BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 72

READT 038/18

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	PETER HIKAKA Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 416) First Respondent
AND	MARTIN LOVELL, SUZANNE LOVELL, JANET O'SHEA and LOVELL REAL ESTATE LIMITED Second Respondents
Hearing:	29 October 2018, at Tauranga
Tribunal:	Hon P J Andrews, Chairperson Ms N Dangen, Member Ms C Sandelin, Member
Appearances:	Mr J Temm, on behalf of Mr Hikaka Mr J Simpson, on behalf of the Authority Mr C Child and Ms S Mitchell, on behalf of Mr Lovell, Ms Lovell, and Lovell Real Estate Limited (Ms O'Shea not participating in the proceeding)
Date of Decision:	7 November 2018

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Hikaka has appealed against the decision of Complaints Assessment Committee 416 ("the Committee"), dated 25 June 2018, in which it decided to take no further action on his complaint against the second respondents.

Background facts

[2] Mr Hikaka's complaint was in relation to the second respondents' marketing of a residential property at Bethlehem, Tauranga. It had been built by Mr Short, and was completed in 2002. On 14 September 2007, Mr Short listed the property for sale with Lovell Real Estate Limited ("the Agency"). Ms Lovell (at the time, Ms Anderson) is a salesperson engaged at the Agency, and was listing agent. Ms O'Shea was, at the relevant time, also a salesperson engaged at the Agency. Mr Lovell is the manager of the Agency. We will refer to Mr Lovell, Ms Lovell, Ms O'Shea, and the Agency collectively as "the Lovells".

[3] The property's cladding was described on the listing agreement as "20 mm solid plaster on cavity system and brick". That description is a "short form" reference to an exterior cladding system designed and produced by Mr Owens, and known as the MCL StuccoRite Cavity Wall Cladding system ("the MCL system"). Mr Short had used the MCL system on two other building projects, but did not do so in the case of the property. In fact, the property had no cavity system, and Mr Short misrepresented the property to the Lovells as having been built using the MCL system.

[4] In mid-2008 prospective purchasers (Mr and Mrs Sanders) (through Mr Sanders) entered into an agreement to buy the property, conditional on obtaining finance. The agreement lapsed, as the finance clause was not satisfied.

[5] The Sanders entered into a second agreement to buy the property, in February 2009, again through Ms Lovell. The agreement was conditional on a satisfactory builder's inspection report. The report was completed by Mr Blissett, of Building Surveying Services Ltd ("the Blissett report"), and referred to possible evidence of exterior moisture ingress (which required further investigation), and indications of

moisture penetrating into concealed framing (which also required further investigation).

[6] The Sanders advised Ms Lovell that there appeared to be a problem with moisture, and cancelled the agreement. Mr Sanders gave Ms Lovell a "verbal overview account" of the Blissett report, and made it clear that their concerns were that there was a problem with a leaking home situation, and the identified moisture levels. Mrs Sanders also referred to problems with the property in an email to Ms Lovell. Ms Lovell asked for a copy of the Blissett report, but the Sanders sought a financial contribution from the Agency, which was refused. Accordingly, the Lovells did not receive a copy of the report.

[7] At some time in or after February 2009, Mr Lovell asked Mr Short for documentation verifying the cladding system for the property. Mr Short provided a "Producer Statement" for the MCL system, dated 5 February 2009, stating that the MCL system had been used in the construction of the property, and technical documentation concerning the system. Mr Short was later convicted on charges under ss 228(1)(a), 258(1)(a), and 259(1)(a) of the Crimes Act 1961, that having induced Mr Owens to write and provide him with the producer statement, he altered it and dishonestly used it.

[8] Mr Short entered into a second listing agreement with the Agency on 30 April 2009. Ms O'Shea was the listing salesperson, and Mr Lovell took over after Ms O'Shea left the Agency. The property description on the second listing agreement referred to "cladding – stucco cavity wall system. 35 mm cavity drained and ventilated see extensive notes on file".

[9] The eventual purchasers of the property (Mr and Mrs Fellows), entered into an agreement to buy the property on 3 July 2009, conditional on (among other things) finance and a satisfactory structural integrity report. They obtained a report from NZBC Pre-Purchase Company Ltd ("NZBC"). It recorded abnormal moisture levels in five locations. It also recorded that NZBC had been advised by the estate agent and the prospective purchaser that the upper floor of the property was constructed with the MCL system.

[10] This agreement was cancelled on 13 August 2009, as the finance condition was not satisfied. Mr and Mrs Fellows entered into a second agreement on 7 December 2009, conditional on being provided with specific information regarding the property (including as to the MCL system). Other than to forward a vendor's warranty, the Lovells do not appear to have any further involvement, as negotiations were conducted by the parties' respective solicitors.

[11] We note, however, that extensive water ingress and damage was discovered in June 2013. Subsequently, Mr Owens instructed Mr Hikaka to investigate the "producer statement" provided by Mr Short. Mr Owens then commenced a private prosecution of Mr Short, leading to his being convicted and sentenced on 13 April 2017.

Complaint

[12] On Mr Owens' instructions, Mr Hikaka complained to the Authority that despite the concerns raised by Mr and Mrs Sanders with Ms Lovell, the Lovells continued to advertise and market the property without notifying prospective purchasers of the possibility that it was a "leaky home situation". Mr Hikaka further complained that neither the Agency, Ms O'Shea, nor Mr Lovell disclosed to Mr and Mrs Fellows that the property was a leaky home situation, and in fact advertised and marketed the property as having been built with a cavity cladding system.

The Committee's decision

[13] After inquiring into the complaint, the Committee found that Mr Hikaka had provided no evidence that any offers had been made for the property before Mr and Mrs Sanders' first conditional agreement. It noted that the Sanders' first and second agreements contained builder's report conditions. It then noted that the Fellows' agreement was similarly conditional on a builder's report.

[14] The Committee stated that it was incumbent on Mr Hikaka to establish that the Lovells had failed to disclose weathertightness issues with the property to subsequent purchasers including the Fellows. It recorded that Mr and Mrs Fellows had left New

Zealand after selling the house, and could not be contacted. Accordingly, the Committee did not have a statement from them as to what disclosure was made to them. The Committee also recorded that Mr Hikaka had not presented any evidence of any offers other than the Sanders' and Fellows' offers.

[15] The Committee found that as Mr and Mrs Fellows obtained builders' reports and elected to pursue the purchase of the property independently of the Lovells, in full knowledge of what the reports contained, Mr Hikaka's allegation that the Lovells "in unison" failed to disclose weathertightness issues was not established. The Committee therefore decided to take no further action on the complaint.

Appeal issues

[16] In his submissions for Mr Hikaka, Mr Temm identified four issues: whether there were weathertightness issues with the property, whether the Lovells knew about the weathertightness issues, whether they had a duty to disclose weathertightness issues, and whether they advised prospective purchasers of those issues. It was accepted that there were weathertightness issues with the property, but the remaining three issues were contested. The Tribunal's consideration of the appeal issues (in particular as to the duty of disclosure) is, however, affected by the question as to the applicable statutory and regulatory regime.

The applicable statutory and professional regulatory regime

[17] Mr Hikaka's complaint alleged a failure to disclose weathertightness issues in the course of marketing the property during 2009. At that time, the Real Estate Agents Act 1976 ("the 1976 Act") was in force. It remained in force until the Real Estate Agents Act 2008 ("the 2008 Act") came into force on 16 November 2009.

[18] Pursuant to s 70 of the 1976 Act, professional conduct rules were made by the Real Estate Institute of New Zealand Inc ("the REINZ Rules"). These included a Code of Ethics (Part 13). The REINZ Rules remained in effect until 17 November 2009, when the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 ("the 2009 Rules") came into effect. The 2009 Rules remained in effect until 8 April

2013, when the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the 2012 Rules") came into effect.

[19] The Committee did not refer to the 1976 Act or the REINZ Rules in its decision. It stated (at paragraph 2.4) that the decision was made under s 89(2)(c) of the 2008 Act, and with reference to rr 6.2 and 6.4 of the 2012 Rules. Similarly, the written appeal submissions on behalf of Mr Hikaka and the Lovells referred to the 1976 Act, and the 2012 Rules.

[20] However, as Mr Simpson submitted for the Authority, the Lovells' conduct in marketing the property must be considered against their obligations under the applicable statutory and regulatory regime, and "standard practice", at the time. The Lovells' involvement in marketing the property had (apart from forwarding a vendor warranty) ceased in or about August 2009. Accordingly, the applicable regime is the 1976 Act and the REINZ Rules.

[21] Section 172 of the 2008 Act sets out transitional provisions relating to complaints made after the 2008 Act came into force, but concerning conduct alleged to have occurred before that date:

> **172 Allegations about conduct before commencement of this section**
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> (1) A Complaints Assessment Committee may consider a complaint, and the Tribunal may hear a charge, against a licensee or a former licensee in respect of conduct alleged to have occurred before the commencement of this section but only if the Committee or Tribunal is satisfied that,–
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> (a) at the time of the occurrence of the conduct, the licensee or former licensee was licensed or approved under the Real Estate Agents Act 1976 and could have been complained about or charged under the Act in respect of that conduct; and
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> (b) the licensee or former licensee has not been dealt with under the Real Estate Agents Act 1976 in respect of that conduct.
>
> (2) If, after investigating a complaint or hearing a charge of the kind referred to in section (1), the Committee or Tribunal finds the licensee or former licensee guilty of unsatisfactory conduct or misconduct in respect of conduct that occurred before the commencement of this section, the Committee or Tribunal may not make, in respect of that person and in respect of that conduct, any order in the nature of a penalty that could not have been made against that person at the time when the conduct occurred.

[22] The Tribunal has held that s172 creates a three-step process for considering complaints or charges in respect of conduct alleged to have occurred before 16 November 2009.[1] As relevant to the present case, the steps are:

[a] Were the Lovells licensed or approved under the 1976 Act and could have been complained about under that Act?

[b] If so, does the conduct amount to unsatisfactory conduct or misconduct under ss 72 or 73 of the 2008 Act?

[c] If so, what orders could have been made against the licensee under the 1976 Act in respect of the conduct?

Could a complaint have been made about the Lovells under the 1976 Act?

[23] It was not suggested that any of Mr Lovell, Ms Lovell, Ms O'Shea, and the Agency were not licensed or approved under the 1976 Act. Accordingly, a complaint could have been made against them.

Does the alleged conduct amount to unsatisfactory conduct or misconduct under ss 72 or 73 of the 2008 Act?

[24] As noted above, we take into account licensees' obligations at the time the alleged conduct occurred. As the Tribunal said in *Gallie v Real Estate Agents Authority (CAC 303)*, given that the 2012 Rules did not apply at the time, a finding of unsatisfactory conduct could not be made under s 72(b) of the 2008 Act (which concerns contraventions of a provision of the 2008 Act or rules or regulations made under that Act). A finding of unsatisfactory conduct could only be made under s 72(a), (c), or (d). Similarly, a finding of misconduct could only be made under s 73(a) or (b) (there being no suggestion s 73(c) might apply).

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[1] See *Complaints Assessment Committee 10026 v Dodd* [2011] NZREADT 1, at [64]–[66], *Gallie v Real Estate Agents Authority (CAC 303)* [2015] NZREADT 5, at [17]–[20], and *Eddy v Real Estate Agents Authority (CAC 404)* [2017] NZREADT 37, at [24]–[29].

[25] However, in assessing whether findings of unsatisfactory conduct or misconduct should be made, the alleged conduct must be examined against the obligations applying at the time.

[26] Part 7 of the 1976 Act contained disciplinary provisions, but as they applied to matters such as supervision of businesses and handling of clients' money, they have no application in this case. Section 99 of the Act set out grounds to cancel or suspend a salesperson's certificate of approval, but those grounds were conviction of a crime of dishonesty, or the public interest in cancelling or suspending a certificate of approval on the grounds of character. Likewise, s 99 has no application.

[27] Within the REINZ Rules, the following were relevant to dealings with clients and customers:

> 13.1 Members shall always act in accordance with good agency practices, and conduct themselves in a manner that reflects well on the Institute, its members, and the real estate profession.
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> …
>
> 13.3 Members shall be fully conversant with the Act, other legislation relating to real estate, and these rules, all of which must be adhered to at all times.
>
> …
>
> 13.8 Whenever a conflict of interest arises, it shall be the duty of the member to disclose the conflict to the member's clients
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> ...
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> 13.10 Members shall not accept instructions to carry out an appraisal unless they are competent to carry out such appraisal.
>
> …
>
> 13.12 A member shall render services with absolute fidelity, honour and courtesy.
>
> 13.13 A member must be fair and just to all parties in negotiations and in the preparation and execution of all forms and agreements, and protect the public against unethical practices in connection with real estate transactions.

[28] The most relevant of the above provisions to the present case is r 13.13, under which a "member" was required to "be fair and just to all parties". Under the REINZ Rules, a "member" was a member of the REINZ. We have no information as to whether any or all of the Lovells were members. However, as r 13.4 provided that it was the responsibility of licensed members to ensure that the conduct of their

salespersons or employees was no less than that required of members, we are not required to address the point.

[29] Notably, the REINZ Rules did not contain any equivalent provision to those introduced in the 2009 Rules as from 16 November 2009, and repeated in the 2012 Rules as r 10.7 (as to disclosure of hidden defects), or r 6.4 (as to misleading clients or customers, providing false information, or withholding information).

[30] It is against that background that the allegations as to the Lovells' conduct must be assessed. The relevant issue is whether the Lovells' conduct was "fair and just".

[31] The Committee did not have before it any evidence as to what would have been considered to be "fair and just" before 16 November 2009. Nor did it have any evidence as to what the standards of the day were as to disclosure. For the purposes of discussion, we approach the issue on the basis that it would have been fair and just for the Lovells to have passed on to prospective purchasers such information as they had concerning the construction of the property, in particular, its cladding.

What did the Lovells know about the property?

[32] Mr Temm submitted for Mr Hikaka that the Lovells knew of the weathertightness issues, having been told about moisture ingress after Mr and Mrs Sanders received the Blissett report.

[33] Mr Child submitted for the Lovells that the Sanders did not tell them about the weathertightness issues, and the evidence established only that they referred to the property as being a "poor investment". He further submitted that the Sanders' evidence that they told Ms Lovell about weathertightness issues should be rejected as it was adduced in other proceedings, resulted from leading questions put to them by Mr Hikaka, and/or was unreliable as the Sanders' recollections would have faded with the lapse of time.

[34] We accept Mr Simpson's submission for the Authority that the Lovells were at least put on notice of weathertightness issues from the time the Sanders cancelled their

second agreement. He submitted that this was supported by Mr Lovell's statement to the Committee that the property was identified at the point of listing as having problematic cladding, and that he asked Mr Short for supportive evidence, Ms Lovell's statement that she was aware of visual cracks in the exterior cladding, and Ms O'Shea's statement that she "vaguely" remembered Ms Lovell indicating that some elevated moisture levels had been found in some areas of the building. Mr Simpson further referred to the Committee's finding (at paragraph 3.2 of the decision) that the Lovells had accepted that the Sanders informed them of weathertightness issues.

[35] Against that evidence, however, were the statements provided by Mr Lovell and Ms Lovell, that Mr Short told them that the cladding was a solid plaster MCL system, with a cavity type construction. Both referred to the producer statement provided by Mr Short, together with technical information for the MCL system. There has been no suggestion that the Lovells knew that Mr Short had obtained the producer statement by unlawful means. In the circumstances, the evidence as to what the Lovells knew about the property's construction and cladding, and when, was equivocal.

[36] Mr Hikaka had the onus of proving that the Lovells knew that the property had weathertightness issues, on the balance of probabilities.[2] In the light of the equivocal evidence before it, the Committee could not have been satisfied, to the required standard, that they had that knowledge.

What did the Lovells disclose to prospective purchasers?

[37] Mr Temm acknowledged that Mr Hikaka had not presented any evidence of disclosure made (or not made) to any prospective purchasers, including Mr and Mrs Fellows, as to weathertightness issues with the property. He said it was for the Lovells to provide evidence establishing that they made proper disclosure. He submitted that on this point, the onus shifted to the licensees, and they had not satisfied that onus.

[38] We reject Mr Temm's submission that the onus "shifted to the licensees". A Committee's investigation of a complaint is an inquiry, and the Committee obtains such information as it reasonably can. In this case, the Committee was not able to

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2 See *Hodgson v Complaints Assessment Committee 10037* [2011] NZREADT 3.

contact Mr and Mrs Fellows for comment as to what information the Lovells gave them.

[39] Licensees have a professional obligation to assist the Committee's inquiry and provide information. We accept Mr Simpson's submission that, had the Lovells failed to respond fully to the Committee's inquiry, and to refer to information they had passed on to prospective purchasers, the Committee would have been entitled to draw an adverse inference, but that does not shift the onus back to the licensee.

[40] However, the Lovells provided evidence to the Committee of what they said to prospective purchasers. Mr Lovell said that "this property was identified at point of listing as problematic cladding and conveyed to all prospective purchasers". Ms Lovell said that "upon property inspection all proposed purchasers were informed of the maintenance requirements, as the hairline cracks were obvious and discussions were made regarding a builders report as part of their agreement".

[41] In the light of that evidence, the Committee cannot be said to have been wrong to conclude that Mr Hikaka had not established on the balance of probabilities that the Lovells failed to disclose weathertightness issues with the property to prospective purchasers.

[42] We are not persuaded that the Committee would have reached a different conclusion if it had considered Mr Hikaka's complaint in the context of the 1976 Act and the REINZ Rules. In particular, there was insufficient evidence on which it could properly have concluded that the conduct of one or more of the Lovells amounted to unsatisfactory conduct or misconduct under ss 72 or 73 of the 2008 Act.

Outcome

[43] Having made the finding set out above, we conclude that it has not been established that the Committee was wrong to decide to take no further action on Mr Hikaka's complaint. His appeal is, therefore, dismissed.

[44] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews
Chairperson

_____
Ms N Dangen
Member

_____
Ms C Sandelin
Member