful", and "very bad".

[29] In June, the appellants returned from an absence of four days to find that the damp and mouldy smell was very bad. It was particularly strong in the lounge area. They discovered water ingress to the sub-floors, then found there was no protection for the sub-ground area under a decorative garden area.

[30] The vendors did not obtain a CCC or COA prior to settlement, or subsequently. Auckland Council inspected the property on 9 July 2015, and sent the appellants a "Section 95" letter on 13 July 2015. The Council's inspection identified 22 items of non-compliance with the NZ Building Code. These included areas of possible water ingress through window flashings, inadequately sealed wet areas, and flashing details where the roof of the extension met the existing roof and a roof ridge that had not been sealed. The letter included the following statements (emphasis as in the section 95 letter):

> To advance the process we recommend that you engage the services of a suitably qualified individual (Building Surveyor) who is qualified in Weather Tight assessment and Remedial Design. This person must further investigate the performance of this building, also taking into account the items below and provide a 'scope of works' and any recommendation to Council for further review.
>
> **Note:** Please do not commence any remedial work until approved by Council, this work may involve an application for a new building consent, and can have a detrimental effect on the issuing of a CCC.

[31] Inspections of the property before the hearing recorded that it had leaks, and remedial work had not been completed. At the time of the appeal hearing, the defects in the property had still not been remedied.

[32] We turn to consider the issues to be determined, concerning disclosure of weathertightness issues, and the conduct of the auction. Before doing so, we refer to the suggestion in the evidence for the second respondents that the evidence as given by each appellant was in many respects identical. Both appellants and their son were cross-examined on the point. They each said that they had prepared their statements of evidence independently, but accepted that they had read each other's statements of evidence. Jing Gao said she read her husband's draft statement and agreed with it, and made a statement to that effect in her statement. She said there were no areas in

which she had assisted him to prepare his evidence. Ji Li and Han Li gave similar evidence.

[33] We reject any suggestion that we should draw any adverse inference as to the appellants' evidence for this reason, or that the evidence of either of the appellants should be given less weight. While it is the case that the evidence of each of the appellants is the same in many respects, they accepted that they had each read the other's evidence. Each of them said they had an independent recollection of the events. They acknowledged that they talked together about what had happened, and had worked together on their complaint. That "very co-operative approach" (as Mr Rea put it) does not constitute grounds to reject the appellants' evidence.

The "disclosure" issue – Ms Riley

[34] The obligation as to disclosure in r 10.7 is expanded on by a note to the Rules (referring in particular to weathertightness issues) as follows:

> A licensee could reasonably be expected to know of this risk (whether or not a seller directly discloses any weathertightness problems). While a customer is expected to inquire into the risks regarding the property and to undertake the necessary inspections and seek advice, the licensee must not simply rely on caveat emptor. This example is provided by way of guidance only and does not limit the range of issues to be taken into account under r 10.7.

(a) The particular allegations of non-disclosure

(i) Disclosure concerning the south wall

Evidence

[35] It was common ground that Ms Riley did not inspect the south wall, and that she did not tell the appellants that she had not inspected it. It was also common ground that, after having carried out her inspection of the property (minus the south wall), Ms Riley did not ask the vendors about access to the south wall, or ask them any questions as to the appearance and construction of the wall.

[36] Ms Riley's reason for not inspecting the south wall was that it would have been necessary for her to scale a wall, and the south wall area was overgrown with trees and foliage. She did not think it would normally be expected of her to climb over a wall and through thick bushes to inspect the exterior of a property. Ms Riley accepted that she had not included a comment on the "Property Description" in the Agency's internal listing system to the effect that she not inspected the whole of the property, and that she had not mentioned it to any other salesperson, or her branch manager.

[37] Ms Riley went on to say that even if she had inspected the south wall, that would not have caused her to have any concerns as to weathertightness issues, as the wall was clad in a fibre cement cladding.

[38] Ms Rhodes said, in addition to the two reasons set out above, that "to go to the lengths required to access [the south wall]… would raise health and safety issues".

[39] We note the evidence of both Ji Li and Mr Fan that they inspected the south wall after the appellants moved in, having achieved this from the eastern side of the house, albeit with some "bush whacking".

Submissions

[40] Mr Akel submitted for the appellants that there were signs of water ingress that Ms Riley would have seen if she had inspected the property adequately. He referred to the leaking skylight window in the storeroom, and evidence given by Ms Horne as to having seen water damage to the wall of the mezzanine area during the first Open Home. He also referred to the possible areas of water ingress identified in the section 95 letter.

[41] Mr Akel further submitted that any difficulty as to access to the south wall did not exonerate Ms Riley, in the light of her evidence that she did not attempt to obtain access to it, and did not ask the vendors how it might be accessed, or anything as to the construction of the wall. He submitted that Ms Riley's culpability was compounded by the fact that she referred to the house in the marketing material

(including the video presentation) in glowing terms, describing the property as "Architectural Style for Dream Life" and referring to it as being "quality designed", without mentioning then, or later, that she had not inspected the whole property.

[42] Mr Rea acknowledged that the fact that a property appears to be well-presented and in good condition does not absolve licensees of "a duty to identify risks of hidden defects that ought to be apparent".[6] However, he submitted, a licensee's perception of the likelihood of any such risk would be affected by the presentation of a property. He submitted that that perception would have a bearing on the inspection that a licensee may consider to be reasonably necessary, particularly where there are access issues. He further submitted that if a property appeared to be poorly maintained, a licensee would likely be more alert to the potential existence of hidden defects, and may go to greater lengths to ensure that all areas were inspected.

[43] In the present case, he submitted, the vendors would have presented as "studious owners who maintained their property to a high standard". He submitted that this factor, together with Mr Craig's occupation as an architectural designer, may have led Ms Riley to assume, "not unreasonably", that the rest of the property would be of a similar standard to the areas she had seen.

[44] Mr Rea submitted that as the property was "exceptionally presented and appeared in such good condition", and access to the south wall was difficult, the seriousness of Ms Riley's conduct "in omitting to inspect (or warn that she had not inspected) other areas" was reduced. He contrasted her conduct to a situation where access to the south wall was easy, but Ms Riley had simply not bothered to see it.

[45] Mr Rea further submitted that there was no evidence that the south wall would have looked the same during her inspection in mid-December 2014 as it did at the end of May 2015, after a period of rain. He submitted therefore that there was no evidence that she would have seen anything that would have raised any concern as to weathertightness issues.

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[6] This appears to be a reference to r 10.7 but, as relevant to this submission, r 10.7 provides: "A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land *may be subject to hidden or underlying defects*, a licensee must either …" [our emphasis]

[46] We note that in his reply submissions Mr Akel submitted that there was no evidence that there had been a period of rain before photographs of the south wall were taken in May 2015, and that it was "more likely than not" that the wall would have appeared basically the same in December 2014 as it did in May 2015. He submitted that the weathertightness issues would have been the same. He referred to Mr Maiden's evidence of unsealed and/or unpainted cladding board joints, and water ingress at a "critical junction between the sloping roof and the lesser sloping roof" at a junction with the end of a block wall.

[47] Mr Akel further said in reply that the reason why there is no evidence as to the appearance of the south wall at the time the property was marketed was obvious: neither Ms Riley nor the Agency's photographer took any photos of it at the time (in contrast to the number of photographs of other parts of the house).

Our assessment

[48] Much was made in the evidence by given by Ms Riley, Ms Rhodes, and Mr Nelligan that the south wall was clad with fibre cement, which is not usually associated with leaky buildings. It was submitted that for that reason, no alarm bells would have rung if Ms Riley had inspected it. The utility of that evidence is considerably lessened by Ms Riley's statement in response to a question from the Tribunal that she could not tell, when she looks at a "flat sheet cladding", what kind of "flat sheet cladding" it is. That is, in the present case, Ms Riley would not have known whether the cladding was fibre cement (which may not be associated with weathertightness issues), or any other form of cladding (which may be). It is further lessened by Ms Rhodes' statement (also in response to a question from the Tribunal) that she would not assume the type of cladding, but ask the vendor or another agent.

[49] Both Mr Damerell and Mr Keightley gave evidence to the effect that a reasonably competent licensee should appreciate that all types of exterior cladding can have defects, so all exteriors need a close inspection where access is reasonably available. In this regard, we note that Jin Li and Mr Fan did access it and inspect it immediately after settlement.

[50] Regarding Ms Rhodes' reference to "health and safety" issues (endorsed by Ms Riley when she was cross-examined on the point), we note that there was no evidence that Ms Riley gave any thought to "health and safety issues" at the time of her inspection. Further, the listing agreement records that the vendors were asked if there were any such issues, and responded that there were none.

[51] The essential point is, as Ms Riley admitted, that she did not inspect the south wall. She did not ask the vendors how she could obtain access to it, and she did not ask the vendors any questions about the wall. Without limiting the range of questions that might have been asked, we would expect a reasonable licensee confronted with difficult access to the south wall to have asked if access was possible, what the wall looked like, how (and with what) it was constructed.

[52] We do not accept Mr Rea's submission that it was "not unreasonable" for Ms Riley to assume from the presentation of the house, and Mr Craig's occupation as an architectural designer, that the part of the house which she did not see was of the same construction, quality, and appearance as the part she did see. It does not excuse Ms Riley from compliance with the Rules, and it does not lessen the seriousness with which her failure to inspect all of the house, and then her failure to advise potential purchasers of that fact, must be regarded.

[53] As a result of not having inspected the south wall, Ms Riley was in no position to form any opinion as to whether it appeared likely that the property may be subject to hidden or underlying risks. By not being in a position to take the steps set out in r 10.7(a) and (b), Ms Riley was in breach of her obligations under rr 5.1 and 10.7.

[54] This breach is compounded by the fact that Ms Riley failed to advise (or warn) the appellants (as potential purchasers) that she had not inspected the south wall. In failing to do so, she was in breach of her obligations under rr 6.2, and 6.4.

(ii) Disclosure concerning the skylight in the storeroom

[55] Mr Akel further referred to Ms Riley's inspection of the storeroom. She said she took one or two steps into the storeroom, which was full of stored items. She did

not move any of the items. She had a quick look round, and noticed the skylight. She said she did not observe any obvious signs of leaking. For example, there was no musty smell. As she did not move any items, she did not become aware of a leaky area around the skylight. She and the vendors had no discussions about the skylight. She did not ask the vendors about it and the vendors did not inform her of any issues relating to it.

[56] We do not accept Mr Akel's submission that a reasonable agent would be expected to move items to check a particular area. Ms Riley was not in breach of the Rules.

(iii) Disclosure concerning the planter box along the driveway

[57] It was common ground between the expert witnesses that the wall cladding on the eastern side of the house went below the level of the ground where it was covered by a planter box covered with pebbles or scoria,[7] and that this was "an obvious risk area".[8] Ms Riley said that it never occurred to her that there was any concern that this might be an area of possible water ingress. Mr Akel submitted that a reasonable licensee should have picked up on the fact that a downpipe into the planter box was not connected to drainage system.

[58] We do not accept this submission. We would not expect a reasonable licensee to excavate the planter box in order to discover that a downpipe into the box was not connected to the property's drainage system. Again, Ms Riley was not in breach of the Rules.

(iv) Disclosure of the "outstanding CCC issues"

[59] As noted earlier, Ms Riley said the vendors told her that there were three areas where work needed to be done, then inspected and signed off by the Council. These were a window at the top rear of the mezzanine floor which had to be replaced, cedar cladding on the northern side of the extension which was being replaced, with new flashings being installed, and that footings for a large concrete wall (which was part

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7 The evidence varied as to whether it was a "scoria" or "pebble" planter box.

8 The witnesses disagreed as to whether there was actual water ingress.

of the landscaping and not attached to the house) had to be inspected and approved. The vendors also told her that the work would be completed and a CCC issued before the date of the auction. Ms Riley also noted that the vendors agreed to provide a warranty to purchasers that the necessary work would be completed prior to settlement of any sale.

[60] It was common ground that the appellants were told about the "outstanding issues". However, there is a dispute as to how the issues were presented to the appellants.

Evidence

[61] The appellants Ms Riley told them about the outstanding issues, in English, and Mr Fan also translated her words into Mandarin. They said that Ms Riley took them around the property with Mr Fan, and identified the three areas. They also said that Ms Riley described the issues as "minor".

[62] Ms Riley said that she explained to visitors to the Open Homes that the vendors were in the process of completing work on the three outstanding areas he had pointed out to her. She denied that she described the issues as "minor". In answer to questions put to her in cross-examination, Ms Riley said she always discloses an outstanding CCC issue, she provides the LIM, and she recommends that a potential purchaser obtains a building inspector's report. She said that she "never, ever" says that a CCC is "minor", as any CCC issue is a matter that has to be considered by the Council. She said, further, that she does not rely on what vendors tell her. Rather, she relies on the matters referred to in the LIM.

[63] Mr Fan's evidence was that there was a discussion regarding "permit issues", which he arranged, at the second Open Home. He said that Ms Riley pointed the three areas out to him and the appellants, and said they were "minor" issues and that after they were fixed, a CCC would be issued. He further said that Ms Riley did not point out any other issues regarding the property.

Our assessment

[64] On the balance of probabilities, we do not find that Ms Riley described the outstanding issues as "minor", and that she did not misrepresent the seriousness of the issues and the work required to remedy them.

(b) Overall assessment of Ms Riley's conduct

[65] We have found that Ms Riley failed to disclose to the appellants that she had not inspected the south wall. As a result of that failure the appellants reasonably assumed that the south wall of the house was in the same condition, and to the same standard as the parts of the house they were able to see. On the evidence, that assumption turned out to be incorrect.

[66] We do not accept that Ms Riley's failure is exonerated, or lessened as to its seriousness, by virtue of the appearance of the house and the vendors, or by the vendors' failure to tell her about matters of concern. While Ms Riley may not reasonably have been expected to inspect the south wall because of access difficulties, that did not excuse her from failing to tell the appellants that she had not done so.

[67] We find that Ms Riley breached rr 5.1, 6.2, 6.4 and 10.7. There is no evidence that Ms Riley had no knowledge of the Act and Rules, so we do not find her in breach of r 5.2. While it was submitted that Ms Riley was also in breach of r 6.1, we do not consider that that rule has any application to her dealings with the appellants.

[68] We have given serious consideration as to whether Ms Riley's conduct amounts to misconduct under s 73 of the Act, in particular whether it amounts to seriously incompetent or seriously negligent real estate agency work pursuant to s 73(b). We have concluded that it does not reach that level of seriousness. Accordingly, there are no grounds on which we could make a determination that the appellants' complaint should be referred back to the Committee for further consideration.

[69] However, we are in no doubt that Ms Riley's conduct amounts to unsatisfactory conduct under s 72 under each of subparagraphs (a) to (d) of s 72.

The "auction" issue – Mr Loughran and Ms Riley

Evidence

[70] During the negotiations, all communications between the appellants and Mr Loughran were through Mr Fan. For convenience, however, we will record the communications as if they were directly between the appellants and Mr Loughran.

[71] Mr Loughran showed the appellants the reserve price of $1.625 million on a piece of paper and asked if they would accept the reserve. The appellants then increased their bid to $1.475 million. Mr Loughran took the appellants' bid to the vendors and it was rejected. There is a dispute as to whether this bid, and further bids, were recorded in writing. We do not consider it necessary to make a finding on the point, as it has no bearing on the issue for determination, which is whether Mr Loughran put undue or unfair pressure on the appellants.

[72] The appellants said that Mr Loughran then told them that there was "another buyer who was waiting in the driveway with a conditional offer of $1.6 million". They were not prepared to offer $1.6 million, but they were concerned they would miss out to the "buyer in the driveway". They increased their offer to $1.5 million. Mr Loughran told them "that won't do it", but took it to the vendors.

[73] The appellants said that Mr Loughran returned with a signed offer from the vendors at $1.595 million and said the vendors would sell the house for $1.595 million if the agreement was unconditional and if not, the vendors would accept "the conditional offer of $1.6 million" from the "people in the driveway". They further said that Mr Loughran said he had another auction to go to, and needed to leave soon.

[74] The appellants said that they felt there was time pressure on them if they wanted to buy the house, and that they were in a "deal or no deal" situation of either

accepting $1.595 million or losing the property to the conditional offer. They then accepted the vendors' offer of $1.595 million, unconditional, and signed a Memorandum of Contract.

[75] Mr Loughran said he did not recall the auction in detail, but he did not accept that he told the appellants that there was a "conditional offer" of $1.6 million, or that he had put undue of unfair pressure on the appellants. He said that at some stage during the negotiations he noticed a couple, with a dog, standing in the driveway. He recognised their faces from recent auctions and asked if they would be interested in the property. They responded that they would, but it would need to be conditional on finance, and they would have to sell their property first. He said he did not tell the appellants that there was a conditional offer for the property but would have said to Mr Fan that the people were conditionally interested at around the reserve.

[76] Mr Loughran said he did not take the couple's details as he was working with the appellants, and was "not a million miles away from a sale". He said he has been told many times that "we are interested" but he gave this couple some credibility as a result of having seen them at previous auctions. He said he would have told the couple "if the property doesn't sell, come back and talk to us". He would also have said that they would need to be at around $1.6 million.

[77] He said he did not tell the appellants that he had a conditional buyer, as there was no conditional buyer. He said that when the vendors said they would accept $1.595 million he would have said to the appellants words to the effect that "if you don't pay $1.595 million you will be in a competition with others", and "there are people in the driveway who will make a conditional offer at $1.6 million" or he would have said there was "conditional interest in the property at $1.6 million".

[78] Mr Loughran further said he did not tell the appellants that he was in a hurry to attend another auction, or for any other reason. That would have been unprofessional while negotiations were continuing. He did have another auction to attend afterwards but it was close by at Devonport and he was not in a hurry.

[79] Mr Fan recalled Mr Loughran mentioning the "people in the driveway". He understood that they had expressed a "conditional interest", and that there was nothing written. He further said that he would have no interest in an expression of "conditional interest". He would only be interested if there was a written conditional offer, and the couple in the driveway did not make such an offer. If they had made such an offer, the "multi-offer" process would be followed. He said that Mr Loughran told the appellants that if they did not accept the vendors' offer of $1.595 million, the vendors would later look at a conditional offer at $1.6 million.

[80] Mr Fan also said that Mr Loughran did not put pressure on the appellants by saying he had another auction to go to; he only said, after agreement was reached "congratulations, I leave the rest to [Mr Fan] as I need to go to Devonport for another auction."

Our assessment

[81] Mr Loughran and Mr Fan have given accounts as to Mr Loughran's communication with the couple in the driveway, and his subsequent statements to the appellants, that conflict with the appellants' account. We are not satisfied that the appellants' evidence establishes on the balance of probabilities that Mr Loughran told them that there was a conditional offer from the couple in the driveway, at $1.6 million. It may be, given the similarity of the words (although not their significance) that the appellants did not understand what they were being told by Mr Fan.

[82] We do not accept the appellants' evidence that Mr Loughran put pressure on them to accept the vendors' of $1.595 million by saying he had another auction to go to. We accept Mr Loughran's evidence that he would have had no reason to put pressure on a potential buyer, as he has no financial interest in achieving a sale, or achieving a sale at a particular price, as he is paid the same for his services as auctioneer, regardless.

[83] We therefore find that it has not been proved that Mr Loughran was in breach of the Rules, as alleged. Accordingly, the Tribunal determines that no further action should be taken in respect of the appellants' complaint against Mr Loughran. In the

light of that determination, we are not required to consider whether Ms Riley was a party to any breaches.

Outcome

[84] We find that Ms Riley has engaged in unsatisfactory conduct under s 72(a) to (d) of the Act.

[85] In the light of that finding counsel are asked to confer and advise the Tribunal whether the matter of penalty may be determined on the papers and, if so, to propose a timetable for submissions as to penalty. In the event that an oral hearing is required, the Case Manager is to arrange a telephone conference in order to set a hearing date and a timetable for submissions.

[86] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

_____
Hon P J Andrews
Chairperson

_____
Mr G Denley
Member

_____
Ms N Dangen
Member