BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 12

READT 020/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	BORIS FESCHIEV Applicant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1901) First respondent
AND	NICOLA (NICKI) CRUICKSHANK & TOMMY'S REAL ESTATE LTD Second respondents
Hearing:	8 October 2019, Wellington
Tribunal:	Mr J Doogue, Deputy Chairperson Mr G Denley Ms C Sandelin
Appearances:	Mr Feschiev, Appellant Ms E Woolley, on behalf of Authority Ms S Baigent, on behalf of Second respondent
Date of Decision:	4 May 2020

DECISION OF THE TRIBUNAL (WITH AMENDED REASONS)

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[1] The appellant, Mr Feschiev ("Mr Feschiev") filed an appeal on 14 July 2019 against a decision of the Complaints Assessment Committee ("the Committee") which dealt with complaints that Mr Feschiev had made to the Real Estate Agents Authority ("REAA") relating to the conduct of one of the second respondents, Nicola Cruickshank ("Ms Cruickshank"). Ms Cruickshank is a licensed real estate agent and is retained by Tommy's Real Estate Ltd ("Tommy's Real Estate"), the other second respondent.

[2] Mr Feschiev immigrated to New Zealand from Bulgaria in February 2017. He is a financial specialist. Soon after his arrival he began making enquiries about suitable properties that he could purchase. This led him to a specific property at 8 Central Terrace, Wellington ("the property") which Tommy's Real Estate had listed for sale. The property was a large villa which the Committee noted in its decision was in the process of being subdivided into two apartments.

[3] It appears that the vendors were deciding whether to sell the property in its entirety or to subdivide it. If they subdivided it, their preference was that they should sell the lower unit and retain the upper level.

[4] The vendors' selling agent was Ms Cruickshank who worked for Tommy's Real Estate. Mr Feschiev has made a number of complaints about the conduct of Ms Cruickshank and Tommy's Real Estate arising out of their involvement in the sale of the property. Specifically, in the case of Ms Cruickshank, he has alleged that she misrepresented the condition of the property and that either she did not disclose that the property constituted an asbestos exposure risk, or alternatively that she did not ascertain that the property posed that risk, and did not inform the purchaser.

[5] Ms Cruickshank said that on 6 February 2017 she met with the vendors along with Mr Matheson, another agent with Tommy's Real Estate. She said that the purpose of the meeting was to take particulars of the property using a pre-formatted form listing the various details about the property that the agency would require. Among other things, they asked the vendors at that meeting what the roof was made of. Ms Cruickshank says that they had to ask this because the roof could not easily be viewed from road level. In any case the pre-formatted form contained a space for the type of

roofing to be recorded. Both Mr Matheson and Ms Cruickshank state that the vendor said that the roof was made of "fibre cement".

[6] It appears that Mr Matheson was filling in an instructions/information sheet at this meeting and he noted this as the type of roof.

[7] Ms Cruickshank says that when she heard the roof was made of fibre cement, her first thought was that it could be an asbestos roof and she immediately asked whether it was. The vendors told both Ms Cruickshank and Mr Matheson that they had had the roof tested by a Wellington laboratory "and the results came back negative". Ms Cruickshank told them she would need a copy of the tests results that had been obtained.

[8] Ms Cruickshank said she did not obtain the report with the test results that day, and that she was required to remind the vendors on subsequent occasions to provide the test results. She says at one point, the vendors told her that they were then residing in Australia and that the report from the laboratory was stored in an attic of a property there. They also said that they would not have access to it until they went back to Australia. Matters were left on the basis that once the vendors returned to Australia, they would locate the report and send it to Ms Cruickshank.

[9] In fact, a copy of the report was eventually provided and it did contain a statement excluding the existence of any asbestos hazard in the building. The report was dated 27 June 2008. The copy came to hand at a point when Ms Cruickshank was no longer the selling agent. It stated that no asbestos had been found in the sample that had been provided. The report also contained a general explanation and said that provided asbestos is incorporated into a "stable matrix", it presents a minimum health risk. As we have stated, the report was not available at the time when Ms Cruickshank was the selling agent, but it is certainly consistent with the evidence she gives about what the vendors told her about the asbestos question.

[10] Later when a LIM report was obtained, Ms Cruickshank noted that it described the roof as being made of "fibrolite". It is implicit in her evidence that she regarded the statement that the roof was made of fibrolite as being inconsistent with the

suggestion that it was made of asbestos. It is not clear when Ms Cruickshank first saw the LIM report but during the investigation she told the REAA that the LIM report had been to hand for some months when Mr Feschiev offered to purchase the property in June 2017. It was her view that the description matched the vendors' description of a roof manufactured from fibre cement.

[11] Unfortunately, Mr Feschiev did not arrange for any building inspection to be carried out before buying the property. He said that this was because he did not know to get one. He also said that he did not know anything about the regulations and tender procedures or the "intricacies of buying a New Zealand home". His position is that he had not been advised by Ms Cruickshank that getting one would be advisable. The Committee in this case concluded that Ms Cruickshank had advised Mr Feschiev to carry out his own due diligence at some point, but he did not do that.

[12] Mr Feschiev was apparently represented by solicitors, Morrison Kent, at the time he entered into the transaction. We note that the agreement for sale and purchase contained, in the "Conditions" section, a query whether a building report was required; the response was that one was not required.

[13] Mr Feschiev made offers to purchase the property but they were not successful because, among other reasons, they were conditional. This did not meet the vendors' requirements; Ms Cruickshank said that they required a "clean" offer.

[14] The evidence of Ms Cruickshank was that her dealings with Mr Feschiev ended following his emailing an offer on the property on 8 March 2017, which was declined by the vendors on the same day.

[15] The next time that Ms Cruickshank dealt with Mr Feschiev appears to have been in May 2017, in respect of another property.

[16] In June 2017 another licensed agent, Ms Adgo approached Ms Cruickshank and asked her if the property was still for sale. After she confirmed it was, Mr Feschiev (with whom Ms Adgo had been dealing in regard to this latest approach) put forward

an offer for the entire property at a price of 3.1 million dollars, which was accepted. The transaction settled in September 2017.

[17] After Mr Feschiev had taken possession of the property he became aware that the roof did in fact contain asbestos. He obtained a report from an asbestos specialist inspector confirming that was the case. He was told that to de-contaminate the house and to have an HRV system installed would cost approximately $200,000.

[18] The complaint which Mr Feschiev made in regard to Ms Cruickshank was recorded by the REAA facilitator as follows:

> After moving in [Mr F] had a builder look at the property. He was told the foundations were a bit weak (which [Mr F] didn't see as an issue) and the roof had asbestos. [Ms C] did not make [Mr F] aware of the asbestos when he was purchasing the property. He believes that it is unfathomable that [Ms C] was not aware of the asbestos because the builder said it was quite obvious from just looking at the roof. It didn't occur to Boris to look for asbestos, because where he comes from, asbestos had been banned for a long time.

[19] Mr Feschiev characterised his complaint with regard to the asbestos issue as being one of "wilful misrepresentation and gross negligence" on the part of Ms Cruickshank.

[20] Mr Feschiev elaborated on this aspect of the claim, subsequently describing it was not just wilful material misrepresentation and gross negligence, but also professional misconduct. Mr Feschiev said that Ms Cruickshank must have been told about the asbestos roof or otherwise she could not have missed such a blatant flaw given that the large roof of the house can easily been seen from outside.

[21] In the decision under appeal, the Committee said:

> 3.9 While the Committee accepts that the Precise Consulting Report confirms the presence of asbestos, the Committee is satisfied that the Licensee was unaware at the relevant time of listing the Property that the roof contained asbestos, and asked the necessary questions of the vendor when alerted to the concrete roofing. The Licensee sought a copy of the certificate held by the Vendors, but it was in Australia and was unable to be obtained before the Property was taken off the market by the Vendors and the Licensee's involvement with the Complainant ended.

3.10 The Committee is also satisfied that the Licensee advised the Complainant of the need to carry out his own due diligence (and he signed the Sale and Purchase Agreement, noting this advice as well).

3.11 The Committee has therefore determined to take no further action on this part of the complaint.

[22] A further complaint that was made to the Committee was that Ms Cruickshank breached Mr Feschiev's confidentiality. The brief background to this complaint is that in January 2018, some time after Mr Feschiev had completed his purchase of the property, he contacted the agent who had acted for the vendor on the purchase, Ms Adgo, seeking to obtain body corporate rules for the property. Ms Adgo contacted Ms Cruickshank and asked for her assistance. The response that this drew from Ms Cruickshank was an email dated 29 January 2018 that she sent to one of the former owners of the property (the vendors who had instructed her in the preceding year 2017), in which she said the following:

> That Boris continues to torment us. Clearly he is going to sell one of the units. Just to clarify I have told [Ms Adgo] we did not have body corporate rules as there was no need bodycorp when they owned whole building. Can you please send me email to that effect and I will forward to the bullying little shit.

[23] Inadvertently, Ms Cruickshank sent a copy of the email to Mr Feschiev.

[24] The contents of the email later became the basis for Mr Feschiev's complaint that Ms Cruickshank breached her obligation of confidentiality by sending the email. This arose, according to Mr Feschiev from the comment in the email that read "Clearly he is going to sell one unit".

[25] He also complained that Ms Cruickshank had breached her obligations to him by using insulting and offensive language.

[26] The complaint concerning confidentiality was dismissed by the Committee. That relating to the insulting language was upheld. The Committee concluded that it amounted to unsatisfactory conduct.

[27] Ms Cruickshank filed an appeal against the determination of the Committee that she had breached her obligations as a licensee by sending the 29 January 2018 email. However, in preliminary directions, this Tribunal determined that Ms Cruickshank had filed her appeal too late and, as well, the case was not an appropriate one for the Tribunal to permit Ms Cruickshank an extension of time for bringing such an appeal.

[28] The Committee concluded in a subsequent hearing that there was no need to impose any penalty. Mr Feschiev has appealed against the determination not to impose a penalty in regard to that part of the complaint.

[29] The Committee also considered the complaint that Tommy's Real Estate failed to properly supervise and control its agents. The circumstances of that complaint will be considered below. The Committee dismissed that complaint and Mr Feschiev has appealed against that finding.

[30] A further question that arises on this appeal is whether Mr Feschiev has filed his appeal within the time limits for an appeal, in regard to the determination concerning the alleged misrepresentation about asbestos, and the alleged breach of confidentiality.

Time limits for appeal

[31] One of the issues that arises in regard to the appeals on the alleged misrepresentation about asbestos in the roof and the breach of confidentiality is whether Mr Feschiev has filed his appeals against the Committee's decisions in time. It is accepted that the appeal against the Committee's decision not to impose a penalty for the unsatisfactory conduct finding regarding the use of insulting language is made in time.

[32] There was a discussion concerning the time limits within which Mr Feschiev was required to bring his appeals in a ruling of the Tribunal which was delivered on 9 September 2019 following the hearing of pre-hearing applications.

[33] As the Tribunal recorded in its ruling on that application, amongst the other topics to be dealt with was:

> [a] Whether Mr Feschiev's appeal, insofar as it relates to the Committee's decision to take no further action against the Agency ("the Agency decision") is out of time and if so, whether he should be given leave to file a late appeal.

[34] The Tribunal decided that the appeals against the decision not to take action in regard to the complaint against Tommy's Real Estate were out of time and that it would not therefore form part of the appeals which Mr Feschiev brought. That decision did not deal with the appeals that Mr Feschiev brought in respect of the Committee's determinations of complaints about Ms Cruickshank.

[35] For that reason, whether appeals have been brought within the appropriate time limit remains a live issue in regard to the appeals that Mr Feschiev brings in regard to the misrepresentation of the asbestos roof and breach of confidentiality.

Time within which appeals are required to be brought under the Act

[36] It is necessary to briefly discuss recent changes regarding the approach that that the Tribunal takes to time limits for bringing appeals. These changes arise from legislative amendments to the Act, particularly s 111.

[37] The topic of appeal periods had been discussed in a decision of the Tribunal, *Edinburgh Realty Ltd v Real Estate Agents Authority (CAC 20004)*.[1] In that case, the Tribunal was required to consider how time would be calculated from the date of the notification of the determination of the Committee. *Edinburgh* contained a discussion about the standard practice of the Committee when hearing a complaint, which was (and is) to deal first with the question of liability. If a charge against the licensee is

[1] *Edinburgh Realty Ltd v Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 16 [*Edinburgh*]

found to be proved, the normal procedure is for the Committee to schedule a penalty hearing to take place in the future.

[38] The appeal rules in the Act require that an appeal is to be brought within 20 working days of the determination.[2] The question arose as to whether the Committee's two-stage process resulted in two separate determinations, each with its own 20-day appeal period, or whether the determination was a collective term applying to both the liability and penalty decisions. If so, there would only be one 20-day period, that ran from when the penalty had been dealt with.

[39] In *Edinburgh*, the Tribunal concluded, that rather than there being two separate periods within which different appeals were to be filed (one in respect of the liability determination and one in respect of the later penalty determination) there should only be one appeal period. Therefore, a licensee who had been found liable for breaching his or her obligations, and who was to be dealt with in a later penalty hearing, would be able to appeal against both or either of those decisions with the appeal being required to be filed within 20 days of receiving notification of the second determination (on penalty).

[40] The Tribunal departed from the *Edinburgh* decision in a later decision, *Catley v Real Estate Agents Authority (CAC 521)*.[3] In *Catley*, the Tribunal determined that *Edinburgh* had not correctly interpreted s 111 of the Act.

[41] In *Catley*, the Tribunal stated its view that, properly interpreted, s 111 establishes an obligation for an intending appellant who has been found liable to file any appeal against that decision within 20 working days of it being notified to him/her and, if the licensee was desirous of appealing against any penalty fixed at the penalty hearing, would have 20 working days from the date of the notification of that decision to file an appeal.

[2] Section 111(1) of the Real Estate Agents Act 2008.
[3] *Catley v Real Estate Agents Authority (CAC 521)* [2019] NZREADT 40 [*Catley*].

[42] The Complaints Assessment Committees are required to include in their determinations, a brief statement of the appeal rights of the parties. This has been interpreted as including advice as to how long a party has to file appeals.

[43] In the present case, at paragraph 6.1 of the Committee's determination dated 8 April 2019 (the liability determination), contained the following advice:

> 6.1 In the matter of Licensee 1, the Committee considers the 20 working day appeal period does not commence until it has finally determined the complaint by deciding what orders should be made, if any.

[44] The Committee's advice in paragraph 6.1 was (understandably) based on the *Edinburgh* approach to time limits for appeals, and not the *Catley* approach which was subsequently issued after the Committee's determination.[4]

[45] We intend to follow which we regard as correctly stating the interpretation of s 111. It follows that in the light of the *Catley* decision the statement about the appeal periods which was included in the first decision, the liability decision, was wrong. It wrongly described the time available within which to appeal against the first determination of the Committee (the "liability determination"), which dismissed the asbestos-related complaint, the confidentiality complaint and the lack of supervision complaint.

The time limits in this case

[46] Mr Feschiev did not file his appeal against the liability determination (notified on 8 April 2019) until 14 July 2019. Under the explanation of time limits in *Catley*, this appeal was therefore well out of time. That much is clear in this case.

[47] The central question in this appeal, though, is what effect, if any, the erroneous notification of appeal periods in the Committee's liability determination has upon Mr Feschiev's entitlement to bring an out-of-time appeal against the decision of 8 April 2019.

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[4] The Committee's liability determination was issued on 8 April 2019; *Catley* was issued on 24 September 2019.

[48] The question arises whether Mr Feschiev can be regarded as excused from compliance with the time limits as explained in *Catley* because the determination of 8 July 2019 included an erroneous notice about the time for appeal.

[49] Ms Woolley for the Authority submitted:

> 2.12 Therefore, it is relevant to consider whether the Committee's determinations (the Liability Decision and the Orders Decision) met the requirements of s 94 of the Act, in particular whether they "describe the right of appeal conferred by section 111" as required by subsection 94(2)(c).
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> 2.13 In the current case, in light of the subsequent decision in *Catley*, there was a deficiency in the description given of the right of appeal in the Liability Decision in relation to the Licensee. It is submitted that not every deficiency in the description of the right of appeal will render the notice of appeal invalid or ineffective. However, the description will be invalid or ineffective where the deficiency is substantial and material.
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> 2.14 It is accepted that the deficiency in the description of the appeal right in the liability decision in this case was a substantial and material deficiency. The description of the appeal right said that time for commencing an appeal against the decision made in the matter of Licensee 1 (Ms Cruickshank) did not commence until the decision on orders had issued. In light of the subsequent *Catley* decision, that description was wrong in a substantial and material way – the appeal period had in fact commenced in relation to the "matter of Licensee 1" when the liability decision was issued.
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> 2.15 Given this, the Authority submits that the notice of appeal rights given in the Liability Decision was invalid such that the requirement of s 94(2)(c) to "describe the right of appeal conferred by section 111" was not met in this case.
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> 2.16 The subsequent Orders Decision gave notice of the rights of appeal, setting out both the 20 working day period and 60 working day periods that apply.

2.17 As a result, the Authority submits that notice of the appeal rights (for both liability and penalty) was not validly given until the Orders Decision was issued. This subsequent notification was, in effect, a fresh notice, correcting the earlier erroneous notice and the appeal period should commence for both liability and penalty decisions in relation to the Licensee from the date that the fresh/valid notice was given.

2.18 If the Tribunal agrees with that analysis, unlike *Catley*, this appeal will be taken to have been filed in time.

[50] The reason why the legislature included a requirement that notices of determinations must include a description of the right of appeal from that determination was no doubt to foster one of the objectives of the Act, to "provide accountability through a disciplinary process that is independent, transparent and effective".[5] In order to facilitate the Parliamentary intention that lay behind it imposing a requirement to describe the time limits, we have no doubt that the description of the rights of appeal would have to include explanation of the time limits within which appeals were to be brought.

[51] Providing an incorrect statement of the appeal periods is more detrimental than simply failing to further the objectives of the Act. The provision of an erroneous appeal period notice would actively work against the objectives of the Act because such a notice, because it emanates from the Committee, would be regarded by most recipients as authoritative. As a result, they would be likely to be misled into filing late appeals.

[52] In this case, the legislature has not made specific provision for what is to happen if the Committee fails to comply with the mandatory requirements relating to notices in s 94 of the Act. The Authority's submissions assume that if the mistake on the part of the committee in describing the appeal periods is wrong in a "material and substantial way" that that will result in the Tribunal being able to rectify the position. The way in which the Tribunal considers that can be achieved is, in effect, by giving

[5] Section 3(2)(c) of the Act.

effect to the erroneous notice or, in other words, treating the erroneous notice as though it correctly described the appeal periods.

[53] We would agree that it would be desirable if some way of neutralising or offsetting the effects of giving wrong advice about time limits could be identified. How exactly that could be done is not clear.

[54] The question is, can this line of reasoning be adopted by the Tribunal?

[55] Notwithstanding that finding a solution to the difficulties that have arisen in this case for the appellant is an outcome that would overcome the issue of defective advice given by the Committee. The Tribunal can only come to such a conclusion if it can legitimately interpret the Act in such a way as to make it possible. Otherwise it would risk exceeding its powers.

[56] Section 111(1) of the Act states that the event that commences time running is the notification of a determination. Time then expires "20 working days after the day on which the notice of **the relevant decision** was given".[6]

[57] There is no ambiguity about what the words in section 111 mean. Time to appeal against a decision ran from when that decision was notified. The words used do not link the running of time to the notification of some other decision. The whole point of the interpretation in *Catley* was that each decision was required to provide its own separate and independent notice about appeal rights.

[58] Further, while in the circumstances of this case there was, fortuitously, a second notice issued, it is unclear what the position would be in circumstances where that did not happen and there was only an appeal filed against one decision.

[59] The only way in which an outcome of the kind that the authority submits for can be brought about is by the Tribunal invoking its power to "regulate its procedures as it thinks fit".[7] Further, the tribunal, while not possessing inherent jurisdiction and

[6] Emphasis added.
[7] Section 105

although not itself a court, has, in common with courts the same features as those described by the Law Commission[8]:

> Although all courts do possess inherent powers, which enable them to do what is necessary to exercise their statutory functions, powers and duties, and to control their own processes: McMenamin v Attorney-General [1985] 2 NZLR 274 (CA).

Our assessment

[60] Our conclusions are these. In the first place, whether the type of outcome that the authority submitted can be reached in this case is a matter of statutory interpretation. This requires consideration of whether it is possible to harmonise any inconsistency between section 105 and section 94. Such an inconsistency arises, first, because section 94(2)(b) requires that the committee as part of its decision must describe the right of appeal in its decision. The section must require a notice that complies with the *Catley* approach which we referred to earlier in this decision. As a consequence, in regulating its procedure under section 105 it would be inconsistent if the Tribunal adopted a general practice of recognising a time limit for appeal that is different from that which is identified by the wording of s 94(2) as interpreted by *Catley*.

[61] We consider that cases of the present kind where the committee has inserted a wrong description of the appeal period are exceptional and anomalous. Further, we consider that the legislature in fixing the time for appeal to run from the date of notification of the decision would not have intended that s. 111(1) would apply even in cases where an intending appellant had been misled by the committee erroneously describing in its decision how long an appellant had to bring an appeal. We consider that to do justice in this case, and in any others that have the same feature, it is possible to imply a statutory power to depart from the literal requirements of s. 111(1). We consider that that the Tribunal has power under section 105 in such cases to recognise that they fall outside the requirements of s 111(1) and to apply to them a different appeal period which is that which is described in the committee decision.

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[8] Law Commission Discussion Paper 29, "Review of the Judicature Act 1908", Wellington, February 2012, fn 32

[62] For these reasons we agree with the contentions put forward on the part of the Authority that this case should be recognised as exceptional and therefore should be approached differently from the way that *Catley* prescribed. It should be noted that in making this decision, the Tribunal is not in any way sanctioning a generalised departure from the *Catley* approach which is recognised as being correct.

Assessment of the complaint about the asbestos

[63] Whether Ms Cruickshank breached her professional requirements essentially comes down to a consideration of the duties that are imposed upon licensees by provisions such as rr 6.2, 6.3, and 10.7 of the Professional Conduct and Client Care Rules.[9] It would appear that the Committee did not make reference to r 10.7, but we are entitled to have regard to its terms when determining this appeal by way of a rehearing.

[64] Rule 10.7 provides:

> 10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either—
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> (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

[65] Rule 6.2 requires a licensee to act in good faith and deal fairly with all parties engaged in a transaction. Rule 6.3 states that a licensee must not engage in any conduct likely to bring the industry into disrepute.

[66] Before we commence our discussion of this topic, we refer to an ancillary issue which Mr Feschiev raised. Mr Feschiev has apparently brought civil proceedings against those that he considers responsible for misleading him in regard to the possible

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9 Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

presence of asbestos in the subject property. At the commencement of the hearing of the appeal he made an oral application to place in evidence certain extracts from pleadings which had been filed in the civil case. In order not to delay matters, we gave our decision, which was that that evidence ought not to be adduced. The Tribunal made a ruling at that time with reasons to be provided now. The reasons why we declined to accept the information is that the material was not relevant to the dispute before us. Pleadings are not sworn documents. Placing them, or extracts from them, before the Tribunal does not add to the body of evidence which the Tribunal should consider when resolving the dispute between the parties. For that reason, we made the ruling that we did declining to allow Mr Feschiev to place this material before the Tribunal.

[67] Reverting to the substantive issue, we record at the outset that we do not accept the implicit contention that Mr Feschiev puts forward that there is an obligation on the part of a licensee to research a property in order to unearth any defects which it may have and which the vendor has not disclosed. Recognising such an obligation would blur the boundaries between the role of a real estate agent and other advisors, such as a building inspectors.

[68] We intend to follow what was said by the Tribunal in its earlier decision of *Fitzgerald v Real Estate Agents Authority (CAC 20007)*.[10]

> [20] An agent has an active role to play in conveying information about the property to a potential purchaser and must be cognisant of that role and carry it out to the best of his/her ability. The Tribunal consider that if Ms Fitzgerald had been asked by Mr and Mrs Reddy whether the fence constituted the boundary then she would have been obliged to have made enquiries about that and either confirmed where the boundaries were or advised the Reddys' to obtain a surveyor's advice.
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> [21] The Tribunal reiterate that there is an obligation on an agent to be proactive where they are asked or might reasonably be expected to be asked about a boundary, for example where there is no clearly marked fence, where the boundaries appear to be in bush land or where a title is 'limited as to parcels'. However we have cautioned against obligations which require agents to become lawyers and we extend this to surveying. An agent must make every effort to know the product that they are selling but they are not required to anticipate problems where a problem might not exist. It would be unduly burdensome if in every case where there is no apparent cause for concern an agent was required to verify the boundary or be liable for failure

[10] *Fitzgerald v Real Estate Agents Authority (CAC 20007)* [2014] NZREADT 43.

> to do so. However the agent must not mislead or deceive or hide anything from the purchaser. We consider that these two paragraphs set out the obligation imposed by the Tribunal in *Rae*.
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> [22] We acknowledge that the Real Estate Agents Act is important consumer legislation and that agents play a vital part in ensuring that purchasers are protected.
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> [23] On the facts of this case Ms Fitzgerald was not making any effort to hide anything from Mr and Mrs Reddy, nor did she dissemble. She simply was silent because as far as she [or anyone else] knew there was nothing extraordinary about the position of the boundary. The fence had been in this place since the property was constructed.
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> 23] We conclude therefore that in the circumstances of this case Ms Fitzgerald was not guilty of unsatisfactory conduct and we reverse the decision of the Complaints Assessment Committee.

Was a defect present?

[69] The first part of r 10.7 requires a licensee to disclose known defects. There has to be, therefore, a defect and it has to be one which is "known".

[70] In the present case, unless this element of the case was admitted, the Committee and the Tribunal would have needed to have before them evidence establishing that there was asbestos present. This would establish that there was a defect present. This would require them to consider whether the evidence overall established on the balance of probabilities that there was.

[71] We understand that from the way in which the case for Ms Cruickshank was run at the appeal stage that she does not dispute that there was asbestos present.

A "known defect"?

[72] The first issue that arises in this case is whether Ms Cruickshank knew about the presence of asbestos in the building-there apparently being no serious dispute that the building has tested affirmatively in that regard. The second issue is whether, if she did not know, ought she have been aware that asbestos was present.

[73] A further issue that Mr F apparently raises is whether even if she did not know about the presence of asbestos, Ms Cruickshank ought to have carried out an investigation which would have revealed the presence of asbestos.

[74] The resolution of these questions depends upon the approach taken in previous decided cases of the tribunal in the proper interpretation of rule 10.7.

[75] At the outset, for the reasons that were stated in *Fitzgerald* we consider that care must be taken not to expand the duties of licensees so that they acquire responsibilities similar to those of a builder or building inspector carrying out a survey of a house.

[76] At the same time, the fact that a licensee is ignorant of the existence of a hidden defect in a property will not necessarily be a complete defence as we will explain.

[77] R 10.7 states that a licensee is not required to discover hidden or underlying defects but must disclose "known" defects to a customer. The rule therefore recognises a distinction between hidden or underlying defects on the one hand, and known defects on the other.

[78] The use of the passive term "known" without any qualification makes it difficult to define with precision what the term means as used in the rule.

[79] Obviously, the term would include defects which were known to the licensee. The licensee in this case did not "know" that asbestos was present.

[80] It is possible that the term "known" could have wider meaning equivalent to "known about generally" in some wider group. We do not need to spend time on discussing that matter because there is no evidence that any potential wider group to whom the defect might have been "known"-such as those engaged in developing property or letting property in the area- knew about the presence of asbestos.

[81] In this case, there is no evidence that the licensee actually knew of the defect of asbestos being present. But even if the licensee is ignorant of the defect, that is not the end of the enquiry. The Committee/Tribunal will then look at the second part of the definition which involves what a reasonably competent licensee would have known.

[82] A licensee can be liable for failing to take the steps required of him/her in 10.7 even though he or she has not adverted to the possibility of a given defect.. The licensee would have been expected to be aware if a "reasonably competent licensee" may suffer from the defect. In that case, the must comply with the requirements of 10.7(a) or 10.7(b).

Did Ms Cruickshank breach of her duty in relation to the presence of asbestos?

[83] We do not consider that Ms Cruickshank knew about the existence of the asbestos. We do accept, though, that Ms Cruickshank apparently thought that the description of the roof being constructed of cement fibre raised a question about asbestos.

[84] The evidence would appear to show that because she knew that the description of "fibre cement"could be associated with the presence of asbestos, she needed to make further enquiries of the vendors. She did that. Their reply on its face provided reassurance. It is true that Ms Cruickshank relied upon the honesty of the vendors when they told her that asbestos was not present. They told her that they had obtained a laboratory report to that effect. They said they would provide it to her. We consisder that Ms Cruickshank was telling the truth when she said that she expected them to honour their undertaking to provide her with a copy of the report on their return to Australia. She had no reason to doubt that when they did so, the report would corroborate their account. In those circumstances, we do not consider that she was mistaken in relying upon the word of the vendors.

[85] Ms Cruickshank was required to disclose defects that were not hidden or underlying. Having regard to the way that the case before us was presented, we have approached it on the basis that Ms Cruickshank will only be liable if she knew about the asbestos.

[86] Our conclusion then is that there is no reason to disbelieve Ms Cruickshank when she said she did not know about the asbestos roof.

[87] She thought it was a possibility, but she received reassurances from the owners that asbestos was not present. We deal next with the fact that she was aware that there was an indication of a possible asbestos problem

Would a reasonably competent licensee have thought it likely that asbestos may be present?

[88] A complaint under r 10.7 can be proved by the alternative route of establishing that a reasonably competent licensee would have understood that the property is likely to be suffering from a hidden or underlying defect.[11] The standard under this part of the rule is an objective one. If a reasonably competent licensee believed that a defect was likely to be present, then it will not help the licensee to say that she did not subjectively know about the defect.

[89] We now consider the level of knowledge that the hypothetical reasonable licensee would need to have about a defect to engage the requirements of r 10.7. We consider that the definition does not require that the reasonably competent licensee has to be certain that the defect is present. All that is required is that there be a belief that the defect is likely to exist. That brings into question how a reasonably competent licensee would have assessed the overall position if standing in the same position as Ms Cruickshank in or about February 2019.

[90] First, we note there is no definition of the type of information that the reasonably competent licensee would have taken into account. In order for the legislation to be given effect, we consider that the first step is to determine what information the reasonably competent licensee would gather from the background circumstances, together with any additional questions that might be raised as a result of the answers that he/she received. We do not know if the reasonably competent licensee would be expected to have raised the question of asbestos in this case and taken the steps in sub rule"(a)" and "(b)".That is to say we do not know if a reasonably competent licensee having known about the description of the roof as "fibre cement"would have concluded that it was likely that there was an underlying or hidden asbestos defect.

[11] R 10.7

Complaint of lack of managerial oversight by agency

[91] The ground upon which Mr Feschiev brought this complaint was set out in his letter to the REA dated 17 May 2018. In that letter he said:

> One of the people copied in the emails between Cruickshank and the sellers, was Mr Bill Mathiesson – a senior executive and shareholder in Tommy's. During a brief accidental meeting with him and a brief discussion, seeking his feedback on the inadmissible behaviour of Cruickshank, I was just brushed off and told to "go away in peace".
>
> That is not what I expect from a professional certified agent, who is supposed to safeguard the laws and apply the highest possible standards to a profession, which at times is criticised for just milking clients, without actually adding any value, and may be this is the unfortunate reality in this case – an agent with low morale and low professional standards, chasing deals and money ruthlessly, without any other consideration in mind.

[92] However, this complaint was dealt with by a pre-hearing ruling of the Tribunal which characterised this complaint as being out of time and said that it could not be considered by the Tribunal.[12] It is not open to the Tribunal to now reconsider the ruling that was made.[13] We do not intend to enquire into this aspect of the complaint.

The breach of confidentiality complaint

[93] The next part of the appeal concerns whether the licensee engaged in unsatisfactory conduct, contrary to rr 5.1 and 6.3 of the Professional Conduct and Client Care Rules. Rule 5.1 states that a licensee must exercise skill, care, competence and diligence at all times when carrying out real estate agency work. Rule 6.3 states that a licensee must not engage in any conduct likely to bring the industry into disrepute.

[94] The background to the possible breach of these rules was as follows. The dealings that Ms Cruickshank had with Mr Feschiev took place mainly in February 2017. We have already noted that in the middle of March 2017, the vendors decided to withdraw the property from the market. On or about 18 June 2017 Mr Feschiev

[12] Ruling of Tribunal on pre-trial applications, 9 September 2019.
[13] The ruling was made by the Chair of the Tribunnal.

contacted Ms Adgo wanting to put forward a further offer in regard to the property. On this occasion Mr Feschiev was successful and a binding agreement for sale and purchase was entered into, which settled in or about September 2017.

[95] In January 2018, Mr Feschiev and his wife made a request to be provided with a copy of the body corporate rules for the property. These requests were in the name of Mr Feschiev's wife, Vanya. On 25 January 2018, Ms Adgo emailed her advising that:

> As they were the B Corp they did not pass on BC rules.

[96] Mr Feschiev renewed the request. This led to Mr Adgo contacting Ms Cruickshank and providing her with the email string of requests that he had been making, requesting to be provided with the body corporate rules. On the same day Ms Cruickshank copied one of the vendors, Ms Grady, into the email string which included the requests from Mr and Mrs Feschiev. In the email, she said:

> That Boris continues to try to torment us. Clearly he is going to sell one units.
>
> Just to clarify – I have told [Ms Adgo] we did not have the Body Corp rules as there was no need Body Corp when they owned whole building.
>
> Can you please send me email to that effect and I will forward to the bullying little shit.

[97] Ms Cruickshank inadvertently sent a copy of this email to Mr Feschiev and it became a basis for part of the complaint which he brought against Ms Cruickshank and Tommy's Real Estate.

[98] The Committee, having enquired into the asserted breach of confidentiality, concluded that the allegations were not proved. They regarded it as important that the licensee was contacting the vendors to obtain a set of the body corporate rules and, further:[14]

> 3.13 Further, the statement made is, in any case, an expression of opinion by the licensee and not a statement of fact. The complainant never discussed his intentions with the licensee and she has drawn her own inferences

[14] Paragraph 3.13 of Committee's decision.

> which she then expressed in the email to the vendors. There is therefore nothing confidential attached to the statement.

[99] We agree with the conclusions of the Committee and the grounds upon which they came to those conclusions. This is not a case where a client had, in the course of his dealings with the licensee, told her in confidence that he was intending to sell one of the apartments, communication that she then passed on without authority. Rather, what happened was that many months after her services as an agent had come to an end, Ms Cruickshank received a further approach from Mr Feschiev and his wife who were by then the owners of the property, seeking the Body Corporate rules. In the course of communications with other parties concerning that matter, Ms Cruickshank, in effect, gave words to the inference she drew. That inference was that because he was requesting a set of the rules, it was likely Mr Feschiev intended to sell one of the units.

[100] We consider that this expression was of Ms Cruickshank's personal views. It was not a repetition of a statement or information that had been made to her by Mr Feschiev, in regard to which she would have been bound to maintain confidentiality. In our view, it is not a transgression of the Professional Conduct and Client Care Rules if a licensee expresses personal opinions in this type of context. Our view is that the Committee was correct in finding that this charge was not proved.

[101] The remaining aspect of the email of 29 January 2018 concerns the offensive words used in that email. The Committee concluded that in making that statement, Ms Cruickshank engaged in unsatisfactory conduct. There is no appeal against that determination, but Mr Feschiev has appealed against the determination of the Committee made pursuant to s 89 of the Act, that it should take no further action with regard to the complaint. In other words, no penalty was imposed. We deal with this aspect of the appeal below.

Insulting language – penalty appeal

[102] Mr Feschiev appealed against the decision of the Committee which decided not to order any penalty against Ms Cruickshank. There was no dispute that this appeal

was brought in time. He claimed that he had never received any form of apology from the licensee and that he sought $25,000 compensation for the "outrageous defamation" by Ms Cruickshank. He also sought that the Committee make an order suspending Ms Cruickshank's licence for a period of no less than 12 months while she undergoes formal retraining. As the Committee also noted, Mr Feschiev also submitted:

[a] There is nothing to support the submission made on behalf of the licensee that she makes substantial donations to various Wellington charities; and

[b] Ms Cruickshank had inflicted financial, moral, reputational and health damage on the complainant and his family.

[103] So far as relevant, the Committee noted the principle submissions on behalf of Ms Cruickshank concerning the question of penalty as being the following:

[a] The issue of the licensee's trustworthiness is not in question;

[b] It was an isolated event;

[c] Issue is taken with three words only, and arguably only one word;

[d] The words were not directed to the complainant, nor were they intended for his knowledge;

[e] Taken in context, the words may be considered applicable if not excusable, reflecting the difficult dealings with the complainant;

[f] This was not a persistent style of behaviour;

[g] The licensee has expressed regret and apologised for the upset her words have caused;

[h] The process has been a significant punishment in terms of the distress to the licensee and the time and resources taken to collate the evidence;

[i] The licensee has an unblemished disciplinary record of 16 years as a licensee;

[j] Ms Cruickshank has modified her text and email practices and proof reads each message properly before sending it;

[k] She fully cooperated with the process;

[l] There is no evidence to support the view that this is a systemic issue in the industry; and

[m] She contributes significantly to the Wellington community.

[104] In our assessment, some of the matters which Ms Cruickshank's counsel put forward on her behalf were relevant to the question of penalty and sufficient to justify the Committee dispensing with any penalty. However, some additional comment may be required. In particular the fact that the words were not directed to the complainant does not assist her case. It is for the very reason that she made statements to third parties that such sting as the words had would have been experienced by Mr Feschiev. The crux of his complaint was that he has been injured in reputation in the eyes of others.

[105] Further, while Ms Cruickshank put forward her remorse through the submissions of her counsel, counsel then somewhat inconsistently appears to take the position that Ms Cruickshank may have been justified in using the language she did because of the difficulties she had in working with the complainant. We assume Ms Cruickshank agreed with that submission being made on her behalf. In our view that submission may indicate that she is not genuinely contrite. We consider it should be made clear that no matter what provocation, it is unsatisfactory conduct for a licensee in the position of Ms Cruickshank to use language that she did in a business communication as a licensee.

[106] On the other hand, we consider that Mr Feschiev's submissions have exaggerated the effect of the language on him. The statement is, after all, nothing more

than an irritated outburst from the former selling agent of the property. The overall context makes it unlikely that the grave consequences that Mr Feschiev claims followed from the use of the words, actually did occur. Even though there is, as the Committee correctly concluded, no power to issue compensation in this case, the fact that Mr Feschiev considered that $25,000 would be adequate recompense for the harm done to him and his family shows in our view that he has formed an exaggerated view of the significance of Ms Cruickshank's comments.

[107] The primary purpose of a penalty in this case would have been to facilitate the achievement of the objects of the Act. If it appeared to the Tribunal to be unlikely that there was any real risk of a repetition of this kind of conduct, then imposing a penalty would be unnecessary and unjustified. We are of the view that in forming its assessment of the requirements as to penalty, the Committee did not make any error. We do not consider that its exercise of the discretion in assessing the question of penalty was in any way impeachable because of error. We consider that there are no circumstances that would justify the Tribunal replacing the decision of the Committee with its own decision in regard to penalty. This part of the appeal, too, is dismissed.

Conclusion

[108] In our decision we have concluded that because of the special circumstance that the Committee decision contained incorrect advice concerning the appeal period, the time within which the appellant could bring his appeal ought to be extended. However, we have concluded that the appeal by Mr Feschiev against the dismissal of the complaints in regard to the misrepresentation on the asbestos issue, the breach of confidentiality and the lack of supervision complaints should all be dismissed on their merits.

[109] We have concluded, further, that the appeal against the decision not to impose any penalty on Ms Cruickshank ought not to be upheld and it is dismissed.

[110] There have been other matters that Mr Feschiev based his appeal on, including the alleged failure on the part of the Committee to have regard to all of his submissions, and in particular a final summary document which he submitted. We do not consider

that the failure to consider this final summary document had any effect on the outcome of the case. It did not raise any matters that were substantially different from those which Mr Feschiev placed before the Committee. That ground of appeal, too, fails.

[111] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008, which sets out appeal rights from this decision. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

_____
Mr J Doogue
Deputy Chairperson

_____
Mr G Denley
Member

_____
Ms C Sandelin
Member