BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 53

READT 077/15

IN THE MATTER OF	an appeal under s111 of the Real Estate Agents Act 2008
BETWEEN	MICHAEL ANTHONY MUNLEY Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 402) First respondent
AND	STEPHANIE KELLAND, STEPHEN WILLIAMS & MEGAN JAFFE REAL ESTATE LTD Second respondents

Hearing:	25 July 2016 (in Auckland)
Tribunal:	Hon P J Andrews (Chairperson) Mr G Denley (Member) Mr J Gaukrodger (Member)
Appearances:	Mr M Munley (Appellant, in person) Ms K Lawson-Bradshaw (on behalf of the first respondent) Ms K Kenealy (on behalf of the second respondents)
Date of Decision:	17 August 2016

DECISION OF THE TRIBUNAL

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[1] The appellant (Mr Munley) has appealed against the decision of Complaints Assessment Committee 402 (the Committee) dated 2 November 2015, to take no further action on his complaint against the second respondents, Ms Kelland and Mr Williams (the licensees) and Megan Jaffe Real Estate Ltd (the Agency). The

licensees are employed by the Agency, Ms Kelland as a licensed agent, branch manager, and compliance overseer, and Mr Williams as a licensed salesperson.

[2] Mr Munley's complaint concerned the licensees' marketing of a property in Parnell, Auckland (the property). The property is a townhouse in a complex with other townhouses. Mr Munley alleged in his complaint that the property should have been marketed as a "leaky building" (as that term is used in relation to properties constructed with a monolithic cladding system).

Background facts

[3] It is necessary to set out the facts in some detail. Apart from the listing of the property, all of the events described occurred between January and March 2015.

[4] The property was listed with the Agency on 28 November 2014. The Agency's listing agreement included a page headed "Property Details". In this section, under the sub-heading "Exterior", the box labelled "Roughcast" has been ticked. The box labelled "Monolithic System" has not been ticked. The "Property Details" page also includes the following: "List any defects, hazards or problems known to Client including leaks, weathertightness and/or contamination issues (attach all related documents/reports)". This has "Not Known" written next to it. The words "Not Known" were the vendor's response to being asked the question by the listing salesperson (Mr Babukhin) at the time of listing. The vendor was also asked if she would be getting a building report for the property, to which she answered "no", and that she preferred a potential purchaser to get their own report.

[5] Mr Munley viewed the property at an Open Home conducted by Mr Williams on 3 January. He said that at this time, he had recently arrived in New Zealand after living overseas for at least 20 years, and did not know a lot about weathertightness issues. He said that he asked Mr Williams if there were any weathertightness issues with the house, and Mr Williams replied that there were none, based on information provided by the vendor.

[6] Mr Williams sent Mr Munley a copy of the Land Information Memorandum (LIM) for the property by email on 6 January 2015. Mr Munley had mentioned getting a building report on the property, and Mr Williams noted that a couple of days' notice was required to get the builder through. Mr Williams also noted that "if it were not for the fact that [the property] is a bit tired and of mostly plaster construction, the market value would be considerably higher".

[7] Mr Munley undertook due diligence on the property. He inspected Council files; considered photograph records, architectural drawings and documentation regarding rectification of a another property in the same complex; and had conversations with a range of local people, including a structural engineer who lived nearby and who visually assessed the property. Mr Munley concluded that the property was "constructed at variance to the original plans, with plaster cladding, parapet deck roofs and set in windows", and that its construction date "followed building code changes that permitted design/construction techniques that ultimately proved flawed". In general terms, Mr Munley's due diligence led him to conclude that the property was a leaky building.

[8] Mr Munley presented a signed offer for the property on 14 or 15 January. He set out the information gleaned from his due diligence, and his offer was conditional "based on evidence that leads us to conclude that [the property] is a leaky house. The property requires a full external re-clad … we have subtracted the estimated costs of rectification". The vendor's response to this offer was that it was too low.

[9] There was then an exchange of emails between Mr Munley and Mr Williams, between 19 and 29 January. Mr Munley asked if the vendor was given all the information contained in the offer, then whether the vendor agreed that the property was a leaky building. Mr Williams told him that the vendor did not agree, and Mr Munley asked if the vendor had evidence that showed the property in a better light. Mr Williams told Mr Munley that the vendor was not interested or prepared to obtain a building report, and that he should get a comprehensive building report to satisfy himself of the property's condition. Mr Williams also told Mr Munley that the vendor had said she was not aware of any weathertightness issues with the property.

[10] Mr Munley visited the property on 31 January. He said he was walking by, it was raining, and he decided on the spur of the moment to go in and look at it. The tenants were moving out at the time. Mr Munley said he witnessed water leaking into the property, and the tenants told him that water leaked through a light fitting in the ceiling. Mr Munley advised Mr Williams of this.

[11] Ms Kelland, as compliance overseer for the Agency, had become involved with the property in late January. She confirmed the vendor's responses at the time of listing, as to defects in the property and as to obtaining a building report.

[12] On 3 February Ms Kelland and the listing salesperson (Mr Babukhin) met with the vendor at the property. Ms Kelland said there were few if any visible cracks in the plaster, and she did not see any evidence of leaking other than in the corner of a group of acutely angled windows. She asked the vendor about a deck on an upper floor, which formed the roof of the house. The vendor responded that the tenants had not looked after the property, and leaves had blocked a drain so that water overflowed and dripped through light fittings in the kitchen below. She said this had been remedied by unblocking the drains.

[13] Ms Kelland and Mr Babukhin had what Ms Kelland described as "a very frank discussion" with the vendor, and insisted that she get a building inspection done, otherwise the Agency would be forced to walk away from the listing. The vendor agreed to a building inspection.

[14] The inspection was done on 4 February, and the report received on 9 February. The report was passed on, with the vendor's permission, to Mr Munley. It was also included in the information pack given to all potential purchasers at Open Homes. Potential purchasers were also advised to obtain their own building inspections.

[15] It suffices for present purposes to note the following comments in the building report, under the heading "General Recommendations":

> Despite reasonable overall workmanship, the building currently appears suffered from moderate exterior envelope defects in various natures such as surface coating deterioration, deck membrane failure, blockwork tanking failure, metal capping deterioration, window leaks and etc. Causes of exterior

> issues are combination of design limitation, envelope complicity, lack of routine professional maintenance and aged related material deterioration.
>
> Total recladding work is always the best and ultimate solution, but will likely be extremely expensive and may even be uneconomical due to design complicity of the subject building. We are currently of the opinion that the building has not been suffering disastrous systemic cladding failure. The building will be able to be kept weathertight by carrying out target repair and total cladding re-surfacing followed with a long term maintenance plan. Total recladding is optional and can only be considered when client is financially capable and willing to do so for considerations of many aspects, such as personal choices, long term ease of maintenance, market acceptance, in conjunction with major alterations and so on.

[16] For completeness, we note that the agency was cancelled on 10 March 2015.

The Committee's decision

[17] The Committee made four findings, which led it to decide to take no further action on Mr Munley's complaint. These findings, and the reasons given by the Committee for those findings, are set our below.

First finding: the Licensees and the Agency did not avoid disclosure of weathertightness issues

[18] The Committee was satisfied that the Licensees and the Agency had correctly identified the property as one which may suffer from weathertightness issues. The Committee noted that weathertightness issues had been "covered off" with the vendor prior to marketing. The Committee also noted that the licensees were not required to market the property as a leaky building, but were required to ensure that prospective purchasers were aware of the likelihood of such an issue and to recommend that an independent building report be obtained. The Committee also noted that Mr Munley understood the issues well, and took them into account.

Second finding: Mr Munley did not provide evidence of leaking issues the Licensees should have known about

[19] The Committee referred to Mr Munley's evidence of seeing water leaking into the Property over electrical wiring. The Committee also referred to the previous tenant having told the Authority's investigator that they had experienced water coming in through light fitting through during bad storms, which they had reported to

the vendor. The Committee recorded the tenant's advice to the investigator that although she had told Mr Munley about this problem, he could not have seen water coming in when he visited the property, as it was not raining that day. The Committee agreed that the licensees could not have known about this as it was a hidden defect they were not required to discover.

Third finding: the Licensees were not required to change the advertising for the property after receiving information about the leaking

[20] The Committee said that advertising "is a matter for the Vendor of the Property to decide and in this case there was no directive to the Licensees from the Vendor to change the advertising." The Committee concluded that the licensees' conduct concerning the advertising was proper.

Fourth finding: the Licensees acted appropriately in going to the vendor to obtain a building report

[21] The Committee said that whilst there was no sign of water ingress, the vendor was requested to organise a building report, and the vendor was told that if she did not agree to obtain a report, the licensees would be required to cancel the listing. The Committee said this was appropriate conduct.

[22] By way of an overall summary, the Committee said that the licensees had taken the complaint seriously and had reacted to Mr Munley's concerns appropriately at all times. The Committee therefore decided to take no further action.

Appeal issues

[23] The nub of Mr Munley's complaint was that the property should have been marketed as a leaky building. Determination of this appeal therefore requires consideration of two broad issues. The first is whether there was evidence from which the Committee could have concluded that the property was a leaky building and, if so, whether the licensees should have known about it. The second relates to the licensees' marketing of the property: whether they should have disclosed when marketing the property that there was a risk that it may be a "leaky building", and

whether the marketing should have been changed after Mr Munley pointed out leaks in the property.

[24] Logically, and notwithstanding the order of the Committee's findings, the first issue to consider is whether Mr Munley established that the property was a leaky building.

The first issue: Did Mr Munley establish that the property was a leaky building?

Submissions

[25] We note first that two questions appear to have been conflated in the Committee's decision and, to some extent, in submissions before the Tribunal. These are whether the house "leaked", and whether the house was a "leaky building". Patently, these are different issues, and raise different issues.

[26] Mr Munley submitted that the Committee was wrong to find that he had not established that the house leaked. He pointed to his own observation of a leak, and to the tenants' advice to him that water leaked through a ceiling light fitting in the kitchen. This was, he submitted, clear evidence of leaks, and the second respondents should have been aware of it.

[27] Ms Kenealy submitted for the licensees that Mr Munley's evidence, at its highest, established only that the properly had been poorly maintained and had leaked as a result of blocked drains. She submitted that the Committee had correctly found that Mr Munley had failed to establish leaking which required the licensees to market the property as a leaky building.

Our assessment

[28] We are satisfied that on the issue whether the house "leaked", there was sufficient evidence before the Committee (Mr Munley's evidence, the reported statements from the tenant, and the vendor's acknowledgement to Ms Kelland of water leaking into ceiling light fittings) from which it could reasonably conclude that it was established that the house leaked.

[29] That evidence would not, however, have been sufficient to meet Mr Munley's obligation (for the purposes of his complaint) to establish that the property was a leaky building. Mr Munley's reference to information he obtained in his due diligence does not provide further support as evidence for the property being a leaky building, as it relied on external appearance (rather than comprehensive testing), and evidence relating to other properties. It was not established that the property could be described as a leaky building until the building report was provided, which points to factors commonly found in leaky buildings (albeit not to the extent of a "disastrous systemic cladding failure").

[30] We are not persuaded that the Committee was wrong to find that Mr Munley had not established that the property was a leaky building.

The second issue: disclosure and marketing

Submissions

[31] Mr Munley submitted that the licensees should have gone further when listing the property, and should have checked the vendor's statement that there were no known issues with the property. He submitted that they should have spoken with the tenants to check the vendor's statement and that if they had done so, they would have become aware of water entry into the property. He then submitted that even after becoming aware of the issues with the property, the licensees continued to advertise the property with no mention of those issues. He submitted that the licensees had avoided disclosing that the property was a leaky building.

[32] Ms Kenealy submitted that once it was held that Mr Munley had failed to prove that the property was a leaky building, the other aspects of the appeal fell away. She further submitted that there was no "avoiding" of disclosure when the property was first marketed, as the licensees, first, encouraged the vendor to obtain a building report then, secondly, advised potential purchasers to obtain their own report. She submitted that if the vendor does not provide a building report it becomes the purchasers' responsibility.

[33] Ms Kenealy also submitted that there cannot, in any event, be a claim as to avoiding disclosure, as Mr Munley was very aware of a cladding issue, having carried out his own due diligence.

Our assessment

[34] Disclosure of defects is covered by r 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012. This provides that a licensee is not required to discover hidden or underlying defects (for example, houses built within a particular period of time, and of particular materials, which are or may be at risk of weathertightness problems) but must disclose known defects to a customer. Rule 10.7 goes on to provide that where it would appear likely to a reasonably competent licensee that land may be subject to such a defect, the licensee must either:

> (a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or
>
> (b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

[35] The Agency's policy on "potentially leaking homes" appears to be largely in accordance with the requirements of r 10.7. In the Agency's response to Mr Munley's complaint it was noted that the policy is:

> - That Vendors obtain a Building Inspection prior to putting the property on the market.
>
> - Pursuant to the disclosure requirements of the Act, in the event that the Vendor discloses any underlying defects, then this is disclosed to all prospective purchasers.
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> - In the event the Vendor does not state any defects on the agency agreement, we make it known to prospective purchasers that all homes of plaster construction built during this period may or may not be subject to defects, and that we urge them to carry out their own building inspection, and to take legal advice on the matter.
>
> - Where possible the disclosure of defects is stated in a clause in the Sale and Purchase Agreement or other documentation signed by the Vendor and Purchaser.

- Any Building Inspection Report obtained by the Vendor is to be made available to any prospective purchasers with the Vendor's permission.

- There are three layers of disclosure:
  1. At the time of listing with the Agency Agreement
  2. The Pre Listing Pre Settlement Checklist
  3. The Sale and Purchase Agreement or other documentation.

[36] In this case, disclosure and marketing is best considered at two stages: first, at the stage of Mr Munley's initial viewing and up to the time that the licensees went to the vendor and insisted that she obtain a building report, and secondly, after the building report was obtained.

(a): The initial period

[37] Mr Munley was told at the Open Home that there were no weathertightness issues "based on information provided by the vendor". However, while the vendor had said she was unaware of any issues, the appearance of the property (notably, the exterior cladding) was such that it would have appeared likely to any reasonably competent licensee (particularly a licensee in Auckland, where there has been a significant leaky building problem) that there was a significant risk of weathertightness issues. We note that the external cladding of the property was sufficient for the nearby engineer spoken to by Mr Munley, to suggest it was a leaky building. Accordingly, the licensees were required to consider r 10.7(a) and (b).

[38] As the vendor refused to obtain a building report and did not confirm, supported by evidence or expert advice, that the property was not subject to weathertightness issues, r 10.7(b) applied. The licensees were required to ensure that all customers (including Mr Munley) were informed of the potential risk of weathertightness issues so that they could seek expert advice if they so chose. This is particularly so for a customer who may be unfamiliar with the "leaky home" problem.

[39] In the present case, the licensees did not comply with r 10.7(b), or the Agency's policy. Mr Williams did not make any comment to Mr Munley at the Open Home as to the construction of the house. He could not rely on the vendor's statement as to not knowing of any issues, and it was not sufficient for him to

recommend that Mr Munley get his own report. Nor did providing the LIM assist disclosure.

[40] Our conclusion with respect to this first stage is in line with the Tribunal's comments in *Mrs C v Complaints Assessment Committee*,[1] concerning a family who had immigrated from England, and bought what was later identified as a leaky building. The Tribunal considered the appeal by reference to the earlier 2009 Rules, which contain an equivalent provision to the current r 10.7. The Tribunal observed that there is no "one size fits all" approach to disclosure, particularly when a licensee is dealing with purchasers who may have no knowledge of the problem and therefore be in no position to evaluate what may be obvious signs of weathertightness problems the property presents.[2]

[41] This appeal concerns, as noted earlier, the marketing of a property which appeared likely to have a weathertightness problem. As the most obvious external indication of a possible weathertightness problem is the external cladding, a licensee should, at the very least, point out the nature of the cladding to a potential purchaser, and strongly suggest that the potential purchaser obtain a comprehensive building report.

[42] Somewhat similar considerations apply in respect of advertising a property where it appears likely that there may be a weathertightness problem. A licensee, particularly an experienced licensee, should be able to read the signs of a building that needs maintenance and may have some issues associated with a plaster-type exterior. Real estate managers must be aware, from personal inspection, that a new property coming onto the market may require the licensees marketing the property to disclose issues, including (but not limited to) a possible weathertightness problem. As a matter of good practice in the advertising for such a property, a licensee should incorporate some wording which would alert a potential purchaser as to the possibility of such a problem. In the present case, although we express no firm view on this point, the advertisement may have achieved this by using the word "roughcast", given that it was highlighted in the listing agreement.

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1 *Mrs C v Complaints Assessment Committee* [2011] NZREADT 19.
2 At [33]-[34].

(b): The later period

[43] In the later period, the licensees went to the property and insisted that the vendor obtain a comprehensive building report. With the vendor's consent, they provided a copy of the report to Mr Munley, and to any other potential purchasers. At this stage potential purchasers were, therefore, made aware of the risk of a weathertightness problem. There can be no complaint as to the licensees' compliance with the disclosure obligations under r 10.7, at this later stage.

[44] As to advertising during the later period, when a licensee has been made aware of evidence of a significant potential risk of a weathertightness problem, it would be prudent as a matter of good practice to amend advertising to alert potential purchasers to that risk, if the initial advertising did not do so. This was the conclusion reached by the Tribunal in *McTernan v Real Estate Agents Authority*,[3] where the Tribunal considered advertising that was not changed when a leaking roof was discovered. The Tribunal commented that "ideally", the licensees "should have reconsidered the advertisement", and that, as a matter of practice, an agency "should review all advertising when previously unknown defects are discovered."[4]

[45] We record here our concern as to the Committee's statement in relation to the issue of whether the advertising should have been changed, that advertising "is a matter for the Vendor of the Property to decide and in this case there was no directive to the Licensees from the Vendor to change the advertising."

[46] The Committee's statement was no doubt founded in r 10.9:

> A licensee must not advertise any land or business on terms that are different from those authorised by the client

[47] However, that must be balanced against a licensee's duty not to mislead (r 6.4):

> A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

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3 *McTernan v Real Estate Agents Authority* [2016] NZREADT 9.
4 At [22(v)].

It must also be balanced against a licensee's obligations under r 10.7 (set out earlier), and a licensee's obligation under r 10.8:

> A licensee must not continue to act for a client who directs that information of the type referred to in rule 10.7 be withheld.

(c): Overall assessment as to disclosure and advertising

[48] For this appeal, in respect of disclosure and marketing, we must take Mr Munley's particular circumstances into account. While he had recently returned to New Zealand after a very long period overseas, he went to considerable (and commendable) lengths in his due diligence regarding the property. As a result of his efforts, he became aware of the weathertightness risk from a very early stage, and framed his purchase offer accordingly. He, personally, was not misled by any failings in disclosure, or the advertising. By virtue of his careful due diligence, Mr Munley is not in the same position as a person who has no knowledge of the leaky home problem, and is thus in no position to evaluate the problem in a particular property.[5]

[49] Further, it is relevant to our assessment that any shortcomings as to disclosure and marketing were remedied by the licensees and the Agency, to a large extent, when the building report obtained by the vendor was provided to Mr Munley and all potential purchasers.

[50] In those circumstances, while we have expressed reservation as to disclosure and advertising of the property, particularly at the initial stage, we are not persuaded that the licensees' and Agency's conduct at this stage would have founded a disciplinary charge, or that the Committee was wrong to decline to deal further with this aspect of the appeal.

[51] However, we refer the licensees and the Agency to the Authority's 2014 continuing education course, which was also part of the Authority's annual verifiable education course for all licensees, which included under the heading "The legal and

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5 As noted in *McTernan*, at [22(iv)] this is a relevant factor in assessing a licensee's conduct.

physical description and representation of real estate"; "Part 2: General Principles of Disclosure"; "Advertising", the following statement:

> Advertisements are a brief summary, rather than a full disclosure of all facts about a property or business. Full disclosure is usually restricted to property description packages made available to prospective customers after they have responded to an advertisement, or otherwise been made aware of the property or business being offered. However in every case you must take care to be accurate and honest, and avoid creating an impression that may be misleading or deceptive.

Outcome

[52] In respect of the first aspect of the appeal (the issue as to whether the Committee was wrong to find that Mr Munley had not established that the property was a leaky building) we were not satisfied that the Committee was wrong in its decision to take no further action in respect of the complaint. We have reached a similar conclusion on the second aspect of the appeal. Accordingly, Mr Munley's appeal must be dismissed.

[53] Our consideration of the second aspect of the appeal (as to disclosure and advertising) leads us to draw licensees' attention to r 10.7. When licensees can see from their own knowledge and experience that a property may be subject to hidden or underlying defects (such as that it may be a leaky home), it is simply not sufficient for licensees to rely on representations from a vendor, and to recommend that potential buyers obtain their own building report.

[54] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.

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Hon P J Andrews
Chairperson

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Mr G Denley
Member

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Mr J Gaukrodger
Member