BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 19

READT 031/20

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	RAYMOND STANLEY MOSELEY Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1907) First Respondent
AND	DEAN SMITH Second Respondent

On the papers

Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin, Member Mr N O'Connor, Member
Submissions received from:	Mr Moseley Mr T Wheeler, on behalf of the Authority Ms A Gaborieau, on behalf of Mr Smith
Date of Decision:	29 April 2021

DECISION OF THE TRIBUNAL

Introduction

[1] In July 2019 the Authority received a complaint from Mr and Mrs Moseley against the second respondent, Mr Dean Smith, in respect of his conduct in marketing a property in Dunedin ("the property"). On 6 May 2020 Complaints Assessment Committee 1907 ("the Committee") issued a decision in which it made a finding of unsatisfactory conduct against Mr Smith ("the substantive decision"). On 29 September 2020 the Committee issued a decision in which it ordered censure of Mr Smith, that he pay a fine of $2,500, and that he pay $2,500 to Mr and Mrs Moseley as a contribution towards their legal costs in respect of the complaint ("the penalty decision").[1]

[2] Mr Moseley has appealed under s 111 of the Real Estate Agents Act 2008 ("the Act") against the Committee's substantive and penalty decisions.

Background

[3] Mr Smith is a licensed salesperson and at all relevant times was engaged by Metro Realty Limited ("the Agency").

[4] The property is in Normanby Street, St Kilda, South Dunedin. The house was built in the early 1900's. Mr Smith had marketed the property in October-November 2013. He marketed it again in February 2016, when it was bought by Mr and Mrs Moseley. The relevant events occurred between February and June 2016.

[5] Mr Moseley first viewed the property on 10 February. He was aware that some houses in the South Dunedin area had been flooded in 2015, and did not want to buy a property that was subject to flooding problems. Accordingly, before he viewed the property, he asked Mr Smith if it had been affected by the 2015 floods. Mr Smith responded that it had not been affected, that the property was one of the lucky ones and never got flooded and neither did the street it was on, or words to that effect.

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[1] We record that Mr Moseley also made complaints against the manager of the Agency, Mr Stevens. The Committee decided to take no further action on these complaints. Although Mr Moseley submitted a Notice of Appeal against this decision it was out of time pursuant to s 111 of the Act and therefore not accepted for filing.

[6] Mr Smith told the Committee that he had asked the vendors if the property had been flooded, and they responded that it had not. He further said that if the property had been flooded there would have been new carpet, new skirtings, and new gib walls throughout, and none of these was present. He was aware that the floors had some prominent undulations, which he had also observed when he marketed the property in 2013, and he pointed out to Mr Moseley that the floor was "a little bit up and down", and that it was "the joists". Mr Moseley was not concerned as to that, as he had fixed joists on a previous property.

[7] Later that day, Mr Moseley told Mr Smith he would make an offer to buy the property. He signed an Agreement for Sale and Purchase at the Agency on 11 February to purchase the property for $229,000. The agreement was conditional only on his arranging finance to complete the purchase within five working days. Mr Smith gave Mr Moseley copies of a LIM report prepared at the time the property was marketed in 2013, an electrical certificate of compliance dated 13 January 2011, and the title to the property. Mr Moseley signed a "Customer (Purchaser) Acknowledgement Form" in which he acknowledged (among other things) that he had been advised that "it is always advisable to obtain recent reports", and that he had been "offered purchaser building report – LIM – insurance etc".

[8] The vendors accepted Mr Moseley's offer, and the Agreement for Sale and Purchase became unconditional on 17 February.

[9] Mr Moseley then began arranging insurance on the property. Because of its age, he was required to submit an insurance check form relating to "pre-1935 houses", which required an inspection of the property. He contacted Mr Smith for assistance with this and with access to the property.

[10] Mr Smith and Mr Moseley went to the property on 22 February to do the insurance check. Mr Moseley had the insurance check form, on which he made the required entries. They inspected the plumbing, electrical wiring, and guttering, all of which required entries on the form. The form required a statement as to whether the property had been "completely re-piled". This was marked "no" on the form, and further details were required to be given. In order to inspect the piles, Mr Smith opened

an inspection hatch in the floor of the hot water cylinder cupboard. He used his cellphone torch to inspect the subfloor area visible from the hatch.

[11] Mr Moseley says that Mr Smith said "they are mixed piles but in good repair". Mr Smith says that he said only that the piles "were of mixed materials". Mr Moseley wrote on the insurance check form "All piles in good repair".

[12] While they were at the property, Mr Moseley noticed rubbish behind an outside shed, and a steel box on an inside wall. He asked Mr Smith to ensure that they were removed before the appellants moved in. He also noticed a drainage downpipe lying on a gully trap, which Mr Smith said he would discuss with the vendors.

[13] The Agreement for Sale and Purchase due to settle on 4 March. Mr Moseley told the Committee he rang Mr Smith to arrange a pre-settlement inspection on 1 and 3 March, but he was unavailable. He spoke to Mr Smith during the evening of 3 March, and said Mr Smith apologised for not having been available. No pre-settlement inspection was undertaken.

[14] Mr and Mrs Moseley went to the property late in the afternoon on 4 March, and were concerned at the condition of the property, which they described as "disgusting". Mr Moseley said he went to turn on the hot water cylinder, and found water dripping from it onto the floor. They returned to the property early on 5 March, when a removal van was due to arrive with their furniture. Mr Smith arrived and removed the rubbish. He also attempted, unsuccessfully, to fix the downpipe.

[15] Mr and Mrs Moseley then had what he described as "a good look" around the property. He told the Committee he found the ground and subfloor was really wet under the house, and there was a really bad smell coming from under the house. He also saw brown and black mould all over the house, which had not been present when he had previously viewed it. He also noticed that some of the woodwork was rotten. They arranged for a plumber to repair the hot water cylinder but it was so corroded it fell apart when it was removed, and the floor beneath it was rotten.

[16] Mr Moseley complained to the Agency. By agreement, the Agency listed the property for sale in March 2017 (with a different licensee as salesperson), noting a "Client's asking price" of $249,000. Mr Moseley told the Committee that this was in breach of his instruction that the selling price should be $150,000 to $175,000. The property did not sell and was re-listed in May 2017 with an asking price of $269,000, but again did not sell. The listing agreement with the Agency was cancelled and the property was sold in June 2018 for $149,500, by a different agency.

Evidence as to the condition of the property

[17] The Committee was provided with marketing photographs of the property, from when the property was marketed by Mr Smith in 2013, and when it was marketed in 2016.

[18] In his statement in support of the complaint, Mr Moseley said that when he viewed the property, "we went from room to room: I could smell fresh paint in the property". As recorded earlier, he said that before he entered the property he asked Mr Smith if it had been affected in the floods in 2015, and was told that the property was "one of the lucky ones", and that it "never got flooded".

[19] Mr Moseley later commissioned technical reports as to the property. A contractor, Mr Gibson, who visited the property on 8 April 2016 reported that there was:

> … an overpowering musty smell in house on inspection there were no working air vents on the NW side of house. There were however 2 vent plates glued on to front of roughcast + one @ back, but these were fake to deceive people to thinking these were providing ventilation. … Note there does appear to be a silt build up under the floor mainly lounge bathroom + kitchen areas from flooding.

[20] The manager of the Agency, Mr Stevens, visited the property on 10 May 2016. In his statement in response to the complaint he told the Committee he noticed "the poor condition of the piles and the dampness".

[21] K2 Environmental Ltd undertook a "biological air quality assessment" on 15 June 2016 ("the K2 report"). This stated that:

> The presence of toxigenic, pathogenic and allergenic[2] fungi suggest that the dwelling is suffering from moisture issues that have resulted in active fungal growth. The fungi measured is undesirable in indoor air.

[22] The K2 report included photographs, two of which were of the subfloor area. It noted that the species of fungal growth found signified wet or very damp building materials, and its observations included that "the ground at the property was noted to be very wet, particularly under the house", "the property is located in the flood zone which was affected in the June 2015 floods", and "in 2015 a burst water main caused flooding under the house – according to the [appellants] the previous home owner did not remediate the water issue for several weeks".

[23] Flanders Marlow provided a "Subfloor Defects Report" following an inspection on 20 June 2016 ("the Flanders Marlow Report"). The report included ten photographs of the subfloor area. Flanders Marlow recorded their observations of the subfloor as follows:

> 4.5 The under floor area can be accessed via a floor hatch in the airing cupboard, within the central hallway.
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> 4.6 Access to the underfloor area was limited and not considered safe and, therefore, no access was gained in this area at the time of the inspection. The views obtained were from the floor hatch and the removed floor boards in the northern bedroom.
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> 4.7 The property has a fully-enclosed subfloor space created by the continuous plaster timber framed perimeter walls. Whilst some ventilation grilles have been recently installed, there are not considered to be enough of them to provide adequate cross-ventilation to the subfloor by current standards. The ground levels being in close proximity to the internal floor level gives a higher risk potential for the long-standing presence of decay and failure of the floor framing,
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> 5.1 [sic] The original piles were unlikely to have been well founded to good ground, with no positive connection or damp proofing installed between the piles and the timber bearers. This coupled with extremely limited cross-ventilation to the subfloor, minimal ground clearance, and evidence of borer infestation would also have contributed to the current condition of the subfloor structure.
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> 4.8 The conditions were obviously damp with a strong musty smell and it was clear that the pile foundations were makeshift and/or decayed from the initial views obtained through the hatch. Similarly, the timber shuttering around the chimney foundation were severely decayed.
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> …

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[2] The K2 report defines "toxigenic" as "known to produce/contain toxic compounds that can have serious health effects", "allergenic" as "known to cause allergic reactions particularly in vulnerable persons", and "pathogenic" as "can cause diseases and infections".

> 4.13 No evidence was provided regarding the extent of the floodwaters at the beginning of June 2015 and no previous condition reports or photographs have been provided for comment to be made …
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> 4.14 It is our opinion that the defects noted are generally typical to this type of property and detailing.
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> …

[24] The conclusions in the Flanders Marlow's report included:

> 5.3 The property is believed to have been constructed circa 1905 with various extensions added over time. Typically, the ground conditions in South Dunedin are damp, with some areas originally being poorly drained marshland, which was reclaimed. Due to the recent flooding, the ground conditions are currently excessively damp.
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> 5.4 Due to the design and construction of the dwelling, it is likely that moisture evaporating from the ground has not been adequately removed by subfloor ventilation during the lifetime of the dwelling, due to the absence of, and insufficient cross-ventilation to the subfloor area.
>
> …
>
> 5.8 While floodwaters would certainly have made the problem worse, it is believed that the defects observed at the time of the inspection are as a result of deferred maintenance and the ongoing and prolonged exposure of the subfloor structure to moisture, which is an inherent problem with this type of construction.

[25] In a letter dated 18 June 2016 a next door neighbour described stormwater redirected by the vendors in May 2014 to a pipe that flowed onto the ground, and not remedied until December 2014, and a burst water pipe that allowed water to escape. This neighbour did not refer to the 2015 floods.

[26] A rear neighbour, whose section was directly behind and slopes down towards the appellants' property, said in a letter to Mrs Moseley dated 5 May 2016 that:

> …
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> In wet (Winter) months the back part of the garden, and specifically the part that is acquired by us and was formerly part of your section, remains wet and damp with the water level on occasion above ground level.
>
> During the torrential rain of June 3rd/4th 2015, the water was so high that our entire backyard was completely flooded up to the house.
>
> There is no doubt in our minds that your section would have been flooded as well, as your garden is significantly lower than ours.
>
> …

[27] At page 31 of a document "The Natural Hazards of South Dunedin", published by the Otago Regional Council ("ORC") in July 2016, there is a photograph captioned:

> Ponding of surface water at south end of Normanby Street, April 1923, following heavy rainfall. This area was not badly affected in the June 2015 flood.

[28] The appellants also provided the Committee with a video from a NewstalkZB website, dated 3/4 June 2015, titled "Dunedin wakes up to flooding aftermath". The Tribunal was provided with a link to this video, which appears to be video footage taken by a person walking along streets, in large part through water. The Tribunal has not seen a transcript of any commentary provided with the video, although the Committee identified the video as being of an area more than a block away from the property.

[29] We note that the LIM for the property records (under the heading "Urban Stormwater Catchment") that:

> This property is located within an urban stormwater catchment that has been modelled in a study to determine the potential effects of land use and climate change that may occur over the next 50 years. This indicates that some areas of the catchment may be subject to a potential flooding risk or surface water ponding during particular rainfall events.
>
> …

The LIM also records the Council's involvement in response to the stormwater discharge referred to in paragraph [23], above.

[30] Mr Moseley provided a USB stick to the Authority, which contained photographs of the subfloor and other parts of the house. While it appears that some of the photographs were provided to the Committee, it is not clear what photographs were not, and why they were not provided to the Committee. The USB stick itself was not provided to the Committee, and the Authority no longer has it in its possession. It does not appear to have been returned to Mr Moseley.

[31] Mr Moseley also referred to cellphone video footage of the 2015 flood, taken by a neighbour across the street from the property, which he said showed the property under water. We note that the Committee said in its substantive decision that the "neighbour's" video footage referred to is the NewstalkZB footage.

[32] Mr Smith said in his response to the complaint that his impression was that the property had improved in quality since he marketed it in 2013, but noted that the only changes were a few feature painted walls in the bedrooms, part of the roof renewed, and a porch painted. He said that nothing suggested that the property had been flooded in the past.

[33] There is no written record of any disclosure as to the condition of the property made by the vendors. The Authority's investigator was advised that a copy of the listing agreement with the vendors (in which such disclosures would have been recorded) had not been retained by the Agency.

The complaint

[34] In the course of the investigation of Mr Moseley's complaint the elements of the complaint were summarised as being that Mr Smith:

[a] misled Mr Moseley by telling him that the property was not affected by the 2015 floods;

[b] failed to exercise skill, care, competence, and diligence by failing to discover and disclose defects that were reasonably discoverable, in respect of flooding, failed drainage, subfloor, piles, cladding, rot, and other building defects; and

[c] avoided making himself available for a pre-settlement inspection of the property.

The Committee's substantive decision

[35] Regarding the complaint that Mr Smith failed to disclose that the property had been flooded in 2015, the Committee found that whilst there was a possibility that the property could have been affected by the flood in some way, the evidence did not establish on the balance of probabilities that the property or the subfloor had flooded or was adversely affected by it. The Committee found on the balance of probabilities

that the dampness, rot, and decay in the subfloor had occurred from prolonged water or moisture getting into the subfloor due to other reasons, and a lack of ventilation.

[36] As a consequence, the Committee found that it was not established that Mr Smith had failed to exercise skill, care, competence, and diligence, or to disclose a hidden or underlying defect, or to act fairly and in good faith in relation to this aspect of the appellant's complaint, and determined to take no further action on it.[3]

[37] On the complaint that Mr Smith failed to disclose the subfloor defects, the Committee made a finding of unsatisfactory conduct.[4]

[38] It found that the "pre-1935 property check form" was a generic insurance checklist, the purpose of the visit was to gather specific information, and was not a detailed investigation. It also found that there was a difference in the evidence as to the insurance inspection, in particular regarding Mr Moseley's evidence that Mr Smith knew where the inspection hatch was and took over the inspection to conceal its true state, which the Committee could not resolve. Accordingly, the Committee found that it was not established that Mr Smith knew about the state of the subfloor or that Mr Moseley was prevented from inspecting it.

[39] The Committee also found that while it was not disputed that Mr Moseley recorded comments on the inspection checklist, there was a difference in the evidence as to what Mr Smith said about the subfloor: Mr Moseley's evidence was that Mr Smith said the piles were of mixed materials but in good repair, but he recorded only "all piles in good repair", and Mr Smith's evidence was that he said only that the piles were of mixed materials. The Committee found that it was not established that Mr Smith said that the piles were in good repair.

[40] The Committee found that at the time of the insurance check water from a broken pipe (noticed by Mr Moseley at the time of his visit to the property on 22 February for the insurance check) was likely to have been discharging water under the property. The Committee found on the balance of probabilities that the damp state of the subfloor

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3 Committee's substantive decision at paragraphs 3.10.–3.22.
4 At paragraphs 3.25–3.44 and 3.52.

would have been reasonably apparent to Mr Smith when he opened the inspection hatch and briefly looked into the subfloor space.

[41] The Committee concluded that the damp odour and damp state of the subfloor was information which in fairness should have been pointed out to Mr Moseley. Mr Smith's failure to do so was a breach of his obligations under rr 5.1, 6.2, 6.4 and 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"). As the breach related to a failure to pass on what would have been reasonably observed, the Committee was satisfied that overall, the breach amounted to unsatisfactory conduct under s 72 of the Act, and not misconduct under s 73.

[42] However, beyond reporting what would have been reasonably apparent from the inspection hatch, the Committee was not satisfied that Mr Smith knew, or reasonably should have known, the true state of the subfloor and failed to disclose it, or that the true extent of the subfloor defects was reasonably discoverable.

[43] The Committee further found that it was not established that Mr Smith avoided giving Mr Moseley access for a pre-settlement inspection of the property.[5]

The Committee's penalty decision

[44] The Committee received submissions as to penalty on behalf of Mr and Mrs Moseley and Mr Smith. On behalf of Mr and Mrs Moseley it was submitted that Mr Smith should be censured and ordered to apologise to the appellants, to undergo training and/or education, to pay relief under s 93(1)(f)(ii) of the Act, to pay a "significant" fine, and to make a payment to the appellants in respect of their costs and expenses incurred in making the complaint and submissions to the Committee. It was also submitted that the Committee should make an order under s 93(1)(ha) of the Act referring the matter to the Tribunal to consider whether to make an order for compensation under s 110.

[45] On behalf of Mr Smith, it was submitted that Mr Smith's conduct was at the lower end of the scale of unsatisfactory conduct, and was "fleeting with no sense of

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5 At paragraphs 3.46–3.51.

deliberacy". It was submitted that Mr Smith's unsatisfactory conduct was not serious enough to warrant a significant penalty and that the appropriate penalty would be orders to apologise and to pay a fine at the lower end of the scale. It was further submitted that as the Agreement for Sale and Purchase was unconditional at the time of the inspection, Mr Smith's unsatisfactory conduct was not causative of the appellants' loss, with the result that a penalty order was appropriate rather than any order to rectify, reimburse, or compensate the appellants.

[46] The Committee noted that Mr Smith's submissions refuted the finding that the damp state of the subfloor would have been reasonably apparent. In the circumstances, it concluded that an apology was unlikely to acknowledge the unsatisfactory conduct. Further, it did not consider further training would address Mr Smith's failure to pass on information, or prevent similar conduct occurring in the future.

[47] With respect to a fine, the Committee noted its jurisdiction to order a fine of up to $10,000. In assessing the seriousness of Mr Smith's unsatisfactory conduct, the Committee took into account the purposes of the insurance check, and placed it at a "low" level. It also took into account Mr Smith's previously unblemished record and the fact that it had not found his conduct to be deliberate. The Committee ordered Mr Smith to pay a fine of $2,500.

[48] The Committee declined to order relief under s 93(1)(f)(ii), on the basis that Mr Smith's unsatisfactory conduct occurred after the Agreement for Sale and Purchase became unconditional, so was not connected to their decision to purchase.

[49] The Committee recorded that it had no jurisdiction to refer the matter to the Tribunal under s 93(1)(ha), as that section did not come into force until 29 October 2019, and the unsatisfactory conduct occurred in 2016.

[50] The Committee ordered Mr Smith to pay the appellants $2,500 as part reimbursement of their legal costs incurred in respect of the Committee's investigation and consideration of the complaint.

Principles as to appeals against decisions of Complaint Assessment Committees

[51] Pursuant to s 89(2) of the Act, having investigated Mr and Mrs Moseley's complaint, the Committee could determine:

[a] that the complaint be considered by the Tribunal (by way of a charge of misconduct under s 73 of the Act);

[b] that it was proved that Mr Smith had engaged in unsatisfactory conduct (under s 72 of the Act); or

[c] to take no further action on the complaint.

[52] The Committee's determination to take no further action on the complaint that Mr Smith misled him in saying that the property was not affected by the June 2015 floods was made pursuant to s 89(2)(c). An appeal against that determination is a "general" appeal and the Tribunal is required to make its own assessment of the merits in order to decide whether the Committee's decision was wrong.[6] If the Tribunal is not persuaded that the Committee reached the wrong decision it will dismiss the appeal. If it is persuaded that the Committee's determination to take no further action was wrong, the Tribunal may make a finding of unsatisfactory conduct, or refer the matter back to the Committee for reconsideration.

[53] The essence of Mr Moseley's appeal in relation to the issue of disclosure of the subfloor defects is that the Committee was wrong to make a finding of unsatisfactory conduct against Mr Smith, and that his conduct constituted misconduct. As is clear from s 89(2) of the Act, the Committee did not have the power to make a finding of misconduct. If the Committee considered that there was evidence before it on which (if accepted by the Tribunal), the Tribunal could reasonably find Mr Smith guilty of misconduct, it could have referred the matter to the Tribunal on a charge of misconduct, pursuant to s 89(2)(a).[7] As recorded earlier, the Committee concluded that Mr Smith's conduct was unsatisfactory conduct, not misconduct.

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6 See *Austin Nicholls & Co Ltd v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141, and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898, at [112].

7 *Edinburgh Realty Ltd*, at [106].

[54] Mr Wheeler submitted that the determination not to lay a charge of misconduct involves the exercise of a "prosecutorial discretion". In its decision in *Maketu Estates Ltd v The Real Estate Agents Authority (CAC 403)*, the Tribunal rejected a submission that an appeal against a Complaints Assessment Committee's exercise of a "prosecutorial discretion" should only be allowed if the Tribunal is satisfied that the Committee acted in bad faith or for an improper purpose.[8] The Tribunal referred to its statement in *Dunn v Real Estate Agents Authority (CAC 10043)* that:[9]

> Some of the [considerations relevant to prosecutorial functions] do not apply to a civil disciplinary matter under the [Act]. the civil nature of these disciplinary proceedings is an important factor in analysing the role of the Tribunal in considering an appeal under s 111 from a decision not to prosecute. …

To that we would add that it would not be consistent with the consumer-protection focus of the Act to take such a restrictive approach to appeals against Committees' determinations not to lay charges of misconduct.

[55] We consider that the correct approach was as set out in *Maketu*: an appeal to the Tribunal against the Committee's exercise of a discretion whether to lay a charge of misconduct will be allowed if the Tribunal is satisfied that the Committee made an error of law or principle, took irrelevant considerations into account or failed to take relevant considerations into account, or if the decision was "plainly wrong".[10] A decision that is "plainly wrong" is one that was not open to the Committee to make on the evidence before it.

[56] If the Tribunal finds on the evidence that it was open to the Committee to find that Mr Smith's conduct amounted to unsatisfactory conduct but not misconduct, then the appeal will be dismissed. However, if the Tribunal is satisfied that there is evidence on which (if accepted by the Tribunal), Mr Smith could reasonably be found guilty of misconduct), the appropriate outcome is that the unsatisfactory conduct finding is quashed and the matter referred back to the Committee for reconsideration.

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8 *Maketu Estates Ltd v The Real Estate Agents Authority (CAC 403)* [2016] NZREADT 48.

9 *Dunn v Real Estate Agents Authority (CAC 10043)* [2012] NZREADT 56, at [13].

10 See *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1, at [32], *Edinburgh Realty Ltd*, at [111], and *Maketu* at [32].

[57] As with all appeals, the onus is on the appellant (in this case, Mr Moseley) to satisfy the Tribunal that the Committee erred.

Application to submit further evidence

[58] Pursuant to s 111(3) of the Act, an appeal against a determination of a Complaints Assessment Committee is by way of a re-hearing of the material that was before the Committee. That is, the Tribunal hears submissions by or on behalf of the parties, and considers the evidence and other material that was provided to the Committee.

[59] In its decision in *Eichelbaum v Real Estate Agents Authority (CAC 303)*, the Tribunal accepted that it may give a party to an appeal leave to submit evidence to the Tribunal that was not before the Committee, if the Tribunal considers that it is just to do so. An applicant for leave must satisfy the Tribunal that:[11]

[a] the evidence could not have been obtained by the party with reasonable diligence and provided to the Committee;

[b] the evidence is relevant to the issues to be determined on appeal;

[c] the evidence is cogent – that is, it would have had an important influence on the outcome; and

[d] the evidence is apparently credible.

[60] However, the Tribunal also accepted that material that would merely elaborate or improve upon the evidence already available in the material before the Committee is unlikely to meet the test for leave, and that its power to allow a party to submit evidence on appeal is not to be used to give the party the opportunity to run their case afresh simply because they wish they had conducted it differently in the first place.[12]

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11 *Eichelbaum v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 3, at [48]–[49].

12 At [51] (citing *Foundation for Anti-Aging Research v the Charities Registration Board* [2015] NZCA 449, at [35]).

[61] Mr Moseley submitted 16 documents and photographs with his submissions. Six of these reproduced documents and photographs which were before the Committee and have been included in the Bundle of Documents for the appeal. Leave is not required to submit these or to refer to them in submissions. We turn to the remaining ten documents and photographs.

[62] One photograph is a screenshot taken from the NewstalkZB video. While the video was before the Committee (and the link to the video is set out in the Bundle of Documents) the screenshot, as a separate document, was not. As part of material that was before the Committee, leave is not required to submit it or to refer to it on appeal.

[63] One further photograph appears to be the same as a photograph annexed to Mr Moseley's submissions to the Committee as to penalty (marked "7: Water marks from flooding and fallen piles"). As this photograph appears to have previously been submitted to the Committee, leave is not required to submit it or to refer to it on appeal.

[64] One document was a medical certificate recording recurrent respiratory infections suffered by Mr and Mrs Moseley after they moved into the property. The certificate was referred to in correspondence before the Committee, and we note that the Committee accepted that the appellants had suffered ill health. In the circumstances, we see no issue in the medical certificate being submitted on appeal.

[65] Another document (part of a letter from the vendors' solicitors) related to the complaint against Mr Stevens, and is not relevant to this appeal. Leave is not given for it to be submitted.

[66] As best as the Tribunal can determine, the remaining six photographs annexed to Mr Moseley's appeal submissions were not before the Committee. The Tribunal was advised that they were on the USB stick submitted to the Authority's investigator by Mr Moseley but not provided to the Committee. They are as follows:

[a] A Google Maps street view of 40 Normanby Street, dated 11 October 2020. The "image capture" date is recorded as August 2019.

[b] A photograph of grass with ponded water, described by Mr Moseley as a photograph showing "the amount of water in the front garden after about four hours of rain".

[c] A small format photograph of a street with surface water.

[d] A photograph of a brown floor surface with black spots on it, described by Mr Moseley as "water spots under carpets in the dining room".

[e] A photograph similar to photograph [d], described by Mr Moseley as "water marks and black mould under carpet".

[f] A photograph of an underfloor area, described by Mr Moseley as "tide marks on piles and make shiff [sic]".

[67] Mr Moseley submitted that the Authority failed to forward to the Committee all of the evidence sent to it, and the USB stick has now been lost. He submitted that it would be unfair for him to be required to seek leave to submit (as new evidence) material that he had already submitted.

[68] Ms Gaborieau submitted that leave should not be given, as the photographs could with reasonable diligence have been provided to the Committee, they were not relevant to issues on appeal, there was insufficient evidence available to determine their provenance and credibility (in particular with respect to photographs that were not date-stamped), or would not have an important influence on the outcome of the appeal.

[69] Mr Wheeler advised the Tribunal that:

> [Mr Moseley] submitted a flash drive containing numerous photographs to the Authority in support of his complaint against [Mr Smith]. As can be seen from the correspondence between the Committee and the Authority, only photographs that established the presence or absence of flooding and what [Mr Smith] would have seen during the insurance inspection were requested. As a result, only a snapshot of photographs were provided to the Committee and therefore included in the [Bundle of Documents] for this appeal.

[70] While acknowledging that it was not through lack of diligence by Mr Moseley that the photographs were not provided to the Committee, Mr Wheeler supported Ms Gaborieau's submission that the photographs should not be admitted.

Discussion

[71] Mr Wheeler referred to "correspondence between the Committee and the Authority". It appears to the Tribunal that the Authority's investigator queried how many of the photographs on the USB stick the Committee wanted to see. The Committee chairperson responded:

> Without knowing what the photos cover it is a bit difficult to say a number.
>
> The most relevant photos will be any that prove the property was/wasn't flooded in the 2015 floods in the area (would need a date proof of some sort), and any that show the issues and defects at the property prior to/at the time of sale to the [appellants] – again these would need to be dated if possible to be relevant – eg exterior or interior rot that was visible without invasive testing, evidence of flooding such as "tide marks" on piles, failing cladding, any obvious subsidence, areas of surface flooding under or around the house.
>
> What we are looking for is evidence of defects that would have been reasonably discoverable by [Mr Smith], not issues that would only become apparent when repairs were carried out or that required a building expert to discover.
>
> We don't want 1000 photos, and don't want double-ups, but do want relevant ones …

[72] The chairperson's response was passed on to the investigator. We assume that a selection was made as to photographs to be provided to the Committee from the USB stick, but it appears that the selection was not made by the Committee. We observe, however, that the chairperson correctly identified what would be relevant to its determination, and stressed that the Committee did want to see relevant photographs.

[73] The Google Maps street view is said to have been captured in August 2019, well after the appellants bought the property. We accept that the property is identified but the photograph does not show anything that would assist the Tribunal to determine the issues on appeal (which relate to Mr Smith's conduct in 2016).

[74] We accept Ms Gaborieau's submission that the six photographs identified in paragraph [66], above, are similar to photographs that were before the Committee, and do not add anything new. Further, none of the photographs is date-stamped, so the

Tribunal has no basis on which it could conclude that they depict the condition of the property as seen by Mr Smith when he was marketing the property. In particular, there is no suggestion that the carpet was taken up when the property was marketed, so photographs of the floor under the carpet are not probative for the purposes of the appeal. We also accept that the photographs would not have an important influence on the outcome. For those reasons, leave is not given for the six photographs to be submitted on appeal.

Was the Committee wrong to find that it was not established that the property was affected by the 2015 flooding?

Submissions

[75] Mr Moseley challenged the Committee's decision that it was not established that the property was affected by the 2015 flooding. He submitted that the evidence before the Committee showed Normanby Street under water, and that it is clear that the street is prone to flooding.

[76] Ms Gaborieau submitted that the Committee undertook a rigorous examination of the evidence before it, including photographs and video evidence, various documentation, and technical reports as to the condition of the subfloor. She submitted that the Committee did not err in concluding that the evidence was inconclusive.

[77] She submitted that neighbours and various tradespeople had not been able to give contemporaneous evidence on the issue of the 2105 flooding, and that the NewstalkZB footage had been shot in an area that was nearly a block away from the property. She also referred to the conclusions in the Flanders Marlow report that the defects in the subfloor were typical to the type of property and dwelling, that it was likely that moisture evaporation from the ground had not been adequately removed, and that there were other issues that had led to water tracking along the ground.

[78] Mr Wheeler advised that the Authority did not wish to make submissions as to the Committee's factual findings, and abides the decision of the Tribunal.

Discussion

[79] In its discussion of this element of the appellants' complaint, the Committee referred to rr 5.1 and 10.7 of the Rules, which provide:

> **5.1** A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
>
> **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–
>
> (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.

[80] The Rules provide a footnote to r 10.7, as follows:

> For example, houses built within a particular period of time, and of particular materials, are or may be at risk of weathertightness problems. A licensee could reasonably be expected to know of this risk (whether or not a seller directly discloses any weathertightness problems). While a customer is expected to inquire into risks regarding a property and to undertake the necessary inspections and seek advice, the licensee must not simply rely on caveat emptor. This example is provided by way of guidance only and does not limit the range of issues to be taken into account under rule 10.7.

[81] The Committee set out the evidence before it as to whether the property was affected by the 2015 flooding, and made a factual finding that the property was not affected. On that basis, it found that it was not established that Mr Smith failed to disclose that it had been affected. The Committee did not address whether, by reporting what he was told by the vendors, Mr Smith complied with his obligations under rr 5.1 and 10.7.

[82] The LIM report (obtained when Mr Smith marketed the property in 2013), referred to the property being "located within an urban stormwater catchment that has been modelled in a study to determine the potential effects of land use and climate change that may occur over the next 50 years", which indicated that "some areas of the catchment may be subject to a potential flooding risk or surface water ponding during particular rainfall events". The LIM sets out that the property is, or may be, at risk of flooding. The Flanders Marlow report included the statement that "typically

the ground conditions in South Dunedin are damp … Due to the recent flooding, the ground conditions are currently excessively damp". It is evident from the NewstalkZB video that the June 2015 flood was widely reported. As at the time the property was marketed to Mr Moseley in February 2016, the 2015 flooding was a very recent event.

[83] The Tribunal observes that a reasonably competent licensee marketing properties in the area would have been aware of the potential risk of flooding in the area, and would have enquired of the vendors as to how the property had been affected by the 2015 flooding and, if told that it had not been affected, would have required evidence or expert advice on the point. There appears to be no evidence that Mr Smith sought any evidence or other advice to support what the vendors said, prior to the appellants' complaint. However, as the Committee did not address the point, and did not make a determination on it, the Tribunal is not able to make any finding in respect of it.

[84] The fact that the agency agreement pursuant to which the property was marketed to the appellants was not retained by the Agency is a matter of serious concern to the Tribunal, particularly as the appellants' concerns were raised with the Agency shortly after they took possession of the property, and a formal letter of complaint was sent by the appellants' solicitors to the Agency on 14 October 2016.

[85] The Tribunal observes that the agency agreement was a relevant document, and should have been retained in order to assist the Authority in the event that a complaint to the Authority followed. On being told that the Agency had not retained the agency agreement it would have been reasonable (in light of the gravity of the appellants' complaint) for the Authority's investigator to request a copy from the vendors. Alternatively, if the agency agreement had been emailed, an email search could have provided a copy.

[86] We have concluded that the evidence before the Committee was equivocal as to whether the property was affected by the June 2015 flooding and if so, to what extent. The rear neighbour (whose section is directly behind and higher than the property) said that "during the torrential rain of June 3rd/4th 2015 the water was so high that our entire backyard was completely flooded up to the house" and she had "no doubt … that [the

property] would have been flooded as well, as your garden is significantly lower than ours". However, that is not direct evidence that the property was in fact flooded, and the ORC publication states that Normanby Street "was not badly affected in the June 2015 flood". We accept that there may be a difference between a property being "badly affected" by the flood and being "affected" by the flood.

[87] The photographs of the underfloor submitted by Mr Moseley appear to show water damage, but Flanders Marlow suggested that this was the result of water issues other than the 2015 flooding. The screenshots from the NewstalkZB video show surface water on Normanby Street, but this is said to be in an area nearly a block away from the property.

[88] In the circumstances, we are not persuaded that the Committee was wrong to determine that it was not satisfied on the balance of probabilities that the house or subfloor of the property had been flooded in June 2015 and that, as a consequence, it could not find that Mr Smith failed to disclose that it had been flooded. The Tribunal will therefore dismiss this element of the appeal.

Was the Committee wrong to find Mr Smith guilty of unsatisfactory conduct in respect of his failure to disclose the subfloor defects?

Submissions

[89] Mr Moseley submitted that Mr Smith had "taken responsibility" when he insisted on checking the piles and subfloor and said the piles were of mixed materials and in good condition. He submitted that this was false information and led to cancellation of the insurance.

[90] He submitted that Mr Smith deliberately failed to pass on exactly what he saw. With reference to Mr Smith's evidence that he had only a brief look at the subfloor, Mr Moseley referred to photographs of the subfloor area and submitted that "you cannot but see just how bad this was". He submitted that Mr Smith's conduct could not be described as a "technical breach", but amounted to misconduct.

[91] Mr Moseley submitted that the Committee was wrong to describe the insurance inspection as being a generic (non-specific) inspection. He submitted that the checklist form requires answers to specific questions, and is a legal document, and the importance of the inspection was explained to Mr Smith. He submitted that Mr Smith's trivial or cursory approach to checking the subfloor and piles amounts to misconduct, not unsatisfactory conduct, as Mr Smith clearly saw the state of the subfloor and withheld information as to that and the true state of the piles.

[92] Mr Moseley also submitted that the Committee was wrong to accept Mr Smith's evidence that he only looked into the inspection hatch for two or three seconds. He referred to a photograph provided to the Committee, which he said was taken looking straight down into the hatch, and submitted that the piles cannot be seen at all, but rotten wood and bearers can be seen. He submitted that to see the piles you have to get down on your knees (as he said Mr Smith did) and look right and left. He said other photographs showed water marks on a joist and "tide marks" on the piles.

[93] Ms Gaborieau submitted that in order for a licensee's conduct to be considered misconduct under s 73, a "sense of wilfulness or recklessness is required". She submitted that on the facts, there was no evidence before the Committee that there was any "deliberacy or lack of regard by Mr Smith for the consequences of his actions". She noted that the Committee found only that a "potential problem" may have been apparent to him when he looked through the inspection hatch. She submitted that a "brief observation that something that is possibly capable of coming into being" lacks the significance and seriousness required in order to result in a finding of misconduct.

[94] Ms Gaborieau submitted that Mr Smith's position is "buttressed" by the fact that the Committee elected only to impose a fine of $2,500 (when the maximum available fine is $10,000), which signifies that having considered all of the evidence and the submissions on behalf of the parties, it concluded that Mr Smith's conduct was at the lower end of the scale of seriousness. Accordingly, she submitted that Committee's finding of unsatisfactory conduct should stand.

[95] Mr Wheeler submitted that if the Tribunal agrees with the Committee's factual findings, then it should find that the Committee was not wrong to determine that Mr

Smith's conduct did not warrant referral to the Tribunal on a charge of misconduct. He submitted that Mr Smith's conduct was at the lower end of the scale of unsatisfactory conduct, and it would be a "considerable step up to consider it to be "on the cusp" of misconduct.

[96] Mr Wheeler acknowledged that distinct conduct issues can be considered cumulatively when determining whether a licensee's conduct should be considered by the Tribunal on a charge of misconduct.

Discussion

[97] In considering the appellants' complaint regarding Mr Smith's inspection of the subfloor area, the Committee referred to rr 5.1, 6.2, 6.4, and 10.7. We have set out rr 5.1 and 10.7. Rules 6.2 and 6.4 provide:

> **6.2** A licensee must act in good faith and deal fairly with all parties engaged in a transaction.
>
> **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.

[98] In its finding as to what would have been reasonably apparent to Mr Smith when he inspected the subfloor area on 22 February, the Committee referred to the evidence that water from a broken-down water pipe (noted by Mr Moseley at the time of the inspection) was likely to have been discharging water under the property, the "overpowering" musty smell noted by Mr Gibson on 8 April, the poor condition of the piles and dampness noted by Mr Stevens on 10 May, the observations in the K2 report in June 2016 that the ground at the property was "very wet, particularly under the house", and the description in the Flanders Marlow report in June 2016 of the subfloor space being "damp with a strong musty smell", and that "it was clear that the pile foundations were makeshift and/or decayed from the initial views obtained through the hatch".

[99] The Committee also took into consideration that at the time it was marketed, some areas of the house had been freshly painted and this masked the musty smell, as neither Mr Moseley nor Mr Smith reported a problem with a musty smell at the time of the inspection in February, the fact that February would have been warmer and dryer

than April and May (the time of the observations by Mr Gibson and Mr Stevens), and the likelihood that the damp condition of the subfloor would have been worse during the winter months of June and July (the time of the inspections by K2 and Flanders Marlow). It also referred to evidence that at the time of the inspection on 22 February the light was limited in the hallway as the electricity was off, and Mr Smith used his cellphone light to look into the hatch. The Committee further referred to the suggestion in the K2 report that the use of humidifiers (which it appears were operating 24 hours a day) may have been the reason why a musty odour may not have been apparent at the time of the February inspection.

[100] Having assessed the evidence, we are not persuaded that the Committee reached the wrong conclusion on the evidence. Direct evidence as to the general appearance of the property at the time of the insurance inspection in February was given by Mr Moseley and Mr Smith. Neither referred to a musty odour, which would have indicated a general issue as to dampness and decay. However, Flanders Marlow reported that "it was clear that the pile foundations were makeshift and/or decayed from the initial views obtained through the [inspection] hatch", and subsequent inspections confirmed the damp state of the subfloor.

[101] We are in no doubt that the Committee was correct to find that the damp odour and damp state of the subfloor would have been reasonably apparent to Mr Smith, and that in failing to report this to Mr Moseley, he failed to exercise skill, care, competence, and diligence, failed to act in good faith, and withheld information that he should in fairness have provided to Mr Moseley, in breach of rr 5.1, 6.2, and 6.4.

[102] We are not persuaded, however, that the Committee was wrong to find that beyond being required to report what was reasonably apparent from the inspection hatch, it was not satisfied that Mr Smith knew or reasonably should have known of the true state of the subfloor. This conclusion is based on the fact that Mr Smith was only looking through the inspection hatch, while subsequent inspections were more extensive (including lifting carpets, and lifting floorboards in other areas of the house). Further, those inspections occurred later in the year when, as the Committee noted, weather conditions would have been different.

[103] We turn to consider Mr Moseley's submission that Mr Smith should have been charged with misconduct. A charge of misconduct is made under s 73 of the Act, which provides:

> **73 Misconduct**
>
> For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct–
>
> (a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
>
> (b) constitutes seriously incompetent or seriously negligent real estate agency work; or
>
> (c) consists of a wilful or reckless contravention of–
>
> (i) this Act; or
>
> (ii) other Acts that apply to the conduct of licensees; or
>
> (iii) regulations or rules made under this Act; or
>
> (d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee.

[104] We reject Ms Gaborieau's submission that in order for a licensee's conduct to be considered misconduct under s 73, a "sense of wilfulness or recklessness" is required. While that submission reflects (in part) the wording of s 73(c), it does not reflect s73(a), (b), or (d). In the light of the Committee's finding in the present case that Mr Smith failed to comply with r 5.1 (which required him to "exercise skill, care, competence, and diligence"), s 73(b) is particularly relevant.

[105] In his submissions on behalf of the Authority, Mr Wheeler referred to the Tribunal's decision in *Maketu*, in which the Tribunal held that conduct that a Complaints Assessment Committee had described as being "on the cusp" of misconduct (but made a finding of unsatisfactory conduct) should as a matter of public interest have been referred to the Tribunal for determination on a charge.[13]

[106] It is necessary to clarify that in *Maketu*, the Tribunal did not hold that it is only when a licensee's conduct is "on the cusp" between unsatisfactory conduct and misconduct that a charge of misconduct should be laid (although clearly that would be a case where a charge should be laid).

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13 *Maketu Estates Ltd v The Real Estate Agents Authority (CAC 403)*, fn 8, above.

[107] Mr Wheeler further submitted that the decision in *Maketu* does not mean that conduct which is properly considered to be "high level" unsatisfactory conduct should be put before the Tribunal for consideration; he submitted that a decision to lay misconduct charges is properly made if there is "a realistic prospect of those charges being established".

[108] We do not accept that that is the correct approach to the determination whether to lay a charge of misconduct. The proper approach is that which is routinely recorded by Complaints Assessment Committees in their decisions to lay charges: a licensee's conduct should be referred to the Tribunal on a charge of misconduct if the Committee is satisfied that there is before it evidence on which, if the evidence is accepted by the Tribunal, the Tribunal could reasonably make a finding of misconduct.

[109] Having considered the evidence that was before the Committee, and the further evidence submitted by leave, we have concluded that it would have been open to the Committee to conclude that there was evidence on which, had it been accepted by the Tribunal, Mr Smith might reasonably have been found guilty of misconduct. However, we are not persuaded that the Committee's decision to make a finding of unsatisfactory conduct, rather than lay a charge of misconduct, was "plainly wrong". The Tribunal will therefore dismiss this element of the appeal.

Was the Committee wrong to determine to take no further action on the complaint that Mr Smith avoided giving Mr and Mrs Moseley access for a pre-settlement inspection?

Submissions

[110] Mr Moseley repeated the evidence he gave to the Committee, in a statement in support of the complaint: he said he rang Mr Smith's cellphone on 1 March just after 12.30 pm and got a voice mail message to leave his name and number. He said Mr Smith called him back after 6 pm and apologised that he had been tied up all afternoon. Mrs Moseley was unwell on 2 March, so they were not able to visit the property. Mr Moseley said he rang Mr Smith again on 3 March and again got a voicemail message, and Mr Smith called him back at 6.30 pm, saying he had had meetings and viewings all afternoon. At that time Mr and Mrs Moseley were about to go to dinner. After that

it was too late for a pre-settlement inspection, as settlement was occurring on 4 March. Mr Moseley's statement was supported by a statement by Mrs Moseley.

[111] He also referred to copies of text message exchanges between himself and Mr Smith (provided to the Committee by Mr Smith), and noted that there were further text messages, during the period from 23 February to 3 March, which Mr Smith had not provided.

[112] Neither Ms Gaborieau nor Mr Wheeler made submissions to the Tribunal on this point.

[113] The Committee based its decision not to take any further action on this aspect of the complaint on the conflict in evidence between Mr Moseley and Mr Smith. It noted Mr Smith's statement that he was available for an inspection in the period from 1 to 3 March, but Mr and Mrs Moseley had not contacted his cellphone or the Agency's office to arrange a pre-settlement inspection. The Committee found that it was not possible to find on the evidence before it that a pre-settlement inspection had been requested.

[114] We are not persuaded that the Committee was wrong to find it not established that Mr Smith avoided making himself available for a pre-settlement inspection. The Committee was faced with directly conflicting evidence, on which it could not make a finding on the balance of probabilities. Further even on the evidence of Mr and Mrs Moseley, Mr Smith did offer an inspection, albeit at an inconvenient time. The Tribunal will therefore dismiss this element of the appeal.

Outcome

[115] The appellants' appeal is dismissed. In the light of the Tribunal's finding, it is not necessary to consider the issue of relief.

[116] 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.

_____
Hon P J Andrews
Chairperson

_____
Ms C Sandelin
Member

_____
Mr N O'Conner
Member