New Zealand Real Estate Agents Disciplinary Tribunal

Complaints Assessment Committee 304 v Chapman [2018] NZREADT 6 (19 March 2018)

Last Updated: 13 April 2018

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 6 READT 022/15

IN THE MATTER OF A charge laid under s 91 of the Real Estate Agents Act 2008

BROUGHT BY COMPLAINTS ASSESSMENT COMMITTEE 304

AGAINST CHRISTOPHER CHAPMAN

Defendant

Hearing: 6 and 7 November, and 8 December 2017, at Christchurch

Tribunal: Hon P J Andrews, Chairperson Mr G Denley, Member

Ms C Sandelin, Member

Appearances: Mr M Hodge, on behalf of the Committee Mr P Rzepecky and Mr A Wedekind, on behalf of the defendant

Date of Decision: 19 March 2018

DECISION OF THE TRIBUNAL

Introduction

The charge

> [1] Mr Chapman is a licensed agent under the Real Estate Agents Act 2008 ("the Act"). Complaints Assessment Committee 304 ("the Committee") has charged Mr Chapman with misconduct under s 73(a) of the Act (disgraceful conduct). Section 73(a) of the Act provides that a person who is licensed under the Act as a real estate salesperson, agent, or branch manager 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 ...

> [2] The charge was laid in the aftermath of the two Christchurch earthquakes, on 4 September 2010 and 22 February 2011, following a complaint made by Mr B McEachen.

> [3] Mr McEachen's son, Matthew, was employed by Southern Ink Tattoo Studio ("Southern Ink"), which was a tenant on the ground floor of the building at 593B Colombo Street ("the building"). He was killed by falling rubble when he tried to flee the building following its collapse in the February 2011 earthquake.

[4] The Committee alleges that Mr Chapman was the property manager of the building, and failed to comply with relevant industry standards as to disclosure to tenants of information regarding the safety of a property for occupation, in that:

[a] He was on notice of Southern Ink's concern as to the safety of the building after the earthquake;
[b] Following the earthquake, he received information as to structural and safety issues with the building after the earthquake, including that:
[i] The building was considered "structurally unsafe to occupy";

[ii] The Agency was to advise tenants that the owners were unable to renew the lease as the premises were "untenantable";
[iii] The external walls appeared to have moved out from the building on three elevations;
[iv] The engineers needed to get onto the roof and check the stability, urgently; and
[v] The work needed to be done immediately for occupancy.

[c] He failed to take steps to clarify whether the building was safe for occupation, did not pass on the information he had regarding the safety of the building to Southern Ink, and none of the information he did pass on adequately reflected the information he had to the effect that the building was unsafe to occupy.

[5] The Tribunal is required to determine, on the balance of probabilities:1

[a] whether Mr Chapman was acting as commercial property manager of the building;
[b] what relevant industry standards require of a commercial property manager as to the disclosure of information to tenants regarding the safety of a property for occupation;
[c] if Mr Chapman was acting as commercial property manager of the building, whether he met those standards; and
[d] if Mr Chapman was required to, and failed, to meet those standards, whether that failure constitutes disgraceful conduct.

1 Section 110(1) of the Act.

Royal Commission of Inquiry

[6] The Canterbury Earthquakes Royal Commission of Inquiry ("the Royal Commission") was established in May 2011 to report on, amongst other things, the causes of building failures as a result of the two earthquakes. Part Two (Volume 4) of the Royal Commission's report was released on 7 December 2012. Section 4 of Volume 4 of the report is headed "Individual unreinforced masonry buildings that caused fatalities". At Section 4.9, the Royal Commission reported on the building.

[7] A copy of the Royal Commission's report concerning the building was provided to the Tribunal. Particular findings and comments made in the report will be referred to in this decision. The report is not binding on the Tribunal, but in view of the Royal Commission's detailed consideration of the relevant issues, it is clearly of considerable assistance to the Tribunal.

This proceeding

[8] It is necessary to stress that this is a professional disciplinary proceeding, under the Act. The purpose of this hearing is not to replicate the Royal Commission's investigation, nor is it to determine any culpability in respect of Mr McEachen's death, nor is it a substitute for any other legal process. The Tribunal's jurisdiction is limited to the determinations set out at paragraph [5], above.

[9] The Tribunal does not accept Mr Rzepecky's submission on behalf of Mr Chapman that a finding by the Tribunal that Mr Chapman is guilty of misconduct would be to single him out of all of the professional people involved in the aftermath of the earthquake. While Mr Chapman's interactions with other professional people are part of the background to the charge against him, the Tribunal's role under the Act is to consider his conduct as a licensee under the Act, in the context of the relevant industry standards.

[10] In particular, the Tribunal has no jurisdiction over, and cannot consider:

[a] whether there were any failures by any other person in relation to the safety of the building; or
[b] what were the causal factors which led to Matthew McEachen's death; or
[c] whether Mr Chapman's actions in relation to the building were a partial or contributory cause of Mr McEachen's death.

Background facts

[11] The relevant events occurred between the two earthquakes, that is, between 4 September 2010 and 11 February 2011. The charge focusses on Mr Chapman's actions following the September 2010 earthquake. Accordingly references to "the earthquake" will be to the September 2010 earthquake, unless stated to refer to the February 2011 earthquake. Factual matters in dispute are noted in the chronology that follows, and will be discussed later in this decision.

[12] The building was situated on the corner of Colombo Street and St Asaph St, with tenancies on both street frontages. Shortly after the earthquake, coloured placards were placed on the building by an engineer, Mr Wall, to denote the seriousness of any damage, and consequent risk to persons entering it. There is no dispute that yellow placards (denoting "unsafe to occupy") were placed on the St Asaph Street frontage. There is a dispute as to what colour placards were placed on the Colombo St frontage, and when.

[13] Mr Chapman is a commercial property manager, engaged by NAI Harcourts in Christchurch, ("the Agency"). The building is owned by members of the Chang family ("the owners"). Some two weeks before the earthquake, the owners enquired about property management services. Mr Chapman gave them a Harcourts standard form contract for commercial property management. The owners never executed this contract. There is a dispute as to whether Mr Chapman acted as a commercial property manager of the building and, if so, the scope of his engagement.

[14] On 10 September 2010 the owners contacted Mr Chapman for assistance with dealing with the aftermath of the earthquake. In particular, they asked Mr Chapman to arrange for a structural assessment of the building. The owners executed a formal agreement covering instructions given to Holmes Consulting Group ("HCG"). Mr Chapman arranged for structural engineers from HCG to inspect the building and assess the damage caused by the earthquake. He made payments to HCG, by way of funds obtained from the owners.

[15] On 20 September the owner of Southern Ink, Mr Parkin, sent Mr Chapman an email stating that he understood that Mr Chapman was "the new property manager", and asked about repair work. Mr Chapman responded the same day, advising that he would be meeting with structural engineers the next day, to start the process of getting the building structurally checked. Mr Parkin and Mr Chapman were in email contact between that time and 28 January 2011. These emails are set out later in this decision.

[16] Mr Boys of HCG inspected the building on 24 September. After his inspection, he went to see Mr Chapman and gave him a brief written report. There is a dispute as to what further information (if any) Mr Boys gave Mr Chapman. On 4 October Mr Seville, also of HCG, inspected the building. He contacted Mr Chapman after his inspection, and subsequently sent Mr Chapman a written report. It is not disputed that Mr Seville sent a written report to Mr Chapman on 6 October, but there is a dispute as to what information Mr Seville gave Mr Chapman.

[17] On 11 October, Mr Chapman sent the owners an "update on where things are at with 593 Colombo Street". The update included a copy of Mr Seville's 6 October report and a "September 2010 Management Report" for "593 Colombo Street", prepared by Mr Chapman. This report recorded Southern Ink as being the only tenant in occupation. Under the heading "Earthquake", the report recorded, as relevant to this proceeding:

Current status 30 Sept 2010

- Structurally unsafe to occupy
- moderate damage reported
- provided access for structural engineer to carry out inspection – copy of initial report attached
- obtained temporary repair strengthening schemes – see attached

Recommended Actions – Harcourts

- Obtain contractor costs to undertake temporary strengthening works, advise owners and have sufficient funds transferred to enable these works to be completed

...

- Advise tattoo tenant that landlord is unable to review the lease as the premises are [untenantable].2

[18] On 9 November, Mr Chapman sent an email to the owners (headed "re 593 Colombo Street") suggesting a meeting to discuss:

... the process that is going to have to be undertaken to get this building back to [a] tenantable state after the earthquake.

Mr Chapman met with the owners at the building on 22 November, having gained access through Southern Ink. Mr Chapman, the owners, and Mr Roberts (of HCG) met at the building on 24 November.

[19] Mr Roberts performed a "more intrusive" inspection of the building on 26 November, and reported to Mr Chapman on 29 November:

... we observed additional earthquake damage that we had previously not seen. Attached are two pictures of interior brick walls at the ground floor which are perpendicular to the South wall on St Asaph Street. Once the plaster was removed from the brick walls, significant lateral displacements between adjacent bricks in the wall were found (50 mm). ..

[20] On 1 December, Mr Roberts told Mr Chapman that he and Mr Seville "would like to sit down with you and discuss the damage, repair schemes and timeframes".

[21] Mr Chapman sent his "November 2010 Management Report" to the owners on 13 December. The report contained the same information that the building was structurally unsafe to occupy, that moderate damage had been reported, and that the "tattoo tenant" was to be advised that the landlord was unable to renew the lease as the premises were "untenantable", as was provided in his September 2010 report (set out at paragraph [17], above).

2. The word used in the September 2010 Management Report was "untenable". It was common ground that Mr Chapman meant to say "untenantable".

[22] Mr Chapman had had a further meeting with HCG on 6 December. He reported on this meeting to the owners on 22 December. His report included a sketch plan of the building. Referring to that plan, which identified the Southern Ink tenancy, he described "significant damage" to the rear wall of the premises (a common wall with tenancies on the St Asaph Street frontage):

.. significant damage – diagonal cracks of around 50 mm, requires removal of existing wall and rebuild with reinforced concrete block, including new foundations to support upper level – repairs required to be carried out to 67% of the Building Code now.

[23] Mr Chapman sent his "December 2010 Management Report" to the owners on 20 January 2011. This repeated the information set out at paragraph [17] above.

[24] On 23 January 2011, the owners told Mr Chapman they were taking over property management of the building themselves. They advised Mr Chapman that they would call him to discuss any work in progress and details for the handover of the property management. There is no evidence that they did this.

[25] On 11 February 2011, HCG sent Mr Chapman marked up plans, showing the general concept of strengthening required to make the building structurally safe. The plans distinguished between "required repairs prior to resumption of occupancy" (marked in red), "alternate options for these items" (marked in green), and "required seismic upgrade to 67% ... by September 2013" (marked in blue). The rear wall of the Southern Ink premises, and columns on the street frontage, were marked red and described as:

Required repairs prior to resumption of occupancy. Damaged structure must be restored to its original strength. Damaged non-structural portions shall be removed or replaced.

[26] Mr Chapman forwarded the plans to the owners on 15 February 2011.

[27] The building was totally destroyed when it collapsed in the earthquake on 22 February 2011.

Disputed evidence

(a) Placards Evidence

[28] Following the earthquake, buildings were assessed for damage, and identified by green (able to be occupied), yellow (medium damage and risk, with only restricted use permitted), and red (unsafe to occupy) placards. There is a dispute as to what colour placards were placed on the building (in particular, the Southern Ink premises and an adjacent door ("the central doorway")), and what information as to the placarding was conveyed to Mr Boys when he inspected the building on 24 September.

[29] An engineer, Mr Walls, gave evidence to the Royal Commission that shortly after the earthquake he placed a green placard on the Colombo Street frontage of the building and a yellow placard on the St Asaph Street frontage. Mr Parkin's evidence, both to the Royal Commission and to the Tribunal, was that a green placard was placed on the door to Southern Ink shortly after the earthquake (but at some point was removed), and that he also saw a yellow placard on the central doorway. His evidence as to when the green placard was removed, and when he saw the yellow placard,

was equivocal.

[30] Mr Boys' evidence to the Royal Commission and the Tribunal was that there was a yellow placard on or adjacent to the central doorway on the Colombo Street frontage when he inspected the building with Mr Boys on 24 September.

[31] Mr Chapman's evidence to the Tribunal was that as far as he knew the Colombo Street frontage had a green placard. In answer to a question from the Tribunal at the hearing, he said he could not remember whether he saw a placard on the central door of the Colombo Street frontage and, if he did see one, what colour it was.

[32] The Royal Commission reported that:3

3. Report of the Canterbury Earthquakes Royal Commission of Inquiry, Volume 4, Section 4, Part 4.9.3, at p 71.

Having considered all the evidence, we have concluded on the balance of probabilities that at some point between 5 September 2010 and 24 September 2010 a yellow placard was placed on the central doorway to 593 Colombo Street. However, there is no evidence before us to establish who placed the placard and the date when that was done. ...

Submissions

[33] Mr Rzepecky submitted that there could never have been a yellow placard on the central door immediately after the earthquake, and that there was no reliable evidence before the Tribunal that there was one there at the time of Mr Boys' inspection with Mr Chapman. He also submitted that Mr Boys did not notice the green placard on the Southern Ink door.

[34] Mr Hodge submitted that a photograph produced to the Tribunal (taken when Mr Seville inspected the building on 4 October), shows a yellow placard on the central door, and no green placard on the Southern Ink door. He submitted that the Tribunal could conclude that there was a yellow placard on the central doorway when Mr Boys inspected the property on 24 September.

Discussion

[35] With respect, we see no reason to differ from the Royal Commission's conclusion. We accept Mr Hodge's submission that there was a yellow placard on the central door on 24 September when Mr Boys inspected the building, and on 4 October when Mr Seville inspected the building.

(b) Information given to Mr Chapman by Mr Boys and Mr Seville Evidence
[36] It is not disputed that Mr Boys gave Mr Chapman a handwritten report on 24 September, in which the only reference to the Colombo Street frontage was that it "appears undamaged".

[37] Mr Boys completed a handwritten "RAPID Assessment Form – Level 2" the same day, after he returned to Auckland. He assessed the building as having minor to

moderate "wall or other structural damage", and recorded the building placard as "YELLOW 1" (restricted use, allowing short term entry, but unsafe for permanent occupation). This appears to have been prepared for the Christchurch Council, and was not provided to Mr Chapman.

[38] Mr Boys also prepared a typewritten report headed "593 Colombo Street". This recorded that there was no damage evident to the Colombo Street frontage. It recorded the building as having a yellow placard, and concluded "Not safe to occupy (YELLOW Tag remains in place)". This report was included, with reports relating to a large number of other properties in Christchurch, in an email sent to the Agency on 29 September 2010. The Committee accepts that this was never received by the Agency (and therefore not by Mr Chapman).

[39] With respect to Mr Seville's inspection, it is not disputed that on 6 October 2010, Mr Seville sent Mr Chapman a written report which included a photograph of the Colombo Street (eastern) wall of the building and the statement that he had observed a 10–20 mm gap between the timber framed floor and the brick façade on that wall, and that the displacement was also observed from outside. The covering email stated that the external walls appeared to be moving out from the building on three elevations. Mr Seville's brief substantive report, and accompanying photographs, make it clear that the reference is to the Colombo Street frontage. Mr Seville went on to say that it was necessary to get onto the roof, urgently, to check the stability of the walls. It is not disputed that there was no mention in Mr Seville's written report of there being a yellow placard on the building.

[40] In dispute is whether either or both of Mr Boys and Mr Seville orally advised Mr Chapman that the Colombo

Street frontage had a yellow placard. Mr Boys' evidence was that, having seen yellow placards on the St Asaph and Colombo frontages of the building, he told Mr Chapman, when he gave him his handwritten report, that the yellow placard was to remain in place. Mr Seville's evidence was that after his inspection he telephoned Mr Chapman and told him that there was a yellow placard on the Colombo Street frontage, and there should not be tenants there.

[41] Mr Chapman's evidence was that he was not given the alleged advice by either Mr Boys or Mr Seville. He said that if Mr Boys had told him that there was a yellow placard he would have made a diary note, given the importance of such information, and it would have been inputted into the Agency's spreadsheet of the buildings they were dealing with. He further said that if he had had a conversation with Mr Seville in which he was told that tenants should not be in the building, he would have made a diary note of the conversation, and immediately taken steps to advise Southern Ink and move it out of the building.

[42] Mr Chapman also said that if he had been told that the Colombo Street frontage was yellow-placarded, or that the tenants should not be in the building, he would immediately have told Southern Ink that they had to vacate the premises within a short time, and would then have arranged for the locks to be changed to prevent unauthorised access.

[43] Mr Chapman produced a copy of a diary note of his discussion with Mr Boys which records only "593 Colombo – far end no go – façade partially", and the relevant entry on the Agency's spreadsheet is "Tattoo Green – far end tenancy no good for a while". Regarding the alleged conversation with Mr Seville, Mr Chapman's diary note is "1.31 pm voice message from Richard – Holmes Consulting – fix tempy", which Mr Chapman said was a reference to some temporary repairs Mr Seville was going to recommend to the St Asaph street frontage.

[44] It is appropriate at this point to refer to the Management Reports Mr Chapman sent to the owners.4 Mr Chapman's evidence was that the September report was based on a standard form used for all properties under the Agency's management, and it was convenient to use it. He said that his reference to "structurally unsafe to occupy" was a summary of the information he had, which was mainly in respect of the St Asaph Street frontage, as was his statement that the building was untenantable. He also said that the recommendation concerning the "tattoo tenant's lease" was looking forward and reflected his belief that repair work would be seriously disruptive, and the owners needed the flexibility to have the building vacant for the work.

4. See paragraphs [17] (Management Report for September 2010), [21] (Management report for November 2010), and [23] (Management report for December 2010), above.

Submissions

[45] Mr Hodge submitted that there were compelling reasons to accept the evidence given by Mr Boys and Mr Seville. He submitted that in light of the Royal Commission's finding that a yellow placard was placed on the central door on the Colombo Street frontage by 24 September, it is highly unlikely that Mr Boys would have limited his discussion with Mr Chapman to the St Asaph frontage. Similarly, when Mr Seville inspected the building on 4 October, it is unlikely that he would not have referred to the yellow placard. For this reason, he submitted, the Tribunal could find that Mr Chapman was told about, and therefore knew, that both the Colombo Street and St Asaph Street frontages were yellow-placarded as from Mr Seville's inspection (at the latest).

[46] Mr Hodge submitted that Mr Chapman's Management Report to the owners for September 2010, without any qualification, that the current status of the building was "structurally unsafe to occupy" provides even more compelling support for Mr Boys' and Mr Seville's evidence. He submitted that bearing in mind Mr Chapman's evidence that he did not receive the typed report from Mr Boys (dated 24 September 2010) (accepted by the Committee), the only way Mr Chapman could have had this information was from Mr Boys' and Mr Seville's statements to him.

[47] Mr Hodge also submitted that Mr Chapman's explanation of his Management Reports was wholly unconvincing, and inherently unlikely in the absence of any supporting evidence. He submitted that the "obvious reason" for Mr Chapman's statement that the building was "structurally unsafe to occupy" was that it reflected what he had been told by either or both Mr Boys and Mr Seville.

[48] Mr Hodge further submitted Mr Chapman's explanation for his statement "advise tattoo tenant that the landlord is unable to renew the lease as the premises are untenantable" was entirely unconvincing. He submitted that if Mr Chapman intended to say that the building should be vacant for repair work to be undertaken, he would have used those words.

[49] Finally, Mr Hodge submitted that while the Royal Commission was unable to resolve the disputed conversations, it did not have the benefit of Mr Chapman's Management Reports at its hearing. The Royal Commission received copies of the Report after its hearing on this aspect of its inquiry was completed, and considered it could not draw any conclusions from them in the absence of cross-examination. Mr Hodge submitted that the Tribunal had had the

advantage of seeing the reports, and hearing Mr Chapman's evidence and cross-examination.

[50] Mr Rzepecky submitted that the Tribunal should accept Mr Chapman's evidence that neither Mr Boys nor Mr Seville told him that the Colombo Street part of the building was yellow-placarded. However, he submitted, it is not necessary for the Tribunal to make the "stark choice" between the conflicting evidence, as there is room for a middle ground, which is as to what Mr Chapman understood from what he was told. He submitted that Mr Chapman's concern was the St Asaph Street frontage, as his understanding was that the main damage was to that part of the building.

Discussion

[51] We are not able to make a finding, on the evidence before us, as to whether Mr Boys' and/or Mr Seville's, or Mr Chapman's, evidence should be accepted. That is, we cannot find, on the balance of probabilities, that Mr Boys and/or Mr Seville expressly told Mr Chapman that there was a yellow placard on the Colombo Street frontage of the building. However, that does not affect our overall finding as to what information Mr Chapman had as to the safety of the building.

What information did Mr Chapman have regarding the safety of the building?

[52] We have accepted the Royal Commission's finding that there was a yellow placard on the central door of the Colombo Street frontage at the time Mr Chapman inspected it with Mr Boys and Mr Seville. That finding indicates that the premises on the Colombo Street frontage had been identified by an engineer as having been damaged to the extent of requiring a yellow placard.

[53] We accept that Mr Seville's written report of 6 October did not say that the Colombo Street frontage of the building had a yellow placard, but neither did it say that the St Asaph frontage had a yellow placard. Mr Seville also referred to damage to the eastern (Colombo Street) frontage in that report. Further, in his covering email to his 6 October report, Mr Seville noted that the "external walls appear to be moving out from the building on three elevations", and that the engineers needed to "get on to the roof to check the stability of the walls ... urgently".

[54] Mr Chapman's Management Reports to the owners from 11 October onwards were headed "593 Colombo Street". No distinction is made in any of the reports to the St Asaph Street frontage of the building and the Colombo Street frontage, and none of the statements is qualified as to its application. Objectively, the statement that the building is "structurally unsafe to occupy" can only be read as referring to the whole building, not one part of it only. Further, the only objective reading of the statement that the "tattoo tenant" was to be told that the owners were unable to renew the lease because the "premises are untenantable" is that the "tattoo tenant's" premises are "untenantable" – that is, unsafe to occupy.

[55] Having considered the narration of the factual background, and our consideration and findings in respect of disputed evidence, we find on the balance of probabilities that following the earthquake, Mr Chapman received information as to structural and safety issues with the building. This information included that:

[a] The building was considered "structurally unsafe to occupy";
[b] The Agency was to advise tenants that the owners were unable to renew the lease as the premises were "untenantable";
[c] The external walls appeared to have moved out from the building on three elevations;
[d] The engineers needed to get onto the roof and check the stability, urgently;
[e] The work needed to be done immediately for occupancy.

Communications between Mr Parkin and Mr Chapman

Evidence

[56] As recorded earlier, Mr Parkin sent an email to Mr Chapman on 20 September, stating that he understood that Mr Chapman was the "new property manager". He went on:

... would it be possible to get someone down to do some repairs on the shop. After the earthquake we have had a lot of plaster fall from the ceiling, and there are still bits of drywall and plaster hanging and dust falling down.

[57] Mr Chapman responded

... our first priority is to get the building structurally [checked] – I am meeting with our structural engineers [tomorrow] to start that process. Once we know the full extent of the damage we will be in a better position to schedule and start the repair works.

[58] On 30 September, Mr Parkin advised Mr Chapman that he would not be paying the rent for that month. He went on:

... also where are we in regards to having the ceiling repaired? It is quite dangerous having loose plaster floating down from the ceiling, as we work in a sterile environment ... it could possibly pose a health risk ...

[59] Mr Chapman responded on 8 October that he had been:

... awaiting the structural engineers survey and recommendations to enable us to be in a position to establish what works are required to make the building re- tenantable and gauge a timeframe those [works] are likely to take so we can advise those tenants and owners alike ... it may be some time before the building will be able to be tenanted legally.

[60] Mr Chapman also asked Mr Parkin to provide him with a copy of the lease. Mr Parkin sent Mr Chapman a copy of his lease on 11 October.

[61] Mr Parkin sent Mr Chapman another email on 18 November, asking if Mr Chapman had heard anything more about the building report. He said:

... we still have some ceiling falling down with all these aftershocks, a piece nearly hit somebody last week when it dislodged and fell down ... it makes me nervous bringing the general public into the studio when you still haven't confirmed whether the building has been deemed safe or not. I'm still waiting

to hear what it is you want to do in regards to our repairs, lease etc ... I am really concerned, and would appreciate some info asap.

[62] Mr Chapman responded to Mr Parkin on 19 November that he had a "big meeting with some of the owners" the next Monday, to "sort out how to get the property sorted", and to discuss Mr Parkin's lease. He asked if Mr Parkin could let him into the shop.

[63] On 21 January 2011, Mr Parkin emailed Mr Chapman:

... just checking to see how the assessment went on the building upstairs and to see if you have had time to negotiate the rent. I have had to get a guy down to fix the ceiling cause with all these aftershocks it drops a lot of dust and debris.

[64] Mr Chapman responded on 24 January 2011:

... the structural engineers have been working away looking at the whole rebuilding/repair work required as well as having to build into that required to earthquake strengthen to 67%.

[65] Mr Parkin asked Mr Chapman on 28 January 2011:

Sixty seven percent sounds like a lot. Is there quite a lot of damage upstairs? and how safe are we downstairs mate:) we really want to stay at the location for as long as possible so it would be good to finally hear what [the owners] want to do rent wise.

[66] Mr Chapman responded on 16 February 2011:

The 67% is a Council wish to get building seismic strengthening too in relation to the code all new buildings need to be built to.

I've finally received some repair plans which I've forwarded on to a contractor to price – these plans include repairs required now so we can re-tenant the empty spaces as well as works required to meet the council's 67% seismic requirement.

Once I have some costs it'll be up to the owners to decide what they're going to do.

Keep in touch and as soon as I know any more I'll let you know.

[67] There was no further communication between Mr Chapman and Mr Parkin before the earthquake on 22 February 2011.

Was Mr Chapman carrying out real estate agency work?

[68] A licensee may be charged with disgraceful conduct under s 73(a) of the Act in relation to conduct in the course of real estate agency work, and the work done by a commercial property manager may come within the definition of real estate agency work. However, it is not a necessary condition for a charge under s 73(a) that the conduct occurred in the course of real estate agency work, and the charge against Mr Chapman is not framed as such. The Committee alleges that Mr Chapman was a licensee carrying out commercial property management work in a manner that would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful.

[69] However, Mr Hodge submitted on behalf of the Committee that there is no "bright line" between real estate agency work and commercial property management work, and the work undertaken by Mr Chapman's conduct was "as close as possible" to real estate agency work. He referred to Mr Chapman's liaison with Mr Parkin in respect of rental issues, correspondence with Mr Parkin in respect of the damage to the building, and his offer to find new premises for Southern Ink.

[70] The Tribunal accepts that there is no "bright line" between real estate agency work and property management work. However, in the light of the wording of the charge, it is not necessary to determine whether Mr Chapman was carrying out real estate agency work for the purpose of deciding whether the Committee has established that he is guilty of misconduct under s 73(a) of the Act.

Was Mr Chapman acting as a commercial property manager?

Evidence

[71] Mr Chapman said in evidence to the Tribunal that "this was not a building which was ever managed by Harcourts". He said that the owners enquired about property management services before the earthquake, but he was never formally appointed as commercial property manager, and he was never paid for the work he undertook. He said that he did not hear back from the owners with regard to their request that he act

as commercial property manager for the building until after the earthquake, when he was asked to manage earthquake issues for them. This only required him to instruct engineers, to pass on the engineers' advice to the owners, and to act on the owners' instructions.

[72] Mr Chapman acknowledged that when Mr Parkin referred to him as "the new property manager", he did not advise Mr Parkin that he was not the "property manager".

Submissions

[73] Mr Hodge submitted that notwithstanding that there was no formal property management agreement, Mr Chapman was in fact doing commercial property management work. He submitted that Mr Chapman's actions went beyond his description of them, and that engaging engineers and liaising with tenants constituted property management work, whatever label might be attached to it. He further submitted that Mr Chapman continued to assume "commercial property management" responsibilities after the owners advised him that they were "taking over the property management" on 23 January 2011.

[74] Mr Rzepecky submitted that in the absence of a property management agreement, Mr Chapman was only responding to the owners' request that he arrange an engineers' assessment, and scope out necessary repairs. He submitted that to the extent that Mr Chapman was acting as a commercial property manager, the scope of that role was limited to managing earthquake issues for the owners and, in any event, ended when the owners advised him that they were taking over the property management.

Discussion

[75] We note that in their email of 23 January 2011, the owners referred to taking over "the property management", and that they would discuss "details on the handover of the property management".

[76] The Royal Commission said, on this point:5

We note that [Mr Parkin] sent an email to Mr Chapman on 20 September 2010 in which he said he understood that Mr Chapman was the new property manager. In responding to the email, Mr Chapman did not disabuse Mr Parkin of this notion. Whatever the exact contractual position, Mr Chapman was effectively acting as a property manager."

[77] With respect, the Tribunal has reached the same conclusion. Mr Chapman's liaising between the owners and HCG, dealing with enquiries from Mr Parkin, and sending "Property Management" reports to the owners, indicates commercial property management work. So, too, does the owners' reference to taking over the property management and discussing the handover of the property management.

[78] We do not accept Mr Rzepecky's submission that any commercial property management property agreement Mr Chapman had was limited in its scope, and that such engagement as he had ended when he was advised that the owners would take over the property management.

[79] We find that Mr Chapman was carrying out commercial property management work, and continued to do so after 23 January 2011.

What do industry standards require of a commercial property manager, as relevant to determination of the charge?

[80] The Tribunal heard expert evidence on this issue from Mr Morley (called by the Committee) and Mr Bercich (called by Mr Chapman). Both were cross-examined. As a preliminary point, we observe that the purpose of expert evidence in this case was to enable the Tribunal to understand the relevant industry standards expected of a commercial property manager, both generally and in the present case. Whether or not Mr Chapman met those standards in this case is for the Tribunal to determine.

[81] Regarding the relevant industry standards, Mr Morley said in his written statement of evidence:

5. Report of the Canterbury Earthquakes Royal Commission of Inquiry, Volume 4, Section 4, Part 4.9.3, at p 70.

The acceptable industry standards for property management is always to disclose all information to tenants regarding any safety issues. Here, the safety issues were of significant concern and the tenant required full and fair disclosure to make an informed decision regarding whether his business remained in occupation.

There are no written rules or standards for acceptable industry standards for property management. ...

[82] In his written statement of evidence Mr Bercich qualified the obligation as to disclosure to tenants according to the particular circumstances:

... I am unaware of any specific obligation on a commercial property manager at the time, imposed by the Real Estate Agents Act 2008 or any other statute, to disclose information to tenants about the safety of the building which they occupied.

I accept however, that if a property manager becomes aware of information about a building's safety, then he has a clear obligation to disclose that information to the building owner and, depending on the particular circumstances, directly to any person in occupation of the building.

[83] Both Mr Morley and Mr Bercich acknowledged that general industry standards as to commercial property management should in this case be considered in the context of carrying out such work in the aftermath of the earthquake, and the particular challenges presented to managers. The Tribunal accepts that it is appropriate to take the particular context in which Mr Chapman was working into account. The corollary is, however, that in that same context (and in particular where, as in Christchurch, numerous aftershocks occurred) it may become even more important for a commercial property manager to disclose safety issues to tenants.

[84] Mr Morley noted that:

... The upholding of health and safety standards have always been an area that managers, tenants and landlords have had to comply with in rental properties.

A manager with 12 or more years' experience would know that ...

[85] Mr Bercich said, regarding the circumstances of the present case:

New Zealand had not faced a civil emergency on this scale for many decades, and possibly never before. No one that I knew of working in the commercial property management area had any direct personal knowledge or experience of such a natural disaster in an urban setting. This meant that individual property managers had to rely on their skill and knowledge to deal with the unique circumstances which they faced as the Christchurch earthquakes occurred. They had to develop systems and procedures for recording information and advising building owners and tenants. ...

He went on to say:

After receiving [the marked up plans from Mr Seville on 11 February 2011] I believe that a competent commercial property manager would have made further enquiries, and possibly sought confirmation from the structural engineer that the [Southern Ink premises were] still safe for Southern Ink to occupy. That is because it was apparent that the damage and remediation plans involved the rear wall of the tenancy and were not confined to just the St Asaph Street frontage.

[86] Mr Bercich accepted in cross-examination that a competent commercial property manager would also have made further enquiries and sought confirmation as to whether the Southern Ink premises were safe to occupy on receiving Mr Seville's written report of 6 October, Mr Roberts' email of 29 November, and after the meeting with HCG on 6 December. Mr Bercich also accepted in answer to a question from the Tribunal that a competent commercial property manager would be "crystal clear" and would have clarified with the engineers whether a reference to "593 Colombo" was intended to refer to the St Asaph Street frontage, or the Colombo Street frontage, or both frontages.

[87] The experts' evidence as to the relevant industry standards applying to a commercial property manager (working in the aftermath of the earthquake) differed only in that Mr Morley's formulation requires a manager to make full and fair disclosure of all information regarding safety issues to tenants, while Mr Bercich's formulation requires a manager to make enquiries and seek clarification before such information is disclosed.

[88] It is relevant here to refer to evidence given by Mr Bercich in answer to questions in cross examination, regarding the particular context of the present case. First, in answer to a question as to what a commercial property manager's response would be if he or she had not received any information from an engineer as to a building's status, in terms of its placarding, Mr Bercich said that "I would want to check, something to rely on that it had been checked and it was safe to occupy".

[89] Secondly, we refer to Mr Bercich's response to questions regarding a commercial property manager's disclosure of information relating to health and safety issues of a building in the absence of approval from the owners. By reference to a

building with weathertightness issues, he was asked if information as to possible health issues should be passed on to a tenant. Mr Bercich agreed with that proposition. He also agreed that the tenant should be advised even if the landlord said it should not be, and that safety issues must take priority, and can override an owner's instructions.

[90] Having considered the evidence given by Mr Morley and Mr Bercich, we conclude that the relevant industry standards require a competent commercial property manager:

[a] If presented with a report as to a possible safety issue affecting a property being managed (or any similar issue) that identifies the particular issue, is clear, and supported by evidence and appropriate analysis, to provide that report to any affected person (including tenants).
[b] If presented with a report as to a possible safety issue which is not of that nature, to make enquiries of the author(s) of the report and seek clarification and further information before providing it to any affected person. A manager must be in a position to identify the particular issue, assess its implications, and provide clear and comprehensive information to any affected person. Where safety issues arise, such enquiries should be made as a matter of urgency, so that the provision of information to affected persons is not delayed.
[c] In the particular context of the present case, to take steps to ensure that he or she is aware of the placard status of a building under management and/or to clarify the status of the building with structural engineers.
[d] Both in the context of the present case and generally, where issues of health and safety are concerned, to disclose those issues to tenants, even if approval of the owners is not sought, or is sought and not granted. Safety issues are a greater priority.

[91] We note Mr Hodge's submission that if a commercial property manager is also carrying out real estate agency work (for example negotiating leases, and working on

the acquisition and disposal of leasehold interests), the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 would apply to the manager. Rule

6.4 provides that 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.

[92] Mr Hodge submitted that it could not be suggested that disclosure of information relevant to the fitness of premises for occupancy following a major earthquake is anything other than information which must be disclosed as a matter of fairness (if not as a matter of law). He submitted that it would be anomalous for there to be one standard for commercial property managers doing commercial property management work alone, and another (stricter) obligation under the Rules for commercial property managers also doing real estate agency work. He submitted that this anomaly does not arise if Mr Morley's formulation is adopted.

[93] We are not persuaded that any such anomaly arises from the industry standards we have set out above. There is a factual distinction between a licensee who is carrying out real estate agency work (as defined in s 4 of the Act) dealing usually with prospective purchasers and owners, and a licensee carrying out commercial property management, dealing usually with owners and "in situ" tenants. However, "full and fair" disclosure (under the Rules) imposes a similar obligation as to disclosure as is required by industry standards of commercial property managers, and requires a similar response by the licensee.

Did Mr Chapman comply with relevant industry standards?

[94] We note Mr Chapman's evidence that he could not now remember whether he saw a placard on the Colombo Street frontage of the building, or if he did, what colour it was. However, regardless of what he was told by Mr Boys and/or Mr Seville, he should have checked the placarding for the building when he visited it.

[95] There is no evidence that Mr Chapman made any enquiries of HCG as to the safety of the Southern Ink premises for occupation, or sought clarification of any of the information he had been given.

[96] We turn to the issue as to whether Mr Chapman met industry standards with respect to information passed on to Mr Parkin.

[97] Mr Chapman's evidence was that he passed the information he had to the owners, but considered that he required their approval before he disclosed it to other parties. He said that without that approval, he could not disclose the information anywhere else. He accepted that he did not tell the owners that the information he had was important information that the tenants should be aware of, and should be forwarded on to Southern Ink. However, as this was important health and safety information, he should have passed it on to Mr Parkin, regardless of whether he had or did not have the owners' approval.

[98] Mr Rzepecky submitted that it is relevant to consider the information Mr Parkin already had, in order to determine whether he had sufficient information to make an informed decision about whether or not to stay in the building. He submitted that Mr Parkin knew that:

> [a] there was a green placard on the Colombo Street frontage immediately after the earthquake, despite there being plaster falling from the ceiling and bits of drywall hanging, and the state of the ceiling caused him concern for the safety of people in the premises and was possibly a health risk;
> [b] Southern Ink moved back into their premises, and some time later a yellow placard appeared on the central door of the Colombo Street frontage (the significance of which was known to Mr Parkin);
> [c] The St Asaph frontage was cordoned off;
> [d] Mr Parkin and his staff felt unsafe and had agreed that they would flee if there was a significant earthquake; and
> [e] Mr Chapman had told him that the building needed to be structurally checked, work was required to make the building re-tenantable, a structural engineer's report had suggested that it would be some time

before the building could be tenanted legally, his lease would not be renewed and the Agency could arrange to find him a new place, work was required to bring the building up to 67% of the building code and there was a Council "wish" for seismic strengthening; and

[f] Mr Parkin repeatedly expressed a desire to stay in the building to preserve his customer base.

[99] We note, first, that it is inconsistent for Mr Chapman to rely on communications as to work "required to make the building re-tenantable", and that "it would be some time before the building could be tenanted legally", when it was Mr Chapman's evidence, and submission, that those comments did not relate to the safety of the Southern Ink premises.

[100] However, even taking all of the matters referred to by Mr Rzepecky into account, it is still apparent that Mr Chapman's communications to Mr Parkin did not extend beyond advising him that the engineers were inspecting the building, did not express any concern as to the safety of the Southern Ink premises for occupation, notwithstanding the real concern expressed to him by Mr Parkin, and did not answer Mr Parkin's questions about the safety of the premises.

[101] While the above comments apply to the majority of Mr Chapman's communications to Mr Parkin after the earthquake, his communication of 16 February 2011 is particularly significant. At that time he had met with HCG on 6 December and reported to the owners on 22 December, including providing them with a sketch plan of the building which indicated damage to the walls on three sides of the Southern Ink premises. He had advised the owners that the rear wall of the Southern Ink premises (a common wall with tenancies on the St Asaph Street frontage) had "significant damage".

[102] Further, Mr Chapman had received (on 11 February 2011) HCG's marked up plans of the general concept for strengthening the building, in which the rear wall of the Southern Ink premises and columns on the street frontage were identified as being in the category of work "required repairs prior to resumption of occupancy". Mr

Chapman sent these to the owners on 15 February, but he did not tell Mr Parkin that there was significant damage to the rear wall of the Southern Ink premises, and that repair work was required to be done prior to resumption of occupancy.

[103] We therefore find that Mr Chapman was on notice as to Mr Parkin's (and therefore Southern Ink's) concern as to the safety of the building, he was aware that there was significant damage to walls of the Southern Ink tenancy which was required to be repaired before resumption of occupancy, and he did not pass on the information he had to Mr Parkin.

[104] The charge against Mr Chapman alleges both:

To the extent that [Mr Chapman] needed to take further steps to clarify whether the building was safe for occupation, [Mr Chapman] failed to take those steps; and

[Mr Chapman] did not pass on to the tenants the reports, emails or other correspondence that contained information relevant to the safety of the building, including the information

[105] We find that Mr Chapman failed to meet industry standards in both respects.

Does Mr Chapman's failure to meet industry standards constitute disgraceful conduct?

Preliminary comments

[106] In assessing whether Mr Chapman's failure to meet relevant industry standards constitutes disgraceful conduct, we are guided by the Tribunal's decision in *Complaints Assessment Committee 10024 v Downtown Apartments Ltd (In Liq)*,6 and the judgment of his Honour Justice Woodhouse in *Morton-Jones v Real Estate Agents Authority*,7 in particular, his Honour's discussion of s 73(a). In *Downtown Apartments*, the Tribunal said:8

"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."

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

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

8 *Downtown Apartments*, at [55].

[107] In *Morton-Jones*, his Honour Justice Woodhouse said:9

... 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" ...

[108] Thus, conduct charged against a licensee under s 73(a) may be found to be disgraceful (whether or not it is in the course of, or related to, real estate agency work) if it meets the ordinary meaning of "disgraceful". That is, whether the licensee's conduct would reasonably be regarded by agents of good standing or reasonable members of the public as disgraceful.

[109] When assessing whether conduct would reasonably be regarded by agents of good standing as disgraceful, the Tribunal takes into consideration the standards that an agent of good standing should aspire to, including any special knowledge, skill, training or experience such person may have. In the present case, the "standards that an agent of good standing should aspire to" are the relevant industry standards, discussed earlier. The standard of proof required before the Tribunal can find a charge under s 73(a) proved is the balance of probabilities.

[110] It is clear from *Morton-Jones* that it is important not to conflate the two separate issues of culpability (whether the conduct was disgraceful) and penalty (the consequences of a finding that conduct was disgraceful), which must be considered in dealing with a charge under s 73(a). Penalty is a matter for separate determination.

[111] Secondly, we accept that it is appropriate, when considering whether Mr Chapman's conduct was disgraceful, to take into account the context of the aftermath of the earthquake, and the particular challenges presented to managers. We have also noted that the corollary is that in that same context (and in particular where, as in Christchurch, numerous aftershocks occurred) it may become even more important for a commercial property manager to disclose safety issues to tenants. Further, these are health and safety issues which, it was agreed by Mr Morley and Mr Bercich, are of particular concern to commercial property managers. As an experienced commercial

9 *Morton-Jones*, at [29].

property manager, Mr Chapman was well aware of the importance of being alert to health and safety issues, of whatever nature.

[112] Thirdly, we record that our assessment whether Mr Chapman's conduct was disgraceful is made with reference to that particular conduct, at the time it occurred, and what he knew at that time. We are acutely aware that very shortly after Mr Chapman's communication to Mr Parkin, on 16 February 2011, the building collapsed, and Matthew McEachen died while trying to flee from the building. However, our assessment must not be based on hindsight.

Discussion

[113] Mr Chapman had information as to structural issues with the building (including in the rear wall of the Southern Ink tenancy) as from his meeting with HCG on 6 December. He provided this information to the owners, but not to Mr Parkin. The information Mr Chapman had from HCG was not clearly limited to the St Asaph Street frontage, and while Mr Chapman may have assumed that it was, he made no enquiry nor sought clarification.

[114] Mr Chapman was given the marked up plans for the building on 11 February 2011, which showed that repair work was required on the rear wall of the Southern Ink premises (marked red) before resumption of occupancy. Notwithstanding that the plans clearly mark the rear wall of the Southern Ink premises, if Mr Chapman still assumed that this information related only to the St Asaph Street frontage, he did not seek clarification from HCG.

[115] We note Mr Rzepecky's submission that HCG did not tell Mr Chapman that the building was not safe for Southern Ink to occupy, but that does not absolve him from not making that enquiry himself. Further, any information Mr Parkin may have had, or any preference to remain on the premises, does not absolve Mr Chapman from meeting the relevant industry standards.

[116] As Mr Parkin noted in an email to Mr Chapman, aftershocks were continuing, and Mr Parkin continued to express his concern as to the safety of the Southern Ink

premises. Despite Mr Parkin's express questions, and the information he had from HCG, Mr Chapman did not tell Mr Parkin anything other than that the building was being checked by engineers, that the engineers were working on what repairs were required, and that it would be up to the owners to decide what they were going to do.

[117] We have recorded Mr Chapman's evidence that he did not remember whether he saw a placard on the Colombo Street frontage or, if so, what colour it was. However, a commercial property manager working in Christchurch after the earthquakes should make a point of looking for the placarding when visiting a building under management, and/or make enquiries to clarify the status of the building.

[118] Mr Chapman's evidence was that he assumed that (because it was cordoned off, and he knew it was yellow-placarded) it was only the St Asaph Street frontage that was damaged and was unsafe to occupy. However, he did not question his assumption, and he did not seek clarification of that from the engineers. This failure put the owners of Southern Ink, its employees, and its customers, at risk.

[119] So, too, did Mr Chapman's failure to pass on the information he had to Southern Ink when there was a clear reference to repair work needed to the rear wall of the Southern Ink premises. We do not accept that it was necessary for him to obtain the owners' approval before telling Southern Ink that the building was unsafe for occupation.

[120] Mr Chapman also said in evidence that if he had been told that the Colombo Street frontage was yellow-placarded, or that tenants should not be in the building, he would have taken immediate steps to advise Southern Ink, move it out of the building, and arrange for the locks to be changed. The advice he received by way of the marked up plans was to the same effect, that the building was unsafe. Yet notwithstanding having that information, Mr Chapman did not advise Southern Ink, and he did not move them out of the building.

[121] As an experienced commercial property manager, Mr Chapman would have been well aware of the importance of safety issues in buildings under management. He was also well aware that the earthquake had caused serious damage, that the structural

stability of many buildings was severely compromised, and that aftershocks (some of which were severe) were continuing. We are satisfied that he had sufficient information to recognise the need for enquiry concerning the safety of the building (and the Colombo Street frontage in particular), and the expressions of concern from Mr Parkin should have rung alarm bells for him that he needed to clarify the matter.

[122] Mr Chapman's conduct in not enquiring into, or seeking clarification of, the information he was given by HCG then passing that information on to Southern Ink, and by not addressing, himself, the question whether the Southern Ink premises were safe for occupation, did not meet the relevant industry standards, by a considerable measure. However, we are not able to conclude that his failure to meet those standards was to such an extent that we could find that it would reasonably be considered by agents of good standing, or reasonable members of the public, as disgraceful.

Concluding remarks

[123] We repeat our earlier comment that nothing the Tribunal has said in this decision is an indication that the Tribunal has any view as to culpability for Mr McEachen's death. The Tribunal does not (and cannot) have any such view.

[124] We also repeat our earlier comment that the Tribunal's only role under the Act was to consider Mr Chapman's conduct in the context of the industry standards applying to commercial property managers. The Tribunal has formulated the relevant industry standards, and has applied those standards to its findings in respect of Mr Chapman's conduct following the earthquake.

Outcome

[125] The Tribunal does not find the charge of disgraceful conduct proved.

[126] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, 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 C Sandelin

Member
