BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 33

READT 045/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	
	RICHARD GRANT WHEELER Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1901) First Respondent
AND	MICHAEL LEDGER Second Respondent
Hearing:	30 June 2020
Tribunal:	Mr J Doogue, Deputy Chairperson Mr G Denley, Member Mr N O'Connor, Member
Appearances	Mr R Wheeler, appellant Ms S Earl, on behalf of the Authority Mr P Brownless, on behalf of the Second Respondents
Date of Decision:	10 August 2020

DECISION OF THE TRIBUNAL

Introduction and background

[1] On 29 October 2019, Complaints Assessment Committee 1901 ("the Committee") issued a decision to take no further action in respect of a complaint that Mr Wheeler (**the appellant)** had made concerning the conduct of Mr Ledger (**the second respondent)** arising out of an agreement for sale and purchase relating to the appellants purchase of 16 Sylvan Way, SilverStream, Upper Hutt. Further background concerning the complaint is set out below.

[2] The vendors signed an agency agreement on 18 November 2018 authorising the second respondent to sell the Property by tender, with a close date of 13 December 2018.[1] The agency agreement included a warranty by the vendors that: *"to the best of the Owner's knowledge and belief the Property is free from any hidden or underlying defects."*

[3] During the course of signing the agency agreement, the second respondent says he informed the vendors that all buyers would need to be advised that the Property had monolithic cladding, as it was a particular risk factor for homes of the era.

[4] The Second respondent was the licensee representing the vendors.

[5] After signing the agency agreement, the vendors notified the licensee that a leak from a dishwasher pipe had caused damage to the Property 8-9 years earlier. The leak resulted from the breakage of a water pipe connected to the dishwashing machine. They explained that damage had been fully remedied through an insurance claim and that there had been no ongoing problems.

[6] The dispute relates to two matters. The first concerned the dishwasher-related leakage. The complaint which the Appellant makes is that the Second Respondent Mr Ledger, although he had been told about it, did not disclose it to those interested in purchasing the property, including the Appellant, and in fact recommended the vendors not to make any mention of it to those interested in purchasing the property.

[7] Before he made his successful offer for the property, the appellant instructed a building inspector, Mr Flowerday to provide a report on the property. Mr Flowerday was not the only

[1] Bundle p 94-100.

inspector who examined the building. Another building inspection provider, RealSure, was also instructed by another interested party to carry out an inspection and report as well.

[8] At some point after he had taken possession of the house, the appellant says, black mould was found in the house when a light switch was removed and the interior of the wall was visible. It is apparently accepted by all parties that the development of this mould was due to the presence of moisture. We understand that the appellant's contention is that this moisture did not arise from penetration of the exterior of the property but was attributable, instead, to the leakage from the dishwasher.

[9] The presence of black mould in the property was not apparently detected by RealSure. Nor was it detected by the appellant's own building inspector, Mr Flowerday. It is apparently accepted by all parties that the mould would not have been revealed by anything less than invasive testing of the interior of the house. It was actually discovered during minor construction work carried out subsequently to the point where the appellant became the owner of the house.

[10] In due course, the appellant made a successful offer for the property and acquired it. He alleges that after he took possession, he instructed his building inspector to carry out further testing as a result of which residual damage was discovered to the flooring and other areas which had been affected by the dishwasher leak. Apparently on this subsequent occasion, invasive testing was carried out.

[11] The appellant says that had he been informed before purchase that there had been a leak in the house, his building inspector would have carried out his checks differently and in such a way that it is likely the dishwasher damage would have been found. His complaint is that in not disclosing the dishwasher leak the second respondent breached his obligations under rules 6.4 and 10.7

[12] A further complaint relates to the RealSure report. It is not disputed that the second respondent obtained from the other interested party, a summary of a written report stating that there was excessive moisture present in the house. The second respondent did not supply the actual report summary that he had obtained to the appellant. It is his position that he was not at liberty to do so, and in any case, he and another licensee from the same agency as him had

adequately summarised the position concerning the RealSure report in discussions with the appellant. They also say that the appellant signed consent forms acknowledging that he had been given this information.

[13] The appellant made a complaint to the Authority. The committee dismissed the complaint. In regard to the dishwasher leaking, the committee in effect concluded that that did not amount to a current defect in the house and the licensee was not bound to disclose it to the appellant. In regard to the RealSure report, the committee agreed with the licensee that he had provided an adequate summary of what the building inspector/s had written about the property in their report. The Committee decided not to take further action on the complaint pursuant to s 89(2)(c) of the Act.

[14] The appellant appeals the Committee's decision on the grounds that the licensee who knew about the dishwasher leak ought to have disclosed it to the appellant when he provided information to the appellant. The appellant further asserts that the failure to do so amounted to a breach of rule 6.4 amongst others.

[15] The appellant also asserts as a second ground of appeal that he was not shown the summary of the RealSure report. The stated grounds of appeal are not clear, but the hearing before the Tribunal proceeded on the basis that that was his complaint. He says that the conclusion of the Committee was wrong and that the licensee by omitting to provide the summary of the RealSure report engaged in unsatisfactory conduct. He says that had the RealSure report been disclosed accurately and in its entirety, as was required in his view, he would not have entered into the ASP without proceeding with the RealSure recommendation to obtain "a full weather tightness specialist report to be undertaken by a suitably skilled Registered Building Survey Or Architect weathertightness specialist". He did not do that because he had not been told about the recommendation.

[16] This appeal, then, is concerned with the issue of whether the Committee was correct to conclude that no further action should be taken on the two separate aspects of the complaint, namely, the failure to disclose the dishwasher leak and the omission to provide to the appellant a copy of the RealSure report summary[2].

[2] The Second Respondent was never provided with the full report

The Appeal

[17] Having conducted a hearing 29 October 2019, the Complaints Assessment Committee 1901 ("the Committee") made a decision pursuant to section 89(2)(c) of the Act to take no further action in respect of a complaint that Mr Wheeler had made concerning the conduct of the second respondent.

[18] In dealing with an appeal against such a determination of the Committee, the Tribunal is required to proceed by way of rehearing. This involves the Tribunal in considering the evidence which was placed before the Committee. Having done so, it may conclude that the decision appealed from was correct and dismiss the appeal or allow the appeal: section 111 of the Act.

The Internal Leak complaint

[19] There are two breaches of the rules which might have occurred in this case and which could potentially amount to unsatisfactory conduct on the part of the second respondent.

[20] Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 provides:

> 6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

[21] Rule 10.7 states:

> 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 defects1, a licensee must either—
>
> (a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or
>
> (b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

[22] Under rule 6.4, the question is whether the second respondent withheld information about the property, namely the occurrence of the leakage, which by law or in fairness ought to have been provided to the customer, the appellant.

[23] There is no particular provision of the law, whether a statutory enactment or a binding decision, which provides the answer as to whether the type of previous event that occurred in this case ought to have been disclosed to the purchaser. The obligation of the Committee and of the Tribunal is to consider whether in all the circumstances it should be concluded that wider legal considerations including the provisions of the Act, obliged the licensee to make disclosure of the leak.

[24] In the decision that it gave in *Donkin v Real Estate Agents Authority and Morton-Jones*[3] the Tribunal said:

> …In our view the issue is simply that when advertising includes a positive representation such as in this case, that the property is a legal home and income, then the agent must ensure that either;
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> a) they have made proper enquiries to ensure that the property is a legal home and income; or
> b) they make it clear to any purchaser that this is a statement from the vendor and will need to be independently verified by the purchaser; or
> c) they clearly inform the purchasers that there may be issues regarding this and they need to obtain independent legal advice
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> [9] the point is that an agent should make sure before a positive representation is made that they have at least taken some precautions to check the veracity of the representation…The agent's job is to ensure that the purchaser is not misled.

[25] While *Donkin* was a decision concerning a positive representation that proved not to be correct, it does provide guidance as to how a licensee should proceed in a case where he/she withholds information as the licensee did in this particular case.

[26] In *Donkin* the Tribunal also drew attention to the fact that the Act is a consumer protection measure which is confirmed by the explicit provision to that extent in section 3.

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[3] *Donkin v Real Estate Agents Authority and Morton-Jones* [2012] NZREADT 44 at paragraph [9]

[27] The criterion of fairness in 6.4 should not, in our view, mean that a committee or tribunal should only consider fairness from the perspective of the complainant. That is, the interests of the licensee are not to be ignored. If licensees have made a reasonable decision about whether information about a property should be withheld, it would not seem to be fair for them to later be subject to prosecution for unsatisfactory conduct.

[28] The second respondent does not dispute that he knew about the dishwasher leakage. His view was that the leak was a singular event and that the consequences of it had been remediated by the repairs which were undertaken to the house. His counsel, Mr Brownless, submitted that that was a reasonable position to take and the licensee should not be criticised for assuming that repairs had been properly carried out, nor for not suspecting that there was invisible unrepaired damage arising from the leak. He further submitted that if the appellant submissions were to be accepted, it would "create an unrealistic burden of disclosure on licensees, requiring them to disclose, more or less, any repair work undertaken throughout the life of the property.

[29] Mr Brownless made the further submission that:

> 63. The appellant produces the Real Estate Authority's 'Principles of Disclosure' in support of his claim. The allegation is that the dishwasher leak in this case fits the description of 'previous flooding' in that document and so ought to have been disclosed.
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> 64. It is submitted that the appellant's interpretation of the word 'flooding' is incorrect. In the context of the document, flooding is more likely to mean flooding by way of rain or river which floods an area of property, not the fact that a water hose in a house may have leaked.

[30] The Committee concluded that Mr Ledger had taken appropriate steps to confirm the details of the dishwasher leak and his decision that it was not a matter requiring disclosure was in line with the expectations of a reasonably prudent and competent licensee.

Our assessment of the disclosure required concerning the dishwasher leak

[31] The evidence in this case establishes that the licensee had been told that while there had been a leak in the past it had been repaired by the insurer.

[32] Where repairs have been carried out, the two logical possibilities are that the problem has been remedied and is no longer of concern or, alternatively, that there is reason to suppose

that despite attempted remediation the defect or potential risks associated with the earlier problem continue to exist.

[33] It would not seem to be necessary for the licensee to assume that because a property has previously been defective in the sense in which we have been discussing, that it must still be subject to continuing problems. To take an obvious example, if the property had previously suffered from water ingress and had been repaired, indications that all might not be well may include that there is evidence that mould has formed in the area concerned since the repairs took place. Notwithstanding assertions by the vendors that the problem had been fixed, the duties on the licensee under 10.7 would probably be activated in such a circumstance.

[34] In the end, the question is one to be resolved after considering all the relevant facts. These might include observations of the property which a reasonably competent agent licensee would be expected to have made. General knowledge acquired by licensees about how a particular type of defect will usually manifest itself in the appearance of the property may be one of the matters that should alert a licensee that the building has a continuing problem. Any statement of opinion by a third party who, because of their credentials and experience speaks with authority, would be another factor which an experienced and competent agent would take into account. A reputable building inspector may come into this category. If such a person told the licensee that the problem may not have been remedied by the attempted repairs, then a reasonably competent licensee could well conclude that the property may be subject to a continuing defect.

[35] In such a case, the licensee would not be entitled to withhold the information about the history of the property. To do so would be to breach rule 6.4. It could also result in the provisions of rule 10.7 being activated because in such hypothetical circumstances, a reasonably competent licensee should conclude that the property may be subject to a hidden or underlying defects.

[36] No evidence has been put forward which provides guidance on the question of what an experienced and competent licensee would make of the known fact that the building had suffered from a leak 6 to 8 years previously. Had there been, for example, evidence that it was well known in the industry that such problems were notoriously difficult to permanently fix,

then the licensee's obligations under one or possibly both of the rules mentioned would be triggered.

[37] It is our assessment that taking into account the totality of the evidence in judging the matter by the circumstances in which the second respondent found himself, it has not been established that the he breached his obligations of disclosure under rules 6.4 and 10.7. The fact that on an earlier occasion the house had been flooded did not give rise to an inference that there is a substantial risk that the same problem was going to happen again.

[38] Nor was there any ground upon which the second respondent could be held responsible for the alleged failure to properly remediate the property following the leakage. Evidence that that might have been the case could have been obtained by invasive testing but without it there would be no basis for knowing what the position was. There are no grounds for assuming that the second respondent knew about mould and damage to the underfloor areas and therefore it could not have been a case of him withholding information about that problem for the purposes of rule 6.4. Further, if the criteria of what a reasonably competent licensee which is applicable under 10.7 is invoked, there were no reasons for him to tell the appellant that the property was suffering from a hidden defect in that consequences from the earlier leak had not been properly repaired.

The RealSure Complaint

[39] In December 2018, another prospective purchaser instructed RealSure to complete a building inspection. An inspector/s from RealSure conducted an assessment while Ms Rigden, another agent who was assisting Mr Ledger on the sale was present at the house. Ms Rigden overheard some discussion between the RealSure inspectors.

> I was sitting at the kitchen bench when I overheard them discussing moisture levels outside the upstairs bi-fold doors. I went outside and saw them looking in the area by the downpipe on the second floor.

[40] Ms Rigden subsequently told Mr Flowerday, about this conversation[4]. This occurred when Mr Flowerday visited the property. She also said she told Mr Flowerday about damage that she had seen in the bathroom. She also told the second respondent about the conversation she had heard.

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[4] BD 180

[41] On 13 December 2018, Ms Rigden received an email from another prospective purchaser regarding the building inspection report which RealSure had produced and which made some unsatisfactory findings.[5] The person who obtained that report sent a written summary of the RealSure report that RealSure had provided to her. That client did not send the full report[6] to Ms Rigden. The report summary indicated the Property was in average condition, noted design-related weathertightness concerns, and identified higher than normal moisture readings near some exterior doors and on exterior cladding.

[42] The appellant was not provided with a copy of the RealSure report summary. The appellant contends that the committee ought to have initiated proceedings against the second respondent based upon that omission. The next issue to be considered is what, if any obligations, the appellant had to provide the complainant with a copy of the summary report from RealSure.

[43] It is the submission of both respondents that there was no obligation to disclose the summary document to Mr Wheeler. The report (including the summary) was arranged and paid for by another prospective purchaser, who was entitled (and possibly obliged) to treat it as having been prepared for their purposes only. It was the contention of the Authority that while the respondent was not required to provide the report summary document to the appellant, having received a summary of the report and being aware of the matters raised within it, the licensee was obliged to tell other prospective purchasers that he was aware of a building report that had raised areas of concern with regard to the cladding and elevated moisture readings, and to reiterate the importance of their own due diligence with respect to such matters.

[44] Some disclosure was in fact made about the existence of the RealSure report. There is a dispute though about the extent of that disclosure. The appellant, though, contends that the summary of the RealSure summary which the second respondent gave him was "economically worded" and not accurate or complete.

[45] The respondents reject those criticisms. Mr Brownless, submitted:

> 69. The appellant argues that if he had been aware that RealSure had recommended a weathertightness inspection, he would not have made an offer on the Property. That argument fails to take into account that the appellant was aware

[5] Bundle p 122.
[6] Bundle p 123.

> of the exact issues noted by RealSure, had in fact engaged his own building inspector and had accepted those findings.

[46] The licensee says that on 13 December 2018 the appellant attended the Licensee's office to complete his tender application. Mr Ledger, his wife and Ms Rigden were also present. The second respondent disclosed the adverse findings of the RealSure report in a detailed discussion. The appellant confirmed that he was happy to proceed.[7]

[47] It is not disputed that the appellant signed a Customer Consent form which included: "Purchaser has had own builder through the property. Is aware of high moisture readings in ensuite + moisture under house. Client is happy to take any further procedures himself. Is also aware of cracking in the cladding…"[8]

[48] As well, on 14 December 2018 the licensee made an entry in Bayleys' Property Suite management system record which reads: "Rick has been advised of the RealSure report summary provided to us. He is aware of the high moisture readings in the ensuite, also moisture under and around the house. He had noted the cracks in the cladding in particular around the garage and knows the cladding needs repainting. Is happy in the knowledge to proceed with his offer."[9]

[49] Ms Rigden says that she was present when the summary report from RealSure was discussed at the licensee's office. She said that the licensee had told Mr Wheeler that RealSure had said there was high moisture readings which she, Ms Rigden, had pointed out to his building inspector, Mr Flowerday. She said the appellant told them he was not concerned as his drain layer and builder had advised about these issues as well. He said he was happy to proceed with his offer[10]. Ms Rigden also told the investigator that there was a second occasion at the office where the appellant was apparently present at which the RealSure summary was discussed and the appellant was asked if he was still happy to proceed and he replied affirmatively.

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[7] Bundle p 88 – Statement of Michael Ledger, paragraph 15.
Bundle p 180 – Statement of Anne Rigden, question 7.
[8] Bundle p 126.
[9] Bundle pp 148, 149.
[10] BD180

[50] The appellant says that[11] after negotiations, documents were amended and initialled with Anne Rigden at which point, she mentioned the RealSure inspection briefly to the Appellant and downplayed it with RealSure being - in her words "over the top". Mrs Rigden then updated the Consent by Customer document with the three items found during the Appellants builders' inspection. She also added "due for repaint".

[51] The reason why the Committee decided not to take action in regard to the RealSure complaint was that they considered that the licensee had disclosed the adverse findings in the RealSure summary that had been provided to Ms Rigden. They concluded that this disclosure occurred in the presence of Ms Rigden. They also noted that the appellant signed an updated Customer Consent Form that noted the issues disclosed in the RealSure summary[12].

[52] We would accept that it is necessary to closely scrutinise the evidence put forward in cases where there is a dispute whether a licensee made candid disclosure to the customer about defects in a property. That is because the licensee may be tempted to downplay or not to mention at all defects because of a risk that the contract does not proceed.

[53] However, in this case, we note that it was one of the licensee's team, Ms Rigden, who told Mr Flowerday when he was inspecting the house what she had heard the RealSure inspectors discussing when they went through the property. Further, there was never any attempt to conceal the existence of the RealSure summary report even though the entire report itself was not supplied to the appellant.

[54] Subsequently, Ms Rigden says that she was present when the second respondent spoke to the appellant about the report summary. Ms Rigden said that in the conversation with the appellant:

> [The second respondent] spoke about the summary and that RealSure had said that there was high moisture readings, which I had pointed the area out to the builder, and that they had also said about the moisture under the house. Rick Wheeler said that he was not concerned as his drain layer and builder had advised about these issues as well. Mike spoke to him about the report and asked if he was happy to proceed with his offer, which he said he was. I got him to re-initial the customer consent form confirming the same.

[11] In his submissions
[12] Paragraph 3.5 of Committee decision

[55] The licensee's version of events is supported by some notes which he made in the "Deal Transaction Report" which is part of the Bayley's Property Suite electronic diary. The undated notes state:

> Purchaser advised to do due diligence re-cladding has while on a cavity still classified as monolithic… Also advised that another buyer had had RealSure through who had made a negative report. We did not have a full copy of the report but outlined what we know. Advised buyer seek legal and building advice. Buyer had own builder through and addressed three areas of concern by RealSure moisture in shower, moisture under house, cracks and potential moisture cladding and this needs repainting.

[56] The appellant in his submissions to us said that now, having a copy of the RealSure summary, he has found that there were some matters in the report which were not disclosed to him:

(a) The presence of mould;

(b) water ponding;

(c) need for a weather tight assessment.

Appellants evidence concerning the RealSure summary

[57] The REA obtained the evidence of the appellant and the investigator noted the following points that the appellant put forward:

- A subsequent Customer Consent Document showed high moisture readings in the ensuite and under the house
- [The Appellant] was later told by the vendor that following an inspection done for another purchaser (RealSure) the licensee had told the vendor that an infrared moisture check was done and recommended invasive testing. This was not previously disclosed to him by the licensee despite the licensee's advice in the vendor he would disclose the report[13]

[58] He subsequently told an investigator that he had not been aware of the RealSure report until after he had submitted his offer. He said that Anne Rigden:

[13] REA chronology of events

> Said not to be too concerned about it as the assessors for RealSure had done the testing outside the property on the wet day.

[59] He said that he had signed the Customer Consent form:

> Anne asked me to sign that. Then I was asked to initial an amendment to that form which disclosed high moisture readings in the ensuite and under the house. That is my initial next to the amendment[14]

[60] In a follow-up email to the investigator[15] the appellant said:

> The RealSure details were downplayed by Anne as she said "RealSure are over the top and cause more deals to fall over than anyone else". With just four items noted, three minor items already known by myself and 1 dismissed as RealSure being "over the top" –

[61] At the appeal hearing, the appellant said that while the licensee claimed that there had been an extensive discussion of the report at his offices three problems with the building had not been disclosed to him being no mention of the matters set out in [56] above.

[62] He says that after negotiations and after "documents" were amended and initialled[16], Ms Rigden mentioned the report summary briefly and downplayed it describing RealSure's work as being "over the top". He says that Ms Rigden then updated the "Consent by Customer" form by noting the three items that his, the appellant's, inspector had found. The three items to which he refers are stated in the following terms:

> Purchaser has had own builder through the property. Is aware of high moisture readings in ensuite and moisture under house. Client is happy to take any further procedures himself. He was also aware of cracking in the cladding (due for a repaint)

[63] The appellant does not accept that the in-house diary notes kept on the Bayley's system accurately reflect what he was told about the property. He says that in any case they postdate the point when he first signed the agreement.

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[14] BOD 175
[15] BOD 182
[16] Refer to appellants grounds of appeal. This statement is understood to be a reference to the ASP

Assessment of complaint about disclosure of the RealSure summary

[64] We deal first with the assertion that that the appellant ought to have been provided with a copy of the summary report.

[65] The decision about whether the report summary should be provided to the appellant was apparently the second respondent's. It was he who decided that he was not authorised to provide the report but he was able, and indeed required, to provide a summary of what was in it.

[66] We consider that the question of disclosure of what was in the RealSure report was a matter that required some careful judgement on the part of the licensee. As the Authority submissions noted, there may be some problems with the licensee passing to customers reports about properties which other customers have commissioned.

[67] The RealSure report summary did not contain any notice or warning that the document was confidential and was provided only for the information of the customer who had commissioned and paid for it.

[68] If there was such a limitation imposed on the overall report in this case (of which the summary was but a part) then there would likely be restrictions on an agent into whose hands the summary report came from discussing its contents with another interested party who had not commissioned the report.

[69] The customer who had provided the report to the second respondent did not apparently impose any restrictions on its circulation.

[70] There is also the position of the report writer to be considered. An agency such as RealSure could understandably take the position that the report was only for the benefit of those who had requested and paid for it. It was not intended, in other words, that other persons should receive the gratuitous advantage of having a report that was written for another person.

[71] Our conclusion is that a reasonably competent licensee might well have decided in circumstances such as those which the licensees in this case were confronted with, that they were not authorised to provide the entire report.

[72] What ought an agent in the position of the second respondent have properly done in such a case?

[73] The possible approaches that should be adopted range from, first, treating the RealSure report as having been provided in confidence to the agent- and therefore not able to be discussed with other clients. Another possibility is that the agent could provide a summary of what was contained in the report without breaching any obligation. Another way of dealing with it would be to have disclosed that a negative report had been obtained from an inspector and leaving it to the customer to decide what their response would be to that information.

[74] Before concluding there had been a breach of the rules through not providing to the customer information derived from a report of this kind, it would be necessary for the Tribunal to be satisfied that the agent was free to pass the material on. Our view is that on the specific circumstances of this case, the licensee could rightly conclude that there was doubt about his entitlement to pass on the report.

[75] The question is though whether this assists the licensee in the present case. The licensee here adopted a type of halfway house solution of providing an oral summary of what the report said. In the first place, it would seem to be unlikely that if there were restrictions on further circulation of the RealSure report that they could be got round by providing an oral summary as opposed to a copy of the written summary itself.

[76] It may have been preferable, we consider, if the licensee had adopted some other course. One possibility was to advise the appellant that the licensee had become aware of the existence of a negative report by RealSure which made reference to moisture levels in the house and to suggest that if the customer wanted to take matters further he could contact RealSure and should also consider whether he got his own report about the moisture issue.[17]

[17] In this case it may not have been necessary to take the step of recommending that the customer obtain his own report because the appellant had already done so or was in the process of doing so.

[77] Even though there were some potential difficulties in the second respondent passing on the contents of the RealSure report to the appellant, it is unclear whether that was the reason for the second respondent not passing on the report in its entirety. Be that as it may, the second respondent in this case appears to have taken the view that he would not provide the verbatim report summary to the appellant. He was apparently not asked why he made that decision. The only comment that he made about it was that the party for whom the report was written refused to discuss it with the second respondent on the telephone[18].

[78] The second respondent, as we have noted elected instead to give the appellant an oral precis of what was in the report summary. That led to problems which will shortly be referred to. The type of problems encountered in this case suggest that for a real estate licensee who is not an expert in the areas of weather tightness to attempt to provide a summary of a specialist report is not likely to be a satisfactory way of dealing with the problem.

[79] The appellant says that he was not told about significant parts of the summary. Specifically, the appellant says he was not told about the recommendation that a full weather tightness specialist be obtained because of the risk indicators relating to this property.

[80] The key issue is that we have to decide whether we ought to prefer the evidence of Mr Wheeler over that of the licensees, that is the second respondent and Ms Rigden. Unless we are able to do that, the complaint will not have been established on the balance of probabilities.

[81] At the end of assessing the evidence we must be left in a position where we accept that it has been established that the appellant was not given a reasonably accurate summary of the position disclosed in the RealSure document. In taking that into account all of the relevant evidence, and not just that of the appellant in the second respondent requires to be considered. The evidence of Ms Rigden and the evidence concerning the entries of contemporaneous notes needs to be factored into our assessment.

[82] The question of whether a reasonably accurate assessment was provided requires a broad assessment of the substance of what the appellant was told in the circumstances at the time.

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[18] BOD 88

[83] We consider that he was given a reasonably sufficient summary of what the RealSure report said. We consider that Ms Rigden's note referred to at paragraph [55] which referred to the need for the appellant to do his own diligence because the property re-cladding has while "on a cavity" still classified as monolithic was significant. We interpolate that this was another way of telling the appellant that there was a risk of weather tightness issues in the property. The other references that are recorded in the documentation about moisture presence in the building and cracking of the cladding all combined to suggest that there must be concern about the weather tightness of the building.

[84] As we have noted at paragraph [50] above, the appellant contends that Ms Rigden downplayed the RealSure report. We are not aware whether this claim was put to Ms Rigden for her comment. We also note that the second respondent is the party against whom the complaint has been made and who is one of the respondents to the appeal. He would not generally be responsible for statements that had been made by Ms Rigden that he did not know about. If Ms Rigden made statements in the presence of the appellant and the second respondent with which the second respondent appeared to agree, or at least did not dissent from, then he could be seen as responsible for content of such statements. But it has not been established that such was the case here.

[85] In any case, the uncertainties that we have about the evidence of Ms Rigden downplaying the RealSure report are several. We do not know exactly what Ms Rigden was alleged to have said and whether it was a statement made in the presence of the second respondent and appellant. For those reasons we cannot be sure that Ms Rigden statements deprived the warnings that had been given to the appellant about the RealSure report of any substance. They cannot therefore affect our views about whether the appellant, although not having been provided with the report itself, was given a fair summary of the main points.

Overall conclusion concerning RealSure report

[86] On rehearing this part of the complaint, the Tribunal is not persuaded that the evidence establishes that it should come to a different view from that which the committee reached. We conclude that the evidence is not sufficiently clear to establish on the balance of probabilities that the second respondent failed to bring to accurately tell the appellant about the existence of the real sure report and its main conclusions. We consider that the contemporaneous

documentation supports the evidence of, and for, the second respondent. It is not therefore established on the balance of probabilities that the Second Respondent improperly withheld information in breach of Rules 6.4. and 10.7. This part of the appeal therefore fails as well.

Orders

[87] The appeal is dismissed.

[88] In his submissions, Mr Brownless advised that if the second respondent was successful, he would wish to be heard on the question of costs pursuant to section 110A of the act. The second respondent is to file any submissions on the question within 21 working days of today's date and the appellant will have 21 days thereafter to respond. Submissions on costs and not to exceed five pages in length on each side.

[89] 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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Mr J Doogue
Deputy Chairperson

_____
Mr G Denley
Member

_____
Mr N O'Connor
Member