

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2022] NZREADT 18

Reference No: READT 029/2019

IN THE MATTER OF

An appeal under s 111 of the Real Estate Agents Act 2008

BETWEEN

QQ
Appellant

AND

**THE REAL ESTATE AGENTS AUTHORITY
(CAC 1902)**
First Respondent

AND

NQ
Second Respondent

Hearing on 9 August 2022

Tribunal:

D J Plunkett (Chair)
C A Sandelin (Deputy Chair)
G J Denley (Member)

Representation:

The appellant:	Self-represented
Counsel for the first respondent:	M Mortimer-Wang
Counsel for the second respondent:	G Dewar

SUBJECT TO NON-PUBLICATION ORDER

DECISION

Dated 7 September 2022

INTRODUCTION

1. QQ (the appellant) was one of two owners of a residential property (the property). They were in dispute, so the High Court directed a sale of the property and authorised a solicitor, Michael Hofmann-Body, to carry out the sale (the solicitor). The second respondent, NQ (the licensee), was appointed by the solicitor to conduct the sale. The property had leaks and other defects and was sold 'as is where is'. The appellant wished to buy the property, but it was sold for a price higher than he considered it was worth. He makes a number of allegations against the licensee, notably that he did not disclose a particular leak.

2. The appellant made a complaint against the licensee to the first respondent, the Real Estate Agents Authority (the Authority). Complaints Assessment Committee 1902 (the Committee) decided on 5 August 2019 to take no further action on his complaint. The appellant appeals against the Committee's decision.

BACKGROUND

3. The appellant owned the property, situated in [Suburb], [City], with LL (the co-owner). The ground floor comprised a lounge, dining room, kitchen and laundry with a separate toilet. The first floor comprised three bedrooms, a bathroom and a separate toilet.

4. The licensee is a licensed salesperson under the Real Estate Agents Act 2008 (the Act). At the relevant time, he was engaged by [(the agency)].

5. There is a builder's report (26 February 2015) obtained by the appellant at the time he and the co-owner bought the property. It relevantly noted the following areas of possible moisture ingress:

1. The ceiling of the laundry above the dryer, located below the bathroom/shower. Further investigation was recommended.
2. The side of the shower. The area may have leaked in the past and further investigation was recommended.
3. Potential moisture ingress risk points (building design, cladding).
4. The ceiling in the lounge, where there was staining but no high moisture readings on the day of inspection. The area may have leaked in the past causing damage to the wall framing which could not be seen.

6. Irreconcilable differences arose between the appellant and the co-owner, both of whom occupied the property as offices for their respective businesses. The appellant occupied the first floor and the co-owner the ground floor. The differences arose after the appellant started using the upstairs rooms for living.

7. The appellant sought to buy the property but was unable to reach agreement with the co-owner. The appellant obtained a valuation from a registered valuer (dated 9 October 2017). The market value was given as \$380,000. The only “problems” noted concerned the roof cladding.

8. As a result of the differences between the owners, mortgage payments were not made, and the bank issued a notice of default. The High Court ordered sale of the property and on 16 November 2017, the Court authorised the solicitor to sell it. He was also authorised to appoint a real estate agent.

9. The solicitor obtained appraisals of the property from two agencies in November 2017. The licensee’s appraisal (24 November 2017) gave a price range of \$443,000 to \$497,000. In the other appraisal (30 November 2017), the range was given as \$455,000 to \$475,000 for a forced sale and \$470,000 to \$490,000 under normal market conditions. The second appraisal noted the “little overgrown” grounds, the dirty and untidy upstairs, as well as a rodent issue. The agent recommended that the property be vacant for marketing.

10. The solicitor appointed the licensee. An agency agreement was signed by the solicitor and the agency on 9 February 2018.

11. The solicitor sent an email to the appellant on 9 February 2018 advising him of various matters relating to the listing of the property with the licensee. He required the appellant to vacate the property prior to marketing, as it would best be marketed vacant. The licensee had advised him that if the property was not vacant, that could materially impact the sale price.

12. On 16 February 2018, the appellant contacted the Authority about his concern that the property would be marketed without disclosure of certain defects.

13. The solicitor sent an email to the appellant on 20 February 2018. In respect of “the leaks”, he advised they would be disclosed as part of the marketing. He added that the licensee had made clear to him that selling the property empty would increase the sale potential.

14. On 22 February 2018, the appellant sent an email to the Authority's investigator setting out the background. He listed the defects, including the leak in the lounge ceiling. He noted that the co-owner did not want to disclose the leaks. The solicitor had looked at the property and the appellant showed him all the leaks and defects. The appraisals given to the solicitor (including one from the licensee) made no mention of the leaks and defects. The appellant said he wanted to disclose the leaks.

15. On 28 February 2018, the solicitor advised the Authority's investigator that he had discussed the defects with the licensee. Known defects would be disclosed and unknown defects would be addressed by way of deleting the warranties. The attention of prospective purchasers would be drawn to the need to complete due diligence.

16. The appellant sent an email to the solicitor on 28 February 2018. He referred to the exaggerated price range mentioned by the agents. The other party had left no stone unturned in trying to get him out of the property and was mainly interested in creating hardship for him. He asked the solicitor to explain how not vacating the property would not engage more buyers or decrease the price. It was obvious to him it was a set-up created to work against him. They were alleging that he was impeding the process and sought to transfer to him blame for the sale price, even though he was fully cooperating.

17. The solicitor replied to the appellant on the same day. The solicitor said his focus was to sell the property for the best possible price. A vacant house would enhance the sale process. Unless someone advanced the staging costs, he would not be able to stage the property. In his view, the state of the property when he visited in November presented difficulties for marketing. The real estate agents had recommended that the property be vacant or staged.

18. An investigator from the Authority visited the appellant at the property, also on 28 February 2018.

19. The appellant obtained a further appraisal (5 March 2018) from another real estate agent. The price range given was \$365,000 to \$385,000. It recorded that known building issues would require disclosure. There was yet another appraisal (9 March 2018) from a different agent, addressed to both the appellant and the co-owner. The price range was given as \$370,000 to \$400,000. A draft advertisement in this appraisal stated that offers from \$379,000 would be welcome. The advertisement additionally stated that there had been a number of leaks which might have damaged the interior structure, as well as other defects.

20. The appellant sent an email to the licensee and the solicitor on 22 April 2018. He noted having given a building report (26 February 2015) to the solicitor. Furthermore, he

showed the solicitor and the licensee certain defects when they visited the property on 22 November 2017 (relevantly including):

1. Damage to the kitchen ceiling and lino probably due to a leak.
2. Heavy leak in the lounge ceiling, requiring four buckets on the ground to catch the dripping water. The co-owner had organised someone to cover up the stains.
3. Leak in the laundry ceiling.
4. Spouting rusted and cracked.
5. Damaged carpet in the conservatory due to a leak.
6. Damage in the garage due to a leak.
7. Wallpaper bloating at the entrance and staircase due to moisture ingress.
8. Worn out rubber window seals throughout the property allowing moisture ingress.
9. Damage to the ceilings of the bathroom and the toilet due to moisture ingress.
10. Damage in the master bedroom and another bedroom due to moisture ingress.
11. Containers and buckets in the roof cavity to capture water from leaks in roof.

21. In his email to the licensee and solicitor, the appellant further said that after showing those defects to them on 2 March 2018, he informed them he did not want the property marketed dishonestly. The licensee had suggested getting a property inspection report done, which could be given to every viewer, but the solicitor negated this suggestion. The solicitor did not want to know any more defects in the property.

22. On 23 April 2018, the solicitor sent an email to the appellant, copied to the licensee. He noted that the appellant had provided him with an exhaustive list of issues relating to the property. He had instructed the licensee to market the property 'as is where is' and to advise all potential purchasers they would need to take due care in making their offers. He noted that time had been given to the appellant to vacate the

property as that was prudent to best market it. The appellant elected not to vacate, but he had substantially improved the appearance of the upper level.

23. The solicitor said in his email that the suggestion he and the licensee would dishonestly market the property was totally unfounded.

24. The solicitor explained that he had rejected getting a building report as further information beyond what was known would potentially diminish the purchase price. There was a positive obligation on vendors and agents to disclose all known defects. However, a licensee was not required to discover hidden or underlying defects in land. The disclosure provided to date was adequate. Furthermore, the property was to be sold 'as is where is' and the warranties deleted, so the purchasers would be on notice to make their own enquiries.

25. Marketing of the property commenced on 27 April 2018. The Tribunal has seen one item of marketing, a brochure in the name of the licensee. It is noted from the photographs that the house is largely empty of furniture and personal items. The only comment on the condition of the property was:

The house is in tidy condition while still having some deferred maintenance items to attend to...

26. On 30 April 2018, the Authority's investigator sent an email to the appellant. He confirmed having met him at the property and having spoken to both the solicitor and the licensee. He advised that from the information provided, no breach of the "code" was apparent and the inquiry was closed.

27. In the Particulars and Conditions of Sale by Auction, a number of the standard vendor's warranties and undertakings were deleted, notably those concerning local government and Building Act 2004 requirements. The particulars also incorporated the following clause:

21.0 As is Where Is

21.1 The parties agree that the Property is sold on an "as is where is" basis regardless of any warranty or representation to the contrary in this agreement whether express or implied.

21.2 In deciding to purchase the Property the purchaser has relied on its own judgement and not on any representation made by the vendor or by any person on the vendor's behalf. The purchaser will raise no objection to, or requisition in respect of, the Property, its condition or any matters affecting the Property.

28. Disclosure forms notifying defects in the property were signed by prospective purchasers before bidding at the auction. Certain defects were disclosed. The bidders acknowledged having been:

...told that there may be a leak in the upstairs bathroom from around the base of the shower that may cause a leak through the ceiling below.

29. On 24 May 2018, the property was sold at auction for \$465,000.

30. Following the sale of the property, the co-owner sought costs and orders against the appellant under s 343 of the Property Law Act 2007. The High Court delivered its decision on [date redacted].¹ The appellant was ordered to pay the co-owner occupational rent for a period and to pay for the cleaning costs over the weekend at the time of settlement.

THE COMPLAINT

31. On 28 August 2018, the appellant made a formal complaint against the licensee to the Authority.

32. The appellant stated that he had informed the licensee about the leak in the ceiling of the lounge, but it was intentionally not disclosed in the auction document.

33. According to the appellant, the co-owner wanted to sell the property and the appellant wanted to buy it, but the co-owner did not want to sell to him. The appellant said that while he showed the licensee all the defects, there was no mention of them in the licensee's appraisal.

34. After the appellant had earlier contacted the Authority, the solicitor and the licensee came to the property to see the defects and leaks. They attempted to persuade him not to disclose the leaks, as that would put more money in his pocket. The appellant said he refused. On the auction document, there was no mention of the leak in the lounge ceiling, though he had showed them "both". During heavy rain, water used to drip from the ceiling, and they had to put four buckets in a straight line to catch the water.

35. In an email to the Authority (22 February 2019), the appellant stated that there was a suspected leak from the shower upstairs to the laundry ceiling downstairs, which was fixed by the previous owner. This leak was coming from the roof because whenever he had a shower, the water was not leaking from the laundry ceiling. However, there was a current leak in the lounge. The co-owner had confirmed there was a leak in his office (the lounge).

¹ [Decision redacted].

36. The appellant also alleged that there was no elevated drone photography and no premium photo sign as mentioned in the marketing plan. There was only a basic wooden sign.

37. The appellant sent further information to the Authority on 27 February and 7 March 2019. In the latter email, he referred to the licensee's basic signboard, which was not as mentioned in the marketing plan. Nor was any elevated drone photography done.

38. According to the appellant, it was the intention of the co-owner and the solicitor to get him out of the property and restrict his access, so the leaks could be covered up. This would fetch a price higher than he had offered.

39. The appellant provided to the Authority an affidavit (31 May 2018) sworn by him in opposition to the application to the High Court by the co-owner for certain post-auction orders.

40. In his affidavit, the appellant said that he and the co-owner had in 2016 agreed to sell the property. There was a leak in the ceiling of the lounge. The appellant stated that he "got carried away" with the co-owner's idea of covering up the leak and then listing the property. Before the agents came to appraise the property, cash was paid to a handyman to cover up the leak. A separate dispute between them arose. The co-owner wanted to list the property by hiding the leaks and the appellant wanted to disclose the leaks and defects. The co-owner wanted to avoid the appellant purchasing the property.

41. The appellant further deposes that on the same day that a valuer was due to arrive, the co-owner arranged for a handyman to cover up the leak in the ceiling of the lounge.

42. In his affidavit, the appellant also said that the co-owner wanted to get rid of him from the property for no other reason than to create hardship in retaliation for the appellant disputing his accounting fees (the Tribunal records that there have been proceedings in the Disputes Tribunal between the two owners).

Explanation of the licensee

43. The licensee wrote to the Authority on 24 January 2019. He said that the solicitor had made it clear to the licensee that he was acting as the vendor under a court order and the correspondence was to be with him alone.

44. According to the licensee, the appellant wanted negative aspects of the home pointed out to the buyers, even though he did not supply any reports to support his claims.

45. As for the appellant's accusation that he did not disclose the leaks to the buyers, the licensee referred to the buyer disclosure form signed before bidding, as well as the deletion of the warranties and undertakings. He made sure buyers were all made aware of this before the auction day. There would not have been any surprises for the purchasers.

46. In order to achieve the best sale price, the licensee said he often staged homes. In this case, the ground floor was vacant and the appellant, who was living upstairs, had very few belongings or furnishings. A good presentation was vital. The ground floor was partitioned off and locked, the wastemaster in the kitchen leaked and there were mice droppings. He organised a plumber to disconnect the wastemaster, a handyman to take out the rubbish and take down the partition and pest control to deal with the mice. The solicitor arranged for the overgrown garden to be dealt with.

47. There were issues around the appellant not being out of the property until the last minute and the property needing a clean, which held up settlement until the following Monday. He was not involved in this.

48. The licensee provided to the Authority an email (28 January 2019) from a failed bidder addressed to the licensee. It relevantly stated:

We were advised by yourself that the property had several defects, namely ..., the leak in the upstairs bathroom that had damaged the ceiling and potentially the wall lining in the downstairs laundry, ..., leaks in the conservatory ...

49. That bidder had obtained his own builder's report (11 May 2018). It relevantly stated that there was a moderate level of concern with weathertightness:

1. Under the heading "Disclosure of Defects by Real Estate salesperson", there was the comment, "A shower is leaking upstairs and has damaged the laundry and lounge ceilings downstairs" (at p 15 of the report).²
2. There was water staining on the roof framing, though the stains were not wet and the framing did not have an elevated moisture level. It recommended monitoring during the next heavy rainfall.
3. Water was leaking out of the waste disposal.

² See 285 of the Authority's principal bundle.

4. Comments were made regarding design features such as the cladding, rain water collection, soffits and the like.
5. The moisture readings throughout the house were normal, apart from the laundry, one bedroom and the dining room window.

Evidence of the solicitor to the Authority

50. The solicitor wrote to the Authority on 30 January 2019. He stated that the circumstances of the sale involved a protracted dispute between the two owners.

51. The actual and alleged issues with the property were a substantial part of their dispute. It was apparent to the solicitor that the two owners had very different views on the existence or otherwise of defects. Some were obvious, including the presence of leaks. The property was not in a good state of repair. The garden was significantly overgrown and there were vermin. With the assistance of the licensee, a number of issues were rectified prior to the auction.

52. The appellant alleged there were further defects for which the solicitor was not able to obtain evidence. Out of an abundance of caution, he instructed the licensee to market the property on an 'as is where is' basis. The agreement and disclosures were drafted on this basis. It was made clear to all prospective purchasers that caution needed to be exercised and due diligence undertaken.

53. The licensee's duties were to the solicitor as the court-appointed lawyer, not to the appellant.

54. The solicitor stated that he supervised every aspect of the sale process and the licensee always acted in accordance with his directions. In the solicitor's view, the licensee fully complied with his professional obligations.

Decision of Complaints Assessment Committee 1902

55. On 5 August 2019, the Committee issued a decision concluding it would take no further action.

56. The Committee said that r 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) required the disclosure of known defects, but not hidden or underlying defects. The appellant thought that the listing price of the property was too high, and he was concerned that the licensee and the solicitor intended to market the property without disclosure of its defects. The evidence showed

that the appellant was given assurances by the solicitor that the property's defects would be disclosed. Instructions were communicated to the licensee who confirmed that he made sure that buyers were aware of the property's defects. The buyer disclosure and the auction particulars were prepared by the licensee according to specific instructions of the solicitor. A number of defects were disclosed.

57. While the appellant said that not all the defects he had identified were disclosed, the Committee noted the solicitor said that the appellant and the co-owner had differing views of the property's defects. The appellant had alleged certain defects, for which the solicitor was not able to obtain any evidence. The solicitor had therefore instructed "out of an abundance of caution" that the property would be marketed on an 'as is where is' basis. The solicitor said he had disclosed the defects which were obvious to him and he considered that marketing the property on this basis ensured that prospective purchasers were on notice to undertake their own investigations. He had advised on every aspect of the sale process and the licensee had always acted in accordance with his instructions.

58. The Committee found that the licensee had acted on the solicitor's instructions and made appropriate disclosures during the marketing of the property and in the auction documents, with clear written advice to prospective purchasers as to the property being sold 'as is where is' and that there would be no recourse in respect of the condition of the property. It found there was no breach of r 10.7.

59. The Committee also dealt with the complaint that the licensee had not acted in good faith and dealt fairly with the appellant (r 6.2). This was based on the appellant being asked to vacate the property during its marketing. The Committee noted that the condition of the property at the time of sale presented challenges. There were leaks and other defects requiring repair. The co-owner had put a partition between the kitchen and the dining room to demarcate his part of the property. There was a rodent problem, the grounds were overgrown, the appellant was living in the property and he was reluctant to participate in the sale process.

60. The licensee's advice to the solicitor was that he considered that if the property was vacant, cleaned out and staged with furniture, it would increase the sale potential. The solicitor agreed with the licensee and considered that a sale would be more easily achieved if the property was vacant. He said he had been given the same advice by the other agency which had appraised the property. However, the appellant did not want to vacate the property. The solicitor, in the end, marketed the property with the appellant in residence.

61. The Committee found that while it was understandable that the appellant preferred to remain in the property, it was the licensee's professional duty to advise the solicitor how he thought the property should best be presented for sale and the licensee's advice was that a better price would more likely be achieved if the property was vacant and staged for sale. The Committee regarded this as standard industry advice in the circumstances. Accordingly, the Committee would take no further action on this aspect of the complaint.

62. The appellant had also contended that he was wrongly blamed by the licensee for delaying the selling process by filing a complaint with the Authority. The evidence before the Committee showed that the solicitor and the co-owner considered that the appellant's conduct, including his involvement with the Authority, contributed to delays in the sale process and it was noted by the High Court that the appellant was initially disruptive of the sale process. However, the Committee found no evidence that the licensee was a party to any of the accusations against the appellant in this respect. It decided to take no further action concerning this aspect of the complaint.

63. Furthermore, the appellant alleged that he was blamed for delays in the settlement of the property. The sale of the property had been scheduled for settlement on a Friday but was deferred until the following Monday to allow the property to be cleaned over the weekend. The Committee noted that there was evidence of delays by the appellant in vacating the property. The purchaser of the property was the client of another agent at the agency and the licensee said he had not been involved in the deferment of settlement or the cleaning arrangements. The Committee found no evidence that the licensee blamed the appellant for delays in the settlement of the property and accordingly it would take no further action on that aspect of the complaint.

64. The appellant also complained that he was wrongly charged cleaning costs, but the evidence showed that the decision to clean the property was a matter decided between the solicitor, the purchaser's solicitor and the agent representing the purchaser. There was no involvement by the licensee so the Committee would take no further action on this aspect of the complaint.

65. The appellant had additionally raised a complaint about the licensee's marketing costs and said that not all of the marketing was carried out as promised and that it was in part incorrectly charged. The Committee found that as the licensee was acting for the solicitor and not the appellant, the licensee had no obligation to the appellant in respect of the agreed marketing costs. Accordingly, the Committee would take no further action concerning that aspect of the complaint.

APPEAL

66. The appellant sought to produce evidence to the Tribunal that was not before the Committee and also applied to cross-examine a number of witnesses. The Tribunal issued a Ruling on 25 November 2019 declining to admit the new evidence but permitting him to cross-examine the licensee as to his knowledge of the lounge ceiling leak and his disclosure of defects. In Ruling (2) on 22 September 2020, the Tribunal declined the appellant's application to adduce three videos in evidence.

67. The Tribunal issued a Minute (4) on 8 June 2022 concerning the conduct of the hearing. It noted the limited focus of the hearing.

68. On 7 August 2022, two days prior to the hearing, the appellant sent the Tribunal a memorandum produced earlier to the High Court (13 November 2017). At the hearing before the Tribunal, the appellant said it showed the solicitor had been authorised by the High Court to carry out the sale and not appointed by it, as the solicitor had claimed. In an email to the Tribunal on 9 August 2022 immediately after the hearing on that day, the appellant stated that there is a vast difference between being appointed by the High Court and merely being authorised by that Court. The Tribunal accepts that the solicitor was "authorised" by the Court to carry out the sale, but it is irrelevant to the issues before the Tribunal whether that is regarded as a formal "appointment" by the Court.³

69. At the hearing, the appellant raised an issue as to certain photos and videos missing from the Authority's bundle of documents before the Tribunal. He followed this up with emails to the Tribunal on 10 and 11 August 2022, additionally noting that there were two different versions of a cleaning invoice.

70. The Tribunal directed on 15 August 2022 that any photos which had been provided to the Committee, but which were not in the bundles before the Tribunal, could be provided to the Tribunal in the appellant's closing submissions. However, photos not sent to the Committee could not be produced to the Tribunal. As for the videos, the appellant was advised that the Tribunal had earlier ruled they could not be adduced in evidence. The Tribunal also determined that the cleaning invoices were irrelevant.

71. At the conclusion of the hearing, the Tribunal directed closing submissions be produced in writing.

³ [Decision redacted].

Submissions of the appellant

72. In his grounds of appeal (8 October 2019), the appellant says that the solicitor and the licensee clearly saw the ceiling leak on their first visit. They were told at least three times in writing about the leaks. The licensee made no attempt to obtain any evidence for the leak. He hid the leak from prospective buyers. The Committee inadvertently failed to acknowledge that the leak was not a hidden or underlying defect. It was quite evident until the co-owner patched it up. The solicitor did not disclose it in order to fetch a higher price.

73. The appellant says that the Committee failed to note that there was no evidence for the leak between the shower and the laundry. In fact, there was no such leak present, as it had been fixed by the previous owner. While certain warranties were deleted from the sale and purchase agreement and the property was listed 'as is where is', prospective buyers were misled into believing there was just one minor leak (which was not even present) in the property.

74. The leak between the shower and the laundry was not mentioned in the bidder's building report (11 May 2018), yet it was mentioned in the sale and purchase agreement. But the building report did mention water staining on the roof framing, though at the time there was no elevated moisture level, and the stain was not wet. The report recommended that the stain be monitored at the next heavy rainfall. There was therefore evidence in the building report which the Committee failed to note.

75. The Committee wrongly assumed that the appellant was a reluctant participant. As to this, the appellant says he was more interested in getting the property sold as soon as possible as he was moving overseas.

76. There was no genuine reasoning provided by the Committee as to why the appellant should vacate the property, as all the listed defects (the overgrown grounds, the partition in the kitchen and the rodent issue) were not of his making. The appellant's continued residence would not have affected solving these issues, as was successfully done later. The whole plan to require him to vacate the property was to enable the ceiling to be patched up and the leak to be covered up. Only the two agents instructed by the solicitor suggested the property be vacated and not any of the four or five agents that he or the co-owner engaged. The property could have been staged while he was living there, as he did not have many possessions.

77. The appellant contends that the licensee falsely blamed him for the delay in listing the property. There was no evidence of any action on his part which delayed listing the property. As for the delay in settlement, there is no proof that the buyer wanted the property to be cleaned but the buyer had expressed a desire not to settle until a tree was removed. This led to a fake cleaning invoice of \$400.

78. According to the appellant, the Committee dismissed his complaint about the marketing costs on the ground that the licensee owed no obligation to him. While the solicitor was authorised by the High Court, this did not remove the appellant's position as a registered owner of the property. The agency agreement, as well as the sale and purchase agreement, mention him as a vendor. There was no evidence of photography by drone, of a Facebook post or listing on other websites, or of 3D signage. These were never done, yet the licensee billed all of this.

79. The appellant prepared for the Tribunal a summary for hearing (24 February 2020). He contends that the co-owner wanted to market the property without disclosing the major defects and leaks, whereas he wanted it marketed ethically. This was to get a sale price higher than his offer of \$400,000. The solicitor and the licensee inspected the property and he showed them the leaks. The appellant says the agents invited by him to appraise the property mentioned the leaks, whereas the licensee's appraisal did not. This made him realise "their orchestration".

80. There was a big and long leak in the lounge ceiling, stretching from the outer wall to the inner wall along the breadth of the room. It was quite evident as there were water marks and cracks, the paint was bubbling and there was bulging. The condition of the ceiling was "loudly screaming" the existence of a leak.

81. The solicitor and the licensee tried to convince him to list the property without disclosing the leaks, in order to fetch more money and so benefit him. He resisted and insisted that the property be marketed honestly. The licensee kept the ground level locked so he could not take photos of the leak when it rained heavily. The co-owner brought in a tradesman to patch up the lounge ceiling, after which the ground level was kept unlocked.

82. The appellant says that the licensee intentionally participated in the orchestration to hide the leak. He never questioned its disappearance from the ceiling. The licensee had a view that if the appellant vacated, it could fetch more. The reason for this was that if the appellant vacated the property, he would never know about the orchestration and the licensee's participation. The appellant would not then be able to gather the evidence.

83. In his closing statement (13 August 2022), produced to the Tribunal with numerous attachments, the appellant repeats his contention that the solicitor was authorised by the Court to facilitate the sale and was not appointed by the Court. The appellant remained as a vendor. The Committee erred in considering the solicitor to be the vendor.

84. It is submitted that the licensee gave untruthful evidence about the leak from the upstairs bathroom to the ceiling below. The licensee said he did not see any damage to the lounge ceiling, but there is evidence of such a leak. The licensee did not take this prominent leak seriously or ask for evidence of it or its origin. He had a firm intention to hide it. This was why he kept the ground level partition locked, so the appellant could not take photographs.

85. According to the appellant, the licensee's intention was to "execute the orchestration" by getting the appellant out of the property so that the leak could be covered up.⁴

86. The appellant says he vacated the property by 4 pm on the day of settlement, 15 June 2018. The cleaning invoice was fraudulent. The purchaser declined to settle because a tree had not been cut down. The purchaser charged a penalty for late settlement, due to the solicitor's negligence. There is no evidence from the purchaser that settlement was delayed due to the appellant's vacation of the property. The purchaser never raised any concern regarding the cleaning or late vacation. The solicitor orchestrated making him (the appellant) the scapegoat because of the solicitor's negligence.

87. In summary, the appellant submits that the licensee knowingly cooperated, supported and participated in the orchestration of the solicitor in allowing the other party (presumably the co-owner) to cover up the leak in the lounge ceiling.

Submissions of the Authority

88. In the submissions to the Tribunal of counsel for the Authority (27 March 2020), it is accepted that the Committee did not refer directly to the leak in the ceiling in its determination. However, the Committee said that the licensee had complied with his disclosure obligations overall. It is submitted this is correct. The evidence suggests it is unclear whether the leak in the ceiling was caused by moisture issues in the bathroom or the roof.

⁴ Appellant's closing statement (13 August 2022) at 12.

89. In any event, out of an abundance of caution, the solicitor and licensee decided to disclose the possibility of a leak caused by the bathroom leaking, ensuring that prospective purchasers were on notice of potential issues with the lounge ceiling. The proprietors were protected by the exclusion of vendor warranties and an 'as is where is' sale. It is apparent on the evidence that the lounge ceiling was subject to leaky issues. The licensee did not conceal this, disclosing the leak in the ceiling at multiple points in the process.

90. As for whether the appellant should have been asked to vacate the property, the licensee was entitled to advise the solicitor how he thought the property should be best presented for sale. Parts of the property had been partitioned, there was a rodent problem, and the appellant was living in part of the property with very few items of furniture. The licensee was under an obligation to act in the best interests of his client, which involved using his professional expertise to make a recommendation as to how a better price might be achieved.

91. As for the delays in settlement, the Committee found no evidence that the licensee blamed the appellant for these. The appellant says the delays were caused by matters such as removing a tree, not by him. It is submitted the Committee was correct to find there was no evidence the licensee blamed him.

92. In his closing submissions (19 August 2022), Mr Mortimer-Wang submits that the licensee presented as an honest witness doing his best to assist the Tribunal. He was clear that he knew about defects at the property, including leaks, and he disclosed those he knew about. Beyond that, the precise location or nature of the defects might be the victim of memory.

93. As for the documentary record, this is best assessed by reference to contemporaneous documents. These supported the proposition that the licensee made extensive disclosure. He demonstrably made extensive and cautious disclosure, going as far as to market the property on an 'as is where is' basis. Leaks were specifically mentioned in the disclosure.

94. It is contended that there is no error in the Committee's decision and the appeal must be dismissed.

Submissions of the licensee

95. Mr Dewar is counsel for the licensee. In his submissions (13 March 2020), he notes that the solicitor made it very clear that the defects would be disclosed, and that the property would be sold on an 'as is where is' basis. The solicitor put an obligation

on prospective purchasers to complete their own due diligence. Disclosure was also provided to potential bidders.

96. The Committee's decision concluded that the licensee did not fail to disclose defects and did not fail to act in good faith or fairly. It rejected every aspect of the complaint. The decision was plainly right.

97. It is submitted by Mr Dewar that the appellant's submission is a narrative. It does not address any legal point, nor attempt to identify any aspect of the Committee's decision that is defective.

98. Mr Dewar contends that it is appropriate to use common sense. Both the solicitor and the licensee were performing a function as a result of orders of the High Court. Their job was to expedite a reasonable sale as a result of which they would be entitled to be remunerated at appropriate levels.

99. The other aspect of the complaint is that the licensee falsely represented that the appellant was required to vacate the property and/or was disadvantaged by attributing fault to him. This does not appear to be explored by the appellant in his submissions. It is without merit. The High Court, in fact, found fault on the part of the appellant.

100. The appellant's allegations are nothing more than an absurd conspiracy theory against the backdrop of litigation between him and his former business associate. He has failed by a wide margin to put forward any basis on which to find that the Committee was wrong.

101. At the hearing before the Tribunal, the licensee was the only witness to give evidence. The questioning of the licensee by the parties or the Tribunal was confined to his knowledge of the leak in the lounge room ceiling and his disclosure of defects in the property, notably the lounge ceiling leak.⁵

102. The licensee said there were two bidders at the auction. The purchasers were not clients of his and he had no interaction with them. The failed bidder was his client, and he had a lot of dealings with him. The licensee noted the reference to leaks in the builder's report obtained by the failed bidder (11 May 2018).

103. The licensee could not remember seeing any leak in the lounge room. He could recall a leak evident from the laundry ceiling, which it was thought came from the shower in the room above. If there was a leak in the lounge ceiling, he would have thought it came from the shower as water can travel along the framing. Any such leak was not

⁵ [Date redacted].

noticeable. Perhaps, there were small cracks in the ceiling. It did not stand out in his mind. He could not recall seeing any long crack in the lounge ceiling. He could not remember seeking from anyone any details of the lounge leak.

104. It was accepted by the licensee that he received emails from the appellant and was told at least once about a ground level leak.

105. In his closing submissions (23 August 2022), Mr Dewar notes the failed bidder's report (11 May 2018) which recorded ground floor ceiling paint damage, which related to the shower leak above. That report stated that the shower leak had damaged the laundry and lounge ceilings downstairs. The licensee did not recall a specific leak in the lounge, but rather a generic source from the upstairs lounge.

106. The Committee concluded that the licensee did not fail to disclose the defects and that he did not fail to act fairly or in good faith. It rejected every aspect of the complaint and the attribution of fault to him. This decision was plainly right.

107. The evidence is overwhelming in establishing that the licensee did disclose defects, took great care to ensure that the court orders were properly implemented for the benefit of the owners on the basis of proper disclosure, who were invited to purchase on an 'as is where is' basis.

108. If there had been any doubt, it was dispelled by the testimony of the licensee. He made proper concessions to an imperfect memory and appeared as an honest and careful witness. His testimony, along with the documentary evidence, shows that all proper disclosure was made.

JURISDICTION AND PRINCIPLES

109. This is an appeal pursuant to s 111 of the Act.

110. The appeal is by way of a rehearing.⁶ It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.⁷ After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.⁸ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.⁹

⁶ Real Estate Agents Act 2008, s 111(3).

⁷ *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] & [83].

⁸ At s 111(4).

⁹ At s 111(5).

111. A hearing may be in person or on the papers.¹⁰ A hearing in person may be conducted by telephone or audiovisual link.

112. This appeal is against the determination of the Committee under s 89(2)(c) to take no further action. It is a “general appeal”. The Tribunal is required to make its own assessment of the merits in order to decide whether the Committee’s determination is wrong.¹¹ An appellant has the onus of showing on the balance of probabilities that their version of the events is true and hence the Committee is wrong.¹²

DISCUSSION

113. In his appeal, the appellant challenges the Committee’s conclusions on four allegations made in his complaint against the licensee:

1. The failure to disclose the lounge ceiling leak.
2. The requirement or request to vacate the property.
3. A false allegation that the appellant delayed—
 - (a) the listing of the property, and
 - (b) settlement.
4. Overcharging the marketing costs.

114. The Tribunal will deal with each in turn.

1. The failure to disclose the lounge ceiling leak

115. The relevant professional obligation is r 10.7 of the Rules:

10 Client and customer care for sellers’ agents

...

Disclosure of defects

- 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 defects⁴, a licensee must either—

¹⁰ At ss 107, 107A.

¹¹ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] & [16] and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112].

¹² *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22] and the higher court authorities cited therein at fn 9.

- (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.

⁴ 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.

116. The Committee did not expressly refer to the lounge ceiling leak in its decision. It dealt with the matter as a general allegation that the licensee had failed to disclose known defects. It noted that the vendor said that the appellant and co-owner had differing views on the property's defects and that the appellant had claimed there were defects for which the solicitor was not able to obtain any evidence. The solicitor had therefore, out of an abundance of caution, instructed that the property be marketed on an 'as is where is' basis so as to put prospective purchasers on notice to undertake their own investigations. He had also said that obvious defects were to be disclosed. The solicitor said that he supervised every aspect of the sale process and the licensee always acted in accordance with his instructions.

117. The Committee found that the licensee had acted on the solicitor's instructions and made appropriate disclosures during marketing and in the auction documents. It accordingly found there was no breach of r 10.7.

118. We regard it as unfortunate that the Committee overlooked expressly dealing with the lounge ceiling leak. While the appellant had identified many defects in his communications, including numerous leaks, the lounge ceiling leak was a defect he has always emphasised.

119. Nonetheless, the question for the Tribunal is whether the Committee were correct to find, in respect of defects generally and hence specifically the lounge ceiling leak, that there was no breach of r 10.7 because an appropriate disclosure had been made.

120. The first sub question for us is whether there was actually a leak in the lounge ceiling, as alleged by the appellant. We find that there was. The appellant's allegation is corroborated by two builder's reports, that of 26 February 2015 obtained by the appellant when he and the co-owner purchased the property and the more contemporary report of 11 May 2018 obtained by the failed bidder.

121. The next sub question is whether the licensee knew at the time about this leak. Despite his expressed failing memory in his evidence to the Tribunal, we find that he did

know about this leak at the time the property was being marketed. The appellant mentioned it in at least one email to the licensee, as the licensee accepted in his evidence.¹³

122. The lounge ceiling leak was, as noted immediately above, also mentioned in the failed bidder's building report. What is notable about the reference in this report to the lounge ceiling leak is that it records that it was disclosed to the failed bidder by the licensee.¹⁴

123. Indeed, this evidence of the licensee's knowledge of the lounge ceiling leak also answers the third sub question, which is whether he disclosed it. There is no evidence from the eventual purchaser as to this, who appears to have had no interactions with the licensee and has made no complaint, but plainly it was disclosed to the failed bidder by the licensee. There is no reason to believe he would not have also disclosed it to other prospective purchasers with whom he dealt.

124. We find that the known leak in the lounge ceiling was disclosed by the licensee to those prospective purchasers with whom he engaged.

125. We further note the terms under which the property was auctioned. There was a warning to prospective purchasers in the 'as is where is' auction condition to undertake their own investigations. There was also in the disclosure form signed by each bidder, an express reference to the leak in the upstairs bathroom which it was said may have leaked through to the ceiling below. It is not known whether the reference to the ceiling below was intended to draw attention to the laundry ceiling and/or the lounge ceiling, but self-evidently prospective purchasers were on notice of a possible ground floor ceiling leak.

126. The appellant says the leak from the shower upstairs to the laundry ceiling below is a different leak from that in the lounge room. He says that leak had already been fixed. He also says it came from the roof and not the shower. On the other hand, the lounge ceiling leak was extant and was also sourced from the roof.

127. The evidence before the Tribunal does not allow us to determine the source of the lounge ceiling leak. Moreover, it is highly unlikely the licensee would have known precisely where it came from. He knew about the lounge ceiling leak, as we find, and rightly or wrongly appears to have believed it came from the shower (as the builder's report of 11 May 2018 states). The licensee was required to specifically disclose that leak as a known defect to prospective purchasers, but he was not required to investigate

¹³ Email appellant to licensee and vendor (22 April 2018).

¹⁴ Builder's report (11 May 2018) at p15 (Authority's principal bundle of documents at 285).

the gravity of the leak or the source. Importantly, the auction terms and the bidder disclosure form imposed on the bidders themselves the responsibility for further investigating the lounge ceiling leak or indeed any other leak or defect, if of any concern to them.

128. We find that the licensee disclosed the lounge ceiling leak to prospective purchasers. For reasons which are therefore largely the same as those of the Committee, we agree that there is no breach of r 10.7 or any other rule in respect of the lounge ceiling leak.

2. The requirement or request to vacate the property

129. The relevant professional obligation is r 6.2 of the Rules:

6 Standards of professional conduct

...

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

...

130. The Committee found that the condition of the property presented challenges on the basis that the grounds were overgrown, there were leaks and defects requiring repair, there was a partition downstairs and there was a rodent problem. Additionally, the appellant was living in the property and he was a reluctant participant in the process.

131. The Committee noted that the solicitor had agreed with the licensee's advice that a sale would be more easily achieved if the property was vacant. The solicitor had been given the same advice by another real estate agency.¹⁵

132. It found that it was the licensee's professional duty to advise the solicitor how he thought the property should best be presented. Furthermore, it was standard industry advice in the circumstances. Accordingly, the Committee decided to take no further action on this aspect of the complaint.

133. The appellant advances a bad faith motive for the licensee's advice and the solicitor's requirement or request to vacate the property. He says it was to prevent him taking photographs of the lounge ceiling leak which he alleges they were not going to disclose to prospective purchasers.

¹⁵ Appraisal (30 November 2017) at 202 of the Authority's principal bundle.

134. We have already found that the licensee did disclose the lounge ceiling leak to those he engaged with, as the solicitor had instructed. The appellant's contention as to the motive behind the request to vacate is rejected.

135. Furthermore, we agree with the Committee that given the condition of the property (with the various defects and negative features) and the background to the sale (a court ordered sale due to a dispute between the owners), the licensee appropriately recommended that the appellant vacate the property in order to achieve the best price. There is ample evidence of the appellant's obstruction early in the process, though during the course of the marketing and auction process, it transpired he was largely co-operative.¹⁶ The licensee's recommendation, which had also been given by another agency, is standard industry advice in the circumstances.

136. We find no breach of r 6.2 or any other rule in respect of the licensee's advice to the solicitor that the appellant vacate the property.

3. A false allegation that the appellant delayed—

(a) the listing of the property, and

(b) settlement

137. The Committee noted the appellant's complaint that he was wrongly blamed by the licensee for delaying the selling process by filing a complaint with the Authority. It found there was evidence that the solicitor and the co-owner considered that the appellant's actions, including his involvement with the Authority, had contributed to delays in the sale process and that the High Court had found that the appellant was initially disruptive of the sale process.

138. The Committee went on to find that there was no evidence that the licensee was a party to any such accusations against the appellant, so it would take no further action.

139. It is correct that the High Court stated that there was evidence the appellant was "initially disruptive of the sale process".¹⁷ It found that his actions caused the auction date to be postponed by two months.¹⁸ The evidence of that appears to have come from the solicitor and the co-owner. Putting to one side whether the appellant does bear any responsibility for the delayed listing, he has not pointed the Tribunal to any evidence that the licensee accused him of that to any person.

¹⁶ [Decision redacted].

¹⁷ At [40].

¹⁸ *Idem*.

140. As for the delayed settlement, the Committee noted that the sale was scheduled for settlement on a Friday but was deferred until the following Monday to enable the property to be cleaned over the weekend. According to the Committee, there was evidence that there were delays by the appellant in vacating the property.

141. The Committee also found that other persons from the agency were acting for the purchaser at the property on the afternoon of settlement and were in communication with the solicitor concerning the cleaning arrangements and the delay in the appellant vacating the property. The Committee went on to find that there was no evidence that the licensee blamed the appellant for the delays in settlement.

142. We accept that settlement was delayed by a weekend and that this was attributed to the appellant. The Court though appears to have accepted that the appellant vacated the property on the scheduled day of settlement, Friday 15 June 2018, as it gave the co-owner occupational rent only until that date. While the Committee may be correct to say there was “evidence” the appellant delayed vacating the property, it would not be correct to find that he did delay settlement by not vacating the property.

143. However, it is correct that the state of the property at settlement did require cleaning to be undertaken and that this was attributed by the High Court to the appellant. The Court ordered that the weekend cleaning costs be deducted from his share of the sale proceeds.¹⁹

144. The appellant says the property did not require cleaning and the cleaning invoice was a “fake”.²⁰ He says the reason the purchaser delayed settlement was that a tree had to be removed.

145. There is evidence supporting the appellant’s contention that the purchaser was concerned about a tree which the solicitor had undertaken to remove but had not attended to by the settlement date. As for the cleaning costs, plainly the High Court accepted their legitimacy. It may be that settlement was delayed for both reasons, tree removal and cleaning.

146. Irrespective of the true reason behind the weekend delay to settlement, there is no evidence that the licensee blamed the appellant and communicated that to any person.

147. We find there is no breach of any professional obligation by the licensee in respect of the delay to the property’s listing or settlement or attributing that to the

¹⁹ At [44].

²⁰ Grounds of Appeal of the appellant (8 October 2019) at [16]. The invoice (19 June 2018) is at 409 of the Authority’s principal bundle.

appellant. The Committee was correct to take no further action on this aspect of the complaint.

4. Overcharging the marketing costs

148. The evidence before the Tribunal is that the agency charged \$2,352.17 (\$2,705.00 incl. GST) for marketing.²¹ The appellant contends that the agency did not carry out some of the features or events mentioned in the marketing plan (3D signage, drone photography, various website postings). The Committee dismissed the complaint on the basis that the licensee had no obligations to the appellant.

149. In this case, the solicitor had been authorised by the High Court to conduct the sale in the place of the owners, but we do not accept the Committee's finding that the licensee thereby owed no obligation to the owners. However, irrespective of the extent of his obligations to the owners, the licensee was required to comply with his professional obligations (including honesty in regard to any disbursements) and the appellant was entitled to complain about any breach. Any overcharging by the licensee/agency would reduce the ultimate payment of the sale proceeds to the appellant and the co-owner.

150. While the appellant was entitled to complain about the alleged overcharging of marketing costs, he has produced no corroborative evidence. There is no breakdown of the costs charged and no evidence before the Tribunal of the costs incurred, or what had been agreed by the solicitor at the time of the licensee's appointment. The appellant produced a marketing plan (dated 24 January 2018) for \$2,475 (incl. GST), but that plan is unsigned by the solicitor.²²

151. There is no independent evidence of any professional wrongdoing by the licensee in relation to the marketing costs charged. For a reason which is different from that of the Committee, we agree that no further action should be taken on this aspect of the complaint.

Conclusion

152. There is no evidence before the Tribunal of any breach by the licensee of any of his professional obligations. The Committee's decision to take no further action on the appellant's complaint is correct.

²¹ Agency's settlement invoice (29 May 2018) at 401 of the Authority's principal bundle.

²² See attachment to appellant's closing statement, sent to the Tribunal 23 August 2022 ("Email 1").

OUTCOME

153. The appeal is dismissed.

154. Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, setting out the right of appeal to the High Court.

COSTS

155. Mr Dewar has signalled that the second respondent seeks costs against the appellant. The following directions are given:

1. The second respondent has until **23 September 2022** to apply for costs.
2. The other parties have until **7 October 2022** to respond to any application for costs.
3. The second respondent will then have until **14 October 2022** to reply.

PUBLICATION

156. The Committee directed publication of its decision, without disclosing the name of the licensee or any third party or identifying the address of the property.

157. In light of the outcome of this appeal and having regard to the interests of the parties and of the public, it is appropriate to order publication of our decision without identifying the appellant, the co-owner, the licensee, the agency or the property.

D J Plunkett
Chair

C A Sandelin
Deputy Chair

G J Denley
Member