

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2016] NZREADT 56

READT 008/15

IN THE MATTER OF an appeal under s111 of the Real Estate Agents Act 2008

BETWEEN JOHN EICHELBAUM
Appellant

AND THE REAL ESTATE AGENTS
AUTHORITY (CAC 303)
First respondent

AND ROSALYN CLAIRE WHITE
Second respondent

Hearing: 5-7 July 2016, at Auckland

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

Appearances: Mr J Eichelbaum, Appellant, in person
Mr M Hodge, on behalf of the First respondent
Ms R White, Second respondent, in person
Mr J Katz QC (given leave to withdraw as counsel for Ms White at the start of the hearing)

Date of Decision: 22 August 2016

DECISION OF THE TRIBUNAL

Introduction

[1] The Appellant, Mr Eichelbaum, has appealed against the decision of Complaints Assessment Committee 303 (the Committee) dated 16 January 2015 (the decision) in which it determined pursuant to s 89(2)(c) of the Real Estate Agents Act 2008 (the Act) to take no further action with regard to a complaint made by Mr Eichelbaum against the second respondent, Ms White. Mr Eichelbaum's complaint

related to the purchase by his family trust of a property in Parnell, Auckland, owned by Ms White's family trust (the property).

[2] The issue raised in the appeal is whether the Committee should have decided to lay a charge of misconduct against Ms White under s 73 of the Act, for breach of rr 6.2, 6.4, and 6.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009¹ (the Rules), or made a finding of unsatisfactory conduct under s 72 of the Act, rather than deciding to take no further action.

[3] As a preliminary point, we note that following Mr Katz QC's withdrawal as counsel, Ms White appeared on her own behalf. We have taken that into account in our consideration of this appeal, and Ms White's response to it. However, we also note that Ms White was represented by senior counsel up until Mr Katz's withdrawal. All statements of evidence adduced by Ms White referred to Mr Katz as counsel. At the hearing itself, Ms White cross-examined witnesses for Mr Eichelbaum, in some detail.

Background facts

[4] This summary of the relevant facts is based on the summary of facts set out in the Committee's decision. Matters in dispute have been omitted from this summary.

[5] The property had been owned by Ms White's family trust since 1982, and she lived in it until it was sold to Mr Eichelbaum's family trust. It is a large three-storey villa which had been divided into two apartments and a basement "Granny flat".

[6] The property first went on the market in September 2008, with Premium Real Estate. Thereafter, it was listed with a number of real estate agencies, as a sole or general agency. The agencies included Ms White's agency, Rossi White Realty Ltd, and Bayleys Real Estate Ltd (Bayleys).

¹ These Rules were in force at the time of the alleged conduct. They have since been revoked and replaced by the Real Estate Agents Act (Professional Conduct and Care) Rules 2012. Rules 6.2 and 6.4 of the 2009 Rules are reproduced as rr 6.2 and 6.4 of the 2012 Rules. Rule 6.5 of the 2009 Rules has been replaced (in almost identical terms) by r10.7 of the 2012 Rules.

[7] Mr Eichelbaum first viewed the property with his wife (now deceased) at an Open Home on 20 December 2009. Ms White was present at the house. An offer by Mr Eichelbaum's trust to buy the property was accepted by Ms White's trust on 24 March 2010.

[8] Mr Eichelbaum subsequently obtained engineering reports regarding the property by Mr Westwood of HFC Civil & Structural (North) (dated 24 June 2010), and by Tonkin & Taylor Ltd (dated 11 August 2010.) As a result of advice given to him, Mr Eichelbaum wrote to Ms White on 20 December 2010, complaining that she had failed to disclose defects in the house, which were to do with foundations or perhaps sinking of some description under the house. Ms White responded on 2 February 2011, stating that the house had been sold in good faith and to her knowledge with no defects, so that there was nothing to disclose.

[9] Mr Eichelbaum commenced a proceeding against Ms White in the District Court at Auckland in March 2011. This proceeding was ultimately discontinued. The Tribunal notes that this proceeding was issued in the civil jurisdiction of the District Court, and has not been finally determined by way of a judgment. Accordingly, the District Court proceeding and documents produced for the purposes of the proceeding are not of assistance in determining the present appeal.

[10] Mr Eichelbaum's complaint to the Authority was filed on 25 November 2011. He filed an amended complaint on 5 December 2011. The complaint contained three principal allegations: that Ms White had failed to disclose known defects in the property, had falsely advertised the age of the property, and had failed to fully disclose the property's lack of compliance with Auckland Council requirements.

[11] The complaint was initially considered by Complaints Assessment Committee 20003 (CAC 20003), which determined to inquire and investigate the complaint, but to defer any hearing pending the outcome of the District Court proceeding. CAC 20003 was subsequently disbanded. Mr Eichelbaum's complaint was passed to the Committee in September 2014, for fresh consideration. The Committee considered the complaint on 10 September 2014.

The Committee's decision

[12] The Committee dealt with three issues:

- [a] *Whether Ms White was acting as a real estate agent when she sold the property to Mr Eichelbaum's trust (as Mr Eichelbaum contended), or as a trustee vendor (as Ms White contended):*

On this point, the Committee concluded that there was sufficient evidence to support a finding that Ms White was acting in her capacity as a real estate agent. Accordingly, the Committee found that Ms White's actions are subject to the standards prescribed by the Act and the Rules.

- [b] *Whether Ms White misled Mr Eichelbaum as to the age of the property:*

On this point, the Committee found that the allegation was not proven and that, therefore, it would take no further action on that part of the complaint.

- [c] *Whether Ms White knew about serious defects to the foundations of the property and failed to disclose these to Mr Eichelbaum:*

The Committee referred to this as being the main cause for concern in the complaint. It referred to evidence adduced by Mr Eichelbaum from builders and a re-piler, as to finding (upon removing part of the basement floor) that there were no foundations under a load-bearing wall. The Committee also referred to Ms White's submission that she did not know of any defects to the property, and that Mr Eichelbaum had had ample time to complete due diligence before buying the property. The Committee concluded that it had insufficient evidence before it to determine that Ms White knew of the state of the foundations.

- [d] *Whether appropriate building consents were obtained for work on the property:*

The Committee again concluded that it had insufficient evidence to determine that Ms White knew, or ought to have known, that work was unconsented when it required a consent.

[13] The Committee came to the view that it was unable to provide the evidential sufficiency required to find unsatisfactory conduct, or to lay a charge of misconduct against Ms White.

The appeal

[14] The question of building consents was not pursued on appeal. The issues argued on appeal may be summarised as follows:

- [a] Was Ms White acting as a real estate agent when she sold the property?
- [b] As to the foundations:
 - [i] At the time Ms White sold the house, were the foundations under the basement granny flat rotten or absent?; and
 - [ii] If the answer to [b][i] above is “yes”, did Ms White know about it?
- [c] As to “serious defects”:
 - [i] Was the house sinking on its north side?, and
 - [ii] If the answer to [c][i] above is “yes”, did Ms White know about it, and that this meant that it was likely that there was a hidden defect in the foundations

[15] It will be clear from the above summary of issues that it was not disputed that Ms White did not in fact disclose any defect as to the foundations, or as to the house sinking.

[16] The appeal hearing proceeded as a de novo hearing. Both Mr Eichelbaum and Ms White gave evidence and were cross-examined. Both called witnesses, who were also cross-examined. The Tribunal has therefore had the advantage of seeing and hearing the witnesses.

First issue: Was Ms White acting as a real estate agent?

Relevant evidence

[17] The property was advertised in “Property Press” prior to Open Homes on 19 and 20 December 2009 with references to Bayleys and Rossi White Realty. On 10 December 2009 Ms White sent an email to the Bayleys agent, attaching her logo for this advertisement, and saying that she would like to do the Open Homes on 19 and 20 December 2009.

[18] The property was also advertised online on Open2View with the “Sales Consultants” stated to be “Rossi White AREINZ – Rossi White Realty”. The invoice from Open2View for this advertising was addressed to “Rossi White AREINZ”.

[19] Ms White provided Mr Eichelbaum with her business card at his first viewing of the property. (We note that there is a dispute as to whether Ms White’s photograph was on the card.)

[20] Ms White sent emails to Mr Eichelbaum from the time he offered to buy the property up until the sale of the property was concluded, which were signed off “Rossi, Rosalyn White AREINZ, Rossi White Realty MREINZ”. We note that an email sent by Ms White on 2 February 2011 had the sign-off after “Rossi” removed.

[21] Ms White faxed a letter to Mr Eichelbaum’s solicitors on 21 December 2009, with a copy of the Certificate of Title to the property. The letter is on “Rossi White Realty” letterhead. Mr Eichelbaum sent a text message to his solicitors on 22 December 2009, referring to “the agent Rossi White”.

[22] Ms White gave evidence that she conducted the Open Home attended by Mr Eichelbaum on behalf of the Bayleys agent, who was away from Auckland on holiday. She also said (in answer to questions in cross-examination from Mr Eichelbaum and counsel for the Committee, Mr Hodge), that at the time of the purchase in 2009-2010, she understood that she had a joint sole agency with Bayleys.

She further said that when she inspected Bayley's documentation at a later stage, she concluded that in fact, Bayleys alone held a sole agency.

Submissions

[23] Mr Eichelbaum submitted that it is clear from the evidence set out above that Ms White was acting as an agent throughout the sale process.

[24] Ms White submitted that she had mistakenly thought she had a joint agency, but had later discovered that Bayleys were the sole agency. She also submitted that she had put her logo on the advertising material, and conducted the Open Homes, so that the sale process could be continued over Christmas, when the Bayleys agent was going to be out of Auckland. She further submitted that the signature footers appeared automatically on her emails, and did not prove or support Mr Eichelbaum's argument.

[25] In addition to these submissions, Ms White submitted that Mr Eichelbaum had himself prepared the Agreement for Sale and Purchase (on a form she does not use) and had not entered her name, or that of Rossi White Agency, in the relevant space on the form. She said this supported her argument that she was not acting as a real estate agent, and that Mr Eichelbaum knew that to be the case.

Our assessment

[26] It is irrelevant that at a later stage Ms White decided that she had not held a joint sole agency for the sale. What is relevant is her understanding at the time of the sale. Her understanding clearly was that she was acting as a real estate agent. Whether she did so on her own account, or jointly with other agents, does not alter the relevance of her understanding at the time.

[27] The evidence of advertising, the emails to Mr Eichelbaum, and the correspondence with Mr Eichelbaum's solicitors, together with Mr Eichelbaum's own message to his solicitors, all support a conclusion (and reinforce her own understanding) that Ms White was in fact acting as a real estate agent at the time of

the sale. The Agreement for Sale and Purchase is not determinative one way or another. It is irrelevant who obtained it and filled it in, and it is not surprising that Mr Eichelbaum would not fill in an agent's name, but would leave it for the agent to do.

[28] We are not persuaded that the Committee was wrong to conclude that Ms White was acting as a real estate agent. We find that Ms White was acting as such. Ms White is, therefore, subject to the standards set out in the Act and the Rules.

Second Issue: Were the house's foundations rotten and/or absent and if so, did Ms White know that?

(a) What was the state of the foundations?

(i) Relevant evidence

[29] The relevant evidence on this issue is that of Mr Ruebe, a tradesman who worked on the property in 2008, and Messrs Stone, Harvey and Julian, who worked on it in 2011-2012. Mr Ruebe did not give evidence at the hearing, but notes he made at the time of his work were available to the Tribunal. Messrs Stone, Harvey and Julian all gave evidence and were cross-examined. The evidence before the Tribunal included photographs of the relevant parts of the house structure.

[30] Mr Ruebe's notes referring to four days' work are paraphrased:

- [a] Day 1: he ripped off rotten sill boards at the back of the house, and saw that the bearer was "gone" as well as the sill boards. He replaced rotten weatherboards. Mr Ruebe noted that he "told Rossi about this and I said I would pick up a new length for her".
- [b] Day 2: he chipped out an old rotten bearer, put a few new studs in and took off Gib on the inside that was water damaged.
- [c] Day 3: he carefully ripped off all the rotten weatherboards and replaced them with new ones.

[d] Day 4: he built a retaining wall under the house five boards high and capped the top. He recorded that this was to retain a foot path where dirt was falling down and undermining etc, and that Ms White then got him to look at a bad bit of rot on a facing board at the back of house and to fix that. He chipped out rot and cut a new piece. He recorded that Ms White then got him to look at middle level bifold doors, and he planed a bit off doors about 3 mm at two spots, after which they closed “heaps better”.

[31] Mr Stone, a builder with more than 20 years’ experience in the building industry and who has carried out building work and repair work on many old villas, gave evidence that he was engaged by Mr Eichelbaum to carry out repairs to the foundations of the house. The Tribunal was referred to the evidence set out in Mr Stone’s statement dated 13 March 2012 (submitted to the Authority’s investigator), a brief of evidence dated 14 August 2015, an amended brief of evidence dated 26 January 2016, and a supplementary brief of evidence dated 12 February 2016. Regarding the state of the foundations, Mr Stone said in his amended brief of evidence:

3. ... we excavated a small segment of the floor in the north east corner of the basement flat to find out more about the existing state of the foundations.
4. This was done in late 2011.
5. When we removed a segment of the concrete flooring in the north east corner, we discovered for the first time that there appeared to be no foundations at all under the load bearing East facing wall, and in the place we excavated, the house was suspended in mid air.
 6. It had previously been impossible to know what the state of the foundations on the East Wall was because concrete ran right up to the edge of the wall on both the inside and outside.
- ...
11. I felt there was little support for the heavy three storey house before. It was resting on bearers which were very old and rotten. In many cases they had rotted through entirely at the bottom and do were not connected to anything to support the house at the foot.
12. We uncovered some old totara stumps during the job. These were probably the equivalent of piles at the time the house was built. It seemed to me that many did not connect up to the other wood supporting the house at all. Age had rotted both the wood and the totara.

[32] Mr Julian, a builder who worked with Mr Stone, made similar statements in a brief of evidence dated 14 August 2015, and an amended brief of evidence dated 26 January 2016.

[33] Mr Harvey, a re-piler with more than 20 years' experience, was engaged by Mr Eichelbaum to assist with re-piling the house. He said in a statement of evidence dated 24 March 2012 (confirmed in a brief of evidence dated 14 August 2015) that he was present at the house directly after Mr Stone first began removing concrete flooring in the basement to get it ready for the planned re-piling and foundation work. He further said:

...

9. The whole basement flat area, which was mainly just old and in many cases rotten wood resting on the ground with no piling support at all, needed replacing with proper piles and/or a concrete footing, as [Mr Eichelbaum] did.
10. The house was on old rotten wooden piles in the rear part under the Granny flat.

...

(ii) *Submissions*

[34] Mr Eichelbaum submitted that it is clear on the evidence, in particular that of Messrs Stone and Harvey, that the foundations for the rear part of the house under the Granny flat were rotten or absent. Ms White was critical of the builders' evidence, but focussed in her submissions on the the issue of whether she knew that the foundations were rotten or absent.

(iii) *Our assessment*

[35] On the basis of the evidence of Messrs Stone, Julian and Harvey, and having viewed the photographs produced, we have concluded that there is no doubt that the foundations under the Granny flat were rotten and/or absent, and that this had been the case for a long period of time.

[36] We find that the foundations at the rear of the house, underneath the Granny flat, were rotten and/or absent.

(b) Did Ms White know that the foundations were rotten and/or absent?

(i) Relevant evidence

[37] As set out at paragraph [30], above, Mr Ruebe recorded that he “told Rossi about” the bearer that was “gone as well” (on Day 1) and that Ms White gave him instructions about the work (on Day 4). When cross-examined by Mr Eichelbaum, Ms White accepted that it was “correct that [she] was constantly overseeing” Mr Ruebe, and had marked a piece of rot that he had missed.

[38] In Mr Stone’s amended brief of evidence, referred to at [31], above, he stated that he “discovered for the first time that there appeared to be no foundations “ after removing a segment of concrete”, and that “it had previously been impossible to know what the state of the foundations on the East Wall was”.

[39] Mr Stone said, when cross-examined by both Mr Hodge and Ms White, that the person who worked on the house earlier (that is, Mr Ruebe) would have seen that the foundations were absent and/or rotten. His evidence was that it was not possible that he did not see this. He further said that when Mr Ruebe replaced the rotten bearer (noted by Mr Ruebe on Days 1 and 2) “it would have been obvious that the house was essentially hanging”.

[40] In Mr Julian’s amended brief of evidence he stated:

...

7. You couldn’t see under the Granny flat (back) part of the house because it was right down to ground level.
8. You could see some concrete at the back of the Granny flat from the walk-in storage area at the front the house. In the end, after full excavation, this turned out to be misleading. ...
9. When we excavated in late November we discovered that there were no proper piles under the back part (Granny flat) area of the house at all.

...

15. The problem was that the house was resting on very old totara stumps that may even have been original from when the house was first built. These were quite rotten, and went all the way around the granny flat at the lowest level of the house, we discovered after fully excavating under the house ...

...

17. It was not possible to identify these problems before excavating the concrete floor out in the granny flat.

[41] Mr Julian also said, when cross-examined by Mr Hodge, that he saw rotten totara piles which were waterlogged, and smelt when they were exposed. He also said that Mr Ruebe should have noticed the rotting piles in the course of the work he did. When cross-examined by Ms White, he accepted that it took a deconstruction to find the rotten and/or absent piles.

[42] Mr Simon Paykel was called by Ms White as an expert witness. His evidence will be referred to in more detail later, in relation to the issue of sinking. In his statement of evidence he did not refer to the state of the piles. It is apparent from his brief of evidence that his instructions did not include commenting on the state of the foundations. However, the night before he gave evidence, he was provided with the statements by Messrs Stone, Julian and Harvey. In answer to a question from Ms White, he said that it would take a deconstructive investigation to discover what was under the house; that is, to observe the state of the foundations.

[43] In her own evidence, when cross-examined by Mr Eichelbaum, Ms White agreed with his proposition that in 28 years' ownership of the house, she had never shown any interest in finding out how the foundations were under the Granny flat.

(ii) *Submissions*

[44] Mr Eichelbaum submitted that the work done by Mr Ruebe in 2008 must have made Ms White aware of the state of the foundations. In this, he relied on the evidence of Messrs Stone and Julian that the state of the foundations "must have been obvious" to Mr Ruebe because of the nature of his work. He further submitted that "common sense" would dictate that everybody would be curious to know the state of the foundations in a house one has been occupying for decades, but had not previously seen them because concrete running up to the edges obscured them.

[45] Ms White submitted that the state of the foundations was not revealed until deconstruction of the relevant area. That being the case, she submitted that she did not know, and could not have known, that piles were rotten and/or absent. She

submitted that “if a purchaser goes digging around the foundations of any 100 year old house shortly after purchase they are guaranteed to find problems”. Ms White was also critical of Mr Ruebe’s notes. She contended that they had been prepared after the event, when she queried the charge for his work.

(iv) Our assessment

[46] Whether Ms White knew about the state of the foundations can only be determined by inference from the evidence. The evidence must be such that we can reasonably infer that Ms White must have known that the foundations under the Granny flat were rotting and/or absent. Here, as noted earlier, the relevant evidence comprises Mr Ruebe’s notes relating to his work in 2008, and the evidence of Messrs Stone and Julian relating to their work in 2010-2011. The evidence of visitors to the house does not assist us to reach a conclusion as to Ms White’s knowledge.

[47] Mr Ruebe’s notes do not contain any direct reference to rotten foundations. He did refer to other areas of rot. We have no doubt that if Mr Ruebe had noticed rotten foundations, he would have referred to them in his notes. This is so whenever the notes were prepared. We also have no doubt that if Mr Ruebe had noticed rotten or absent foundations, he would have told Ms White about them. The fact that he has recorded other matters he told Ms White about supports our view that he would have told her about rotten or absent foundations. Although Ms White accepted that she had “constantly” overseen Mr Ruebe’s work, that does not necessarily lead to the conclusion that she must have become aware of the state of the foundations.

[48] We place weight on the evidence of Messrs Stone and Julian, that they did not discover the state of the foundations until they started excavating. As Mr Stone said, they “discovered for the first time” the rotting and/or absent foundations, and Mr Julian said that they discovered the extent of the rotten totara stumps “after fully excavating under the house” and that it was “not possible to identify these problems before excavating”. That evidence is in line with Mr Paykel’s evidence, and Mr Julian’s acceptance, that the state of the foundations was not evident until a deconstructive investigation was undertaken.

[49] There is no evidence that the state of the foundations was in plain sight, or in any way obvious to Ms White. We cannot reasonably infer that Ms White knew that the foundations under the Granny flat were rotting and/or absent. We find, therefore, that the Committee did not err in concluding that there was insufficient evidence on which a finding could be made that Ms White knew about the state of the foundations.

Third issue: was the house sinking and, if so, did Ms White know that the house was sinking on its north side, and that this meant it was likely that there was a hidden defect in the foundations?

(a) Was the house sinking on its north side?

(i) Relevant evidence

[50] A report was commissioned by Mr Eichelbaum from a firm of engineers, HFC Civil and Structural (North) Ltd. Although HFC did not submit a final report, Mr Eichelbaum was given a report prepared for HFC by Mr Derek Westwood, professional engineer, who was at the time employed by HFC. Mr Westwood was reluctant to give evidence, and appeared under summons. However, he conceded that he had written a report following an inspection of the house (described as “a brief and localised inspection”) on 11 June 2010, and that the report shown to him at the appeal hearing was to the best of his knowledge a copy of that report.

[51] In this report, Mr Westwood recorded, regarding the “master bedroom”, “cracks and hairline cracks evident at valley beam where supported off post above west/east living areas”. Regarding the “west living room”, he recorded “hair line cracks evident in two walls; the wall between the west and east living rooms and west living room and entrance hall”. He also recorded that “in some area [sic] the house has been recently decorated and thus historic movement may have been masked”. He concluded his report: “In summary the observations noted at the time of our survey were not uncharacteristic of many house (sic) of this type and age”. In the light of Mr Westwood’s concession that he prepared the report, we have found it of assistance, and have taken it into account.

[52] A report prepared by Tonkin & Taylor, engineering consultants, was provided to the Tribunal. The report is addressed to Mr Eichelbaum, care of HFC, and is dated 21 August 2010. Although the geotechnical engineer who co-authored the report (Mr Hope) was not required to give evidence or be cross-examined at the hearing, we have considered the report, and have found it of assistance in determining this issue. The authors stated, having carried out a differential measurement, that the house “has experienced differential settlement in the order of 30 to 50 mm”. The report also noted that the settlement “appears to have resulted in vertical cracking on the middle and upper storeys, and a drop in floor levels on the north side of the dwelling”.

[53] In his amended brief of evidence Mr Stone stated (at paragraph 17): “we used a laser measuring device to determine a 30-75 mm decline on the North side prior to levelling of floors in the lounges on the street level and upper (attic) level”. When cross-examined by Mr Hodge, Mr Stone said that he found that the house was “on a lean”, about three inches out of level”. When cross-examined by Ms White, Mr Stone accepted that he had not undertaken a differential measurement.

[54] Mr Julian referred in his amended brief of evidence (at paragraph 12) to “the sinking on the North side which had caused cracks to start to appear in the house above” and said that “by 2012, some doors weren’t opening well as a result of the sinking”. He also said (at paragraph 18) that “we used a laser measuring device to determine a 30-75 mm decline on the North side prior to the levelling on floors in the lounges on the street level and upper (attic) level”. Ms White cross-examined Mr Julian on the issue of sinking, and put to him that Tonkin & Taylor found a “20 mm fall”² and Mr Julian responded that “20 mm of fall means sinking”.

[55] Mr Eichelbaum produced photographs of cracks in inside walls of the house. A statement of evidence by the photographer (admitted without challenge) recorded that the photographs were taken in November 2011 and March 2012. Mr Eichelbaum said in evidence that the house was not level. He referred to the use of pollyfiller to cover up cracks, a bottle placed on the top end of a cupboard rolling

² In fact, as noted a paragraph [52], Tonkin & Taylor found a “differential settlement in the order of 30 to 50 mm”.

downhill and grills in the oven sloping downwards. He produced a video of a bottle rolling down a balustrade on a balcony.

[56] In his statement of evidence Mr Paykel said:

...

[20] From my inspection I observed no obvious signs of subsidence which would be outside of what would be expected of a house of this age of the dwelling at the time of my visit, I could not determine if the house was sinking or subsiding on the north side from my visual observations because there were no typical signs such as cracking to the interior or exterior linings or cracking of the exterior paving immediately adjacent to the alleged affected area.

...

[24] I have not seen any documentation or engineering report that supports the allegation that the house was sinking.

Mr Paykel dismissed the use of polyfiller as indicating cracks demonstrating sinking, saying that polyfiller is widely used prior to painting.

[57] In her own evidence, Ms White said that the floors were level, although she also said, when cross-examined by Mr Hodge, that if there were a slight imbalance, “you put a wedge to balance, but the wedges I used were less than 30mm (and less than 5mm)”. She put to Mr Eichelbaum that the evidence of his builders was completely untrue.

(ii) *Submissions*

[58] Mr Eichelbaum submitted that the evidence of Messrs Stone and Julian, together with that of Tonkin & Taylor, established that the house was sinking. He submitted that the evidence of Mr Paykel should be disregarded, as he had not been asked to consider the evidence of Tonkin & Taylor, Mr Westwood, and Messrs Stone and Julian. He submitted that there was no effective challenge to their evidence of declining floors (as measured by them), and that Mr Westwood’s evidence established that the house was sinking.

[59] Ms White was critical of the evidence of Mr Stone and Mr Julian, and submitted that as their evidence of laser measuring was included for the first time in

their amended briefs of evidence in January 2016, “there would appear to be some conspiracy going on”. She was also critical of the Tonkin & Taylor report, submitting that it was not clear whether Mr Hope had inspected the alleged damage, or had relied on Mr Eichelbaum’s description of it.

Our assessment

[60] We accept the evidence of the Tonkin & Taylor report. We note that Ms White did not require Mr Hope (co-author of the Tonkin & Taylor report) to be present for cross-examination, and cannot now contend that he did not observe for himself what was recorded in the report. This report was prepared in August 2010 (which we note was shortly after Mr Eichelbaum took possession of the house) and was available to Ms White well before she ceased to be represented by counsel. We accept that Tonkin & Taylor’s differential measurement disclosed sinking in the order of 30 to 50 mm.

[61] We also accept the evidence of Messrs Stone and Julian, that their laser measurement also disclosed sinking. In this respect, we note that “sinking on the north side” was mentioned by both Mr Stone and Mr Julian in their original briefs of evidence. Notwithstanding that the laser measurement resulted in a different range of sinking (having the higher level at 75mm rather than Tonkin & Taylor’s 50mm), what is significant is that both forms of measurement found sinking of at least 30mm.

[62] We note Mr Eichelbaum’s evidence of visual indications of sinking (such as items rolling on top of cupboards) but place more weight on the evidence of measured sinking.

[63] We note the evidence as to cracking, and as to the use of polyfiller. While we accept that polyfiller may be used to cover cracks occurring because of sinking, we also note Mr Paykel’s observation that polyfiller is widely used, for a number of purposes, and is not necessarily indicative of sinking. We have not taken evidence as to polyfiller into account in determining whether the house had sunk.

[64] We do not find Mr Paykel's evidence that he did not find any evidence of sinking to be of assistance. Mr Paykel did not undertake any form of measurement in order to determine whether there was sinking or to support the statement set out at [56], above and we note that, as Mr Paykel adds, he relied on "visual observations" only. Further, it is evident from his narration at paragraph [12] of his evidence, of the "reports and documents considered" that he was not provided with Mr Westwood's report, Tonkin & Taylor's report, or the evidence of Messrs Stone and Julian, prior to preparing his evidence. He confirmed when cross-examined by Mr Eichelbaum, that he had not been asked to critique them. Nor had been asked to view the photographs taken in November 2011 and March 2012.

[65] Although Mr Paykel's statement prepared for this hearing is undated, it is evident from the fact that he referred in it to Mr Eichelbaum's Notice of Appeal (dated 16 February 2015) that all of the material referred to above (in particular Tonkin & Taylor's report) was available before the statement of evidence for this hearing was prepared.

[66] In accepting the evidence of the Tonkin & Taylor report, and of Messrs Stone and Julian, we reject Ms White's evidence that the house was level.

[67] We find that the house had sunk by at least 30mm.

(b) Did Ms White know that the house was sinking and that this meant that it was likely there was a hidden defect with the foundations?

(i) Relevant evidence

[68] In his notes for Day 4 of his work, Mr Ruebe states that after Ms White asked him to look at the middle level bifold doors, he planed a bit off the top of the liner (1.5-2mm), and planed a bit off the door (about 3 mm), and "after that they closed heaps better".

[69] In his amended brief of evidence Mr Stone stated (at paragraph 15) that he "pointed out to Mr Eichelbaum that some of the previous alterations had been done to accommodate the sinking. So the wood under the window in the attic was slightly

narrower at the South end than at the North end”. Mr Julian stated (at paragraph 12 of his amended brief of evidence), that “by 2012, some doors weren’t opening well as a result of the sinking”.

[70] In his brief of evidence Mr Eichelbaum stated that after moving in he noticed signs of sinking that were subtle and slight rather than pronounced, but noticeable after a period. He said they were not immediately obvious, but obvious to him living there. Details of these signs have been set out above, in the summary of Mr Eichelbaum’s evidence relating to whether the house was sinking, and need not be repeated.

[71] Mr Eichelbaum also said in his evidence that Ms White had told him, in a telephone conversation, that “the house has always been sinking on the North side”. He could not recall when the conversation occurred, but he said he raised the issue of sinking and Ms White responded, in an “inconsequential way”.

[72] In her evidence, Ms White vehemently denied having told Mr Eichelbaum that the house had “always been sinking”, and that his evidence of such a conversation was a complete lie. She called evidence from visitors to the house who did not notice any structural defects. She also said that no one had complained of unevenness.

[73] The evidence for Ms White included that of Mr Baxter, a solicitor, who is a trustee of Ms White’s family trust. He said in an affidavit, sworn on 10 June 2016 and filed for the proceeding before the Tribunal that:

22. As trustee, ... I was unaware that there was any issue about the house sinking in the North side, such that remedial work or foundation work was necessary.

[74] Mr Paykel concluded his evidence by saying “I do not consider that an owner living at this particular home would have known the house to be sinking on the northern side”.

(ii) *Submissions*

[75] Mr Eichelbaum submitted that the signs of sinking were such that they would have been obvious to Ms White, that she could not have missed it. He submitted that from the extent of the measured sinking, while that may not have been noticed by visitors, the Tribunal could infer, from the fact that Ms White had lived in the house for 28 years, that she must have been aware of it. He also submitted that the Tribunal could accept his evidence that Ms White told him in a telephone call that the house had “always been sinking”.

[76] As recorded earlier, Ms White denied that the house was sinking. She also submitted that she did not know, and could not have known, that it was sinking.

(iii) Our assessment

[77] As we said earlier, the issue of what Ms White knew can only be determined by inference from the evidence before us. On this particular issue, there must be evidence from which we can reasonably infer that Ms White must have known that the house was sinking. We do not find evidence of people who visited, and were there a relatively short time, of assistance in determining this issue. Mr Eichelbaum’s evidence was that the sinking was only evident after being in the house for a prolonged period of time. We accept that in the absence of measured sinking, that will be so.

[78] We note the evidence of Mr Stone and Mr Julian but, as they acknowledged, they had excavated and found rotten and/or absent foundations. Therefore, they may be said to have been working backwards from that position. So we do not find their evidence leads inevitably to a conclusion that Ms White must have known of the sinking.

[79] We also have difficulty with Mr Paykel’s evidence as, as noted earlier, he was working from visual observations made on only two occasions, and had not seen the evidence of, in particular, the Tonkin & Taylor report.

[80] There is, however, evidence which does assist us in determining whether Ms White must have known that the house had sunk.

[81] There is, first, the evidence of what Mr Ruebe did, at Ms White's request, in relation to the bifold doors: he planed a bit off the top of the lining and the door, after which they closed "heaps better". Ms White must have been aware, at that time, that the doors needed to be planed because the house was sinking, causing the doors to require adjustment. As we noted earlier in relation to Mr Ruebe's notes, we accept that he has noted what he did, and said.

[82] Secondly, there is the evidence of Ms White having used wedges to restore balance of various items. While that may not have been substantial for an item which covered only a small portion of the surface area of the house, it can be taken as indicating a possible issue as to sinking, and thus a potential problem with the foundations.

[83] Thirdly, we accept that Mr Westwood observed cracks and hairline cracks in June 2011, and Tonkin & Taylor reported that the differential settlement "appears to have resulted in vertical cracking on the middle and upper storeys, and a drop in floor levels on the north side of the dwelling". That evidence is supported by the photographs taken in late November 2011 and early 2012, which show vertical cracks on the walls. The cracks must have been visible to Ms White, living in the house.

[84] We accept Mr Eichelbaum's evidence as to the telephone conversation with Ms White. His evidence of her saying she knew the house was sinking is supported by the evidence of Mr Ruebe's work, and Ms White's use of wedges.

[85] Finally, we refer to Ms White's answers to questions put to her when she was cross-examined by Mr Hodge. These related to her experience as a real estate agent with many years' experience, and having sold many old timber properties. Ms White acknowledged that if she inspected a house property and noticed sloping and vertical cracks, that would raise in her mind a possible problem as to the house's foundations

[86] Ms White is an experienced real estate agent, and she has sold many old houses of timber construction. We find that there were sufficient indications of sinking and, therefore, possible foundation problems. We are satisfied that we can reasonably

infer that Ms White must have been aware of them. Further we are satisfied that these indications must have raised a question in her mind as to the state of the foundations.

[87] We find that Ms White knew that the house was sinking and that this meant it was likely that there was a hidden defect with the foundations. We therefore find that the Committee was wrong to decide to take no further action on this aspect of the complaint.

Conclusion

[88] We are satisfied that a hidden defect relating to the foundations must be considered to be a significant potential risk for a buyer of a property. It was common ground that Ms White did not disclose to Mr Eichelbaum that it was likely that there was a defect with the house's foundations. We are satisfied that Ms White has breached r 6.5(b) (of the 2009 Rules), in that it appeared likely, on the basis of her knowledge and experience of the real estate market, that the property she was selling "may be subject to hidden or underlying defects" and she did not "ensure that [Mr Eichelbaum] was informed of the significant potential risk so that he could seek expert advice" if he so wished.

[89] We are required to consider whether Ms White's breach reaches the standard where a finding of unsatisfactory conduct is justified, or whether the matter should be remitted back to the Committee in order for a charge of misconduct to be laid. If we conclude that a finding of unsatisfactory conduct is justified, the Tribunal can make that finding.

[90] On consideration, we are not satisfied that the breach is of a level which would require a charge of misconduct to be laid. However, we are satisfied that, pursuant to s 72(a) of the Act, Ms White's conduct "falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee."

[91] We therefore find that Ms White has engaged in unsatisfactory conduct.

[92] We have considered whether we need to call for submissions as to penalty, and have concluded that it is not necessary to do so. In this respect we have taken into account that Ms White voluntarily suspended her licence as from 31 March 2013. The licence remains suspended until 31 March 2017. We have also taken into account that Mr Eichelbaum chose not to obtain a pre-purchase building report.

[93] We have determined that appropriate course is to censure Ms White, but to make no further order as to penalty.

[94] Ms White is therefore censured. No further order is made as to penalty.

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

Hon P J Andrews
Chairperson

Ms N Dangen
Member

Mr G Denley
Member