

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 66

READT 018/17

IN THE MATTER OF

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

BETWEEN

KRISTINA-LORRAINE BROOK
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 403)
First Respondent

AND

JASON HYNES
Second Respondent

Hearing:

12 October 2017, at Dunedin

Tribunal:

Hon P J Andrews, Chairperson
Ms N Dangen Member
Ms C Sandelin, Member

Appearances:

Mrs Brook, Appellant
Mr D LaHood, on behalf of the Authority
Mr M Parker, on behalf of Mr Hynes

Date of Decision:

3 November 2017

DECISION OF THE TRIBUNAL

Introduction

[1] Pursuant to s 111 of the Real Estate Agents Act 2008 (“the Act”) Mrs Brook has appealed against the decision of Complaints Assessment Committee 403 (“the Committee”) dated 31 January 2017, in which the Committee made a finding of unsatisfactory conduct against Mr Hynes (“the substantive decision”).¹ Mrs Brook has also appealed against the Committee’s decision dated 26 April 2017, in which it ordered Mr Hynes to pay a fine of \$1,500 (“the penalty decision”).²

Background

[2] Mr Hynes is a licensed salesperson engaged at Wayne Graham Realty Ltd (trading as LJ Hooker, Dunedin) (“the Agency”). In September 2013, Mrs Brook and Mr Brook bought a property at Opoho, Dunedin (“the property”), in respect of which Mr Hynes was the listing and selling agent.

[3] At the time they viewed the property Mr and Mrs Brook noticed a strong smell of cat urine, as the owner had kept cats inside in the rear bedroom. They were aware that cat urine had damaged the carpet and particle board flooring in this bedroom, which would need reinstatement. They also noted a “springy floor” in that bedroom. The Brooks said they inspected the roof cavity, looked as far as they could see in the sub-floor, and made enquiries at both the Dunedin City Council and the Otago Regional Council. They also said that they asked Mr Hynes, three times, if there was anything they should be concerned about, and he assured them on each occasion that there was nothing.

[4] Other open home attendees referred to a “musty odour inside the property and one of the bedrooms”.

[5] After the purchase was settled, Mr and Mrs Brook discovered a number of defects in the property: carpet patches in the rear bedroom, which they assumed covered a “long history of cat urine”, and that the springy floor was a sprung joist.

¹ Re Jason Hynes, Decision Finding Unsatisfactory Conduct, Complaint No CO9676, 31 January 2017.

² Re Jason Hynes, Decision on Orders, Complaint No CO9676, 26 April 2017.

They were prepared to repair those issues. However, they found black mould on the floor of a wardrobe in the rear bedroom and, when they removed the carpet and cut an opening into the sub-floor area, they discovered dry rot in the sub-floor framing timber (“the sub-floor rot”). They said that the rot was not caused by cat urine, or the sprung joists, but by rising damp in the sub-floor area. They also learned that outdoor structures were not within the title to the property and were not legal.

[6] Mr and Mrs Brook sold the property “as is” in May 2014, at a loss of approximately \$62,000.

[7] Mrs Brook complained to the Real Estate Agents Authority (“the Authority”) about Mr Hynes’ conduct during the course of their purchase, and that of his manager, Mr Graham. The Committee decided to take no further action in respect of the complaint against Mr Graham. Mrs Brook has not appealed against that decision, so the appeal is concerned only with the Committee’s decisions as to the complaint against Mr Hynes.

[8] Mrs Brook’s complaint was that Mr Hynes:

- [a] failed to identify and disclose outdoor structures that were not on the title and were not legal;
- [b] did not recommend that she and Mr Brook seek legal advice;
- [c] did not recommend that they seek technical or other advice;
- [d] did not allow them a reasonable opportunity to obtain advice;
- [e] did not disclose any risk or existence of hidden defects;
- [f] did not keep records of open home attendances;
- [g] failed to supply sale and purchase guides;

[h] represented to them that the sale of the property required a multi-offer process, when it did not;

[i] did not provide them with the Agency's in-house complaints procedure; and

[j] did not advise them they could make a complaint to the Authority.

[9] Mrs Brook sought a remedy by way of compensation, cancellation of Mr Hynes' licence, and publication of his name.

[10] Mr Hynes denied Mrs Brook's complaints. In his response to the complaints, he said that the vendors³ had not disclosed any defect in the property, and there was nothing apparent to him when he inspected the property, or when he marketed the property, that suggested that there were any defects in the property.

[11] Mr Hynes denied that any odour was ever discussed and said that even if an odour was present, he would not have automatically attributed it to a rotten floor. He also said that if any of the parties who inspected the property had alerted him to any issue or concern that he himself had not noticed, he would have looked into it further. He said that as no issue had been raised with him, "there was no evidence to reasonably suppose any issues with the property".

[12] Mr Hynes further said he was not suitably qualified to make any representations about the property, and he did not do so. He said that both Mr and Mr Brook and a second offeror had conducted a thorough inspection of the property, and no concerns arose from either inspection. Further, both parties were offered the opportunity to seek specialists' reports.

³ The vendor was represented at all material times by her daughter, who held a Power of Attorney. For convenience, we will refer to the owner and her daughter as "the vendors".

The Committee's decisions

Substantive decision

[13] The Committee found that Mr Hynes had breached r 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”), and in doing so had engaged in unsatisfactory conduct under s 89(2)(b) of the Act. That finding related only to the complaint that he had “failed to identify and disclose outdoor structures not on the title and not legal”.⁴ We will refer to this as “the title issue”. The Committee dismissed all other complaints against Mr Hynes.

[14] The principal focus in the appeal is the Committee’s finding in respect of Mrs Brook’s complaint that Mr Hynes failed to advise her of a risk that the property might be subject to a hidden or underlying defect (the “sub-floor rot” issue). On that point the Committee found as a fact that the sub-floor rot was not discovered until carpet was lifted.⁵ The Committee further said:⁶

[Mr and Mrs Brook] did not discover it when they inspected the Property prior to making their offer. They did not discover it during the due diligence period. [Mr and Mrs Brook] are in essence saying that a problem they were unable to find on inspection must have been obvious to others when on the balance of probabilities it is in our opinion more likely than not that the problem was not discoverable by anyone on simple observation. Had it been, [Mr and Mrs Brook] would have discovered it at their first viewing.

It was, in short, a classic example of a hidden defect which no reasonable Licensee could have been expected to know about and for this reason we dismiss the complaint.

[15] In respect of other elements of the complaint, the Committee found that Mr and Mrs Brook in fact took legal advice;⁷ the sale and purchase agreement contained a five-day due diligence period during which they had the opportunity to obtain technical advice;⁸ Mr Hynes had explained the loss of records for open homes and his conduct did not amount to a breach of the Rules;⁹ Mr and Mrs Brook confirmed that they had

⁴ Substantive decision, at paragraphs 3.10–3.25

⁵ At paragraph 3.34.

⁶ At paragraphs 3.35 and 3.36.

⁷ At paragraph 3.27.

⁸ At paragraphs 3.28 and 3.29.

⁹ At paragraph 3.37.

received the sale and purchase guides;¹⁰ there was no evidence that they were misled about a multi-offer situation;¹¹ and the Agency had an in-house complaints procedure, which referred to complaints to the Authority.¹²

Penalty decision

[16] The Committee noted that Mrs Brook sought publication of Mr Hynes' name, cancellation of his licence, and payment of \$180,251.64 for losses (which included the loss on sale of the property they attributed to Mr Hynes).¹³ The Committee stated that it could not impose a penalty in respect of complaints that had not been upheld.¹⁴ That is, it could only impose a penalty on the one aspect of the complaint that it had upheld: the failure to identify and disclose structures that were not within the title, and were not legal.

[17] The Committee also stated that it did not have jurisdiction to make the order for compensation requested by Mrs Brook,¹⁵ and noted mitigating factors.¹⁶ In ordering Mr Hynes to pay a fine of \$1,500, the Committee stated that it considered that the finding of unsatisfactory conduct, and the fine imposed, were appropriate to the level of offending in the case.

Appeal issues

[18] In very general terms, Mrs Brook's principal contention was that the Committee was wrong to dismiss her complaint that Mr Hynes failed to advise her of a potential risk of sub-floor rot. She submitted that the Committee should have referred that complaint, and the title issue, to the Tribunal on a charge of misconduct.

¹⁰ At paragraph 3.38.

¹¹ At paragraph 3.48.

¹² At paragraph 3.49.

¹³ Penalty decision, at paragraph 1.2.

¹⁴ At paragraph 3.3.

¹⁵ At paragraph 3.6, (citing *Quin v Real Estate Agents Authority* [2012] NZHC 3557).

¹⁶ At paragraphs 3.7 and 3.8.

Evidence received at the appeal hearing

[19] In a Ruling issued on 17 August 2017, the Tribunal gave Mrs Brook leave to produce statements by Mr Finnie, a builder, and Mr Chisholm, a consulting structural engineer.¹⁷ Both Mr Finnie and Mr Chisholm gave oral evidence on oath and were cross-examined at the appeal hearing.

[20] Mr Finnie said that he had replaced some single-glazed windows with double-glazed units in about 2009. He returned the next day in order to add a sealing coat inside the timber reveals, and noticed “quite a lot” of condensation on the new glass. He spoke to the owner, and looked through a small trapdoor into the sub-floor. He noticed that the foundation concrete was darker than dry concrete would be. He saw no indication of rot in the joints and bearers near to the trapdoor. He suggested that the owner get a dehumidifier to help dry the house, and “sort out” the sub-floor.

[21] Mr Finnie next went to the property in 2013, shortly after Mr and Mrs Brook bought it. He and Mr Brook lifted carpet in the rear bedroom and cut an opening in the floor, in order to look at the sprung joist. He then discovered dry rot present mainly to the outer rim of the sub-floor area of the entire house. He also noticed that the sub-floor had completely dried out. He attributed this to black polythene that had been laid on the ground under the house, at some time after he had first been there.

[22] Mr Finnie said at the hearing that he looked through the trapdoor when he was at the house in 2009, and did not see any indication of sub-floor rot. The sub-floor rot was only discovered when the floor of the rear bedroom was cut through. Although he had seen condensation on the windows in 2009, Mr Finnie was surprised to see sub-floor rot in 2013, and the extent of it.

[23] Mr Chisholm and members of his firm inspected the property and provided reports dated 3 December 2013 and 23 April 2014. The first report stated that a lack of ventilation to the sub-floor space, caused by incorrect construction techniques, had prevented moisture entering the sub-floor from escaping. The build-up of moisture

¹⁷ *Brook v Real Estate Agents Authority (CAC 403)* [2017] NZREADT 48.

over the years had caused timber bearers, stringers, and joists to rot. The report set out possible means to rectify the situation.

[24] The second report recorded that parts of the floor structure had decayed to the extent that it could not be relied on to meet strength requirements of the New Zealand Building Code, and concluded that the house was uninhabitable.

[25] Mr Chisholm provided a statement to the Tribunal which was, in full:

1. There would have been excess moisture in the sub-floor space from when the house was built. The timber decay and the steel rust would have begun soon afterwards.
2. This decay and rust would have been evident to the installers of the subfloor insulation and black polythene.
3. The insulation and black polythene would not have removed the excess moisture from the sub-floor space nor reduced or stopped the ongoing decay in the timber and rust in the steel.
4. It would be difficult to detect odour from timber decay if there was [a] smell from cat urine.
5. Most houses that are left unoccupied, unheated, and not ventilated will have a musty odour.
6. In the 1970's council inspections were not as frequent or as extensive as they are now. It is not unknown that defects such as the lack of ventilation to this sub-floor occurred.
7. We would have expected visitors to the house to notice the dampness.
8. The dampness meant the house would have been harder to heat.

[26] Mr Chisholm was asked at the hearing if he would expect to see mould on particle board flooring. He responded that it would depend on how the particular house was ventilated. In winter, with heaters on, and windows shut, a house would feel damp. He said that a musty odour, and a feeling of damp air, would be a "red flag" of a house that might be damp. However, he also said that any house that had been shut up for a period, unoccupied and unheated, would have a musty odour. He also said that it would be difficult to detect a musty odour if there were an odour of cat urine.

[27] Mr Hynes was questioned as to the evidence he provided to the Committee. He said that none of the visitors to open homes raised any issues as to dampness, a mouldy odour, springing floors, or any other issues. He said that he did not look into the trap door to the sub-floor area before he listed the property, he did not look in the

wardrobes, he did not notice any odour other than that cats had been kept in the rear bedroom, and he could not recall there being any defect in the rear bedroom. He did not accept that there were any “red flags” that should have caused him to suspect that there were any defects in the property.

The nature of this appeal

[28] Section 89(1) of the Act provides that after inquiring into a complaint, the Committee “may” make one or more of the determinations set out in s 89(2). In the present case, the Committee exercised its powers:

- [a] (in relation to the title issue) to make a finding that Mr Hynes had engaged in unsatisfactory conduct under s 89(2)(b) of the Act; and
- [b] (in relation to all other elements of Mrs Brook’s complaint) to decide to take no further action under s 89(2)(c).

[29] The use of the word “may” in s 89(1) indicates that the Committee exercises a discretionary power when considering complaints. As this appeal is against the exercise of a discretion, the Tribunal is required to determine whether Mrs Brook has established that in exercising its powers under s 89(2)(b) and (c), the Committee made an error of law or principle, took irrelevant considerations into account, failed to take relevant considerations into account, or was plainly wrong.¹⁸

[30] It is important to note that if the Tribunal is satisfied that the Committee erred in one or more of those respects, it can only exercise such powers as the Committee could have exercised.¹⁹ In the present case, if the Tribunal allows Mrs Brook’s appeal, the only possible outcomes would be:

- [a] (in respect of the finding of unsatisfactory conduct on the title issue) to refer the matter back to the Committee for reconsideration; and

¹⁸ See *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 2011; *Edinburgh Realty Limited v Real Estate Agents Authority* [2016] NZHC 2898, at [111].

¹⁹ Section 111(5) of the Act.

[b] (in respect of the decision to take no further action on the other elements of the complaint), either to make a finding of unsatisfactory conduct on one or more of those elements, or to remit the matter back to the Committee for reconsideration.

[31] On this appeal, the Tribunal cannot determine whether or not Mr Hynes should be found guilty of misconduct. Nor could the Committee, if Mrs Brook's complaint were to be referred back to it. In respect of a finding against a licensee, the Committee only has the powers set out in s 89(2).

[32] Further, if the Committee makes a finding of unsatisfactory conduct under s 89(2)(b), the only orders the Committee make as a consequence of that finding are the orders set out in s 93 of the Act.

Appeal against the substantive decision

[33] Mrs Brook submitted that the Committee was wrong to make a finding of unsatisfactory conduct against Mr Hynes on the title issue. She submitted that the Committee should have referred that issue to the Tribunal on a charge of misconduct.

[34] Mrs Brook further submitted that the Committee was wrong to reject her complaint that Mr Hynes failed to inspect the inside of the house, and to note anything that might require investigation. She submitted that the Committee should have referred that issue, also, to the Tribunal on a charge of misconduct.

[35] Mrs Brook did not contend that Mr Hynes was obliged to go under the house to look for sub-floor rot (or any other defect). However, she submitted that Mr Hynes failed to act on a number of "red flags" which, she submitted would have alerted him to a need for further investigation, and thus to advise prospective purchasers such as her as to a potential risk of a defect in the property. She submitted that the "red flags" were that the odour of cat urine might have been masking other odours, the presence of black mould in the rear bedroom wardrobe, the presence of carpet patches along the walls and corners of the rear bedroom, and the springy floor in the rear bedroom.

[36] Mrs Brook submitted that Mr Hynes should have asked the vendors what the odour was, and considered whether the odour of cat urine masked other odours (such as a musty, mouldy smell). She submitted that Mr Hynes should have discussed this with the vendors and either obtained written disclosure from them, or refused to list the property. She further submitted that when Mr Hynes did list the property, he should have disclosed to prospective purchasers that there were matters that might indicate a potential risk of a hidden or underlying defect, and he should have suggested that prospective purchasers obtain a building inspection report, and tell them what the inspector should look at.

[37] Mr Parker submitted that the Committee was correct to dismiss Mrs Brook's complaints other than as to the title issue. He submitted that as a real estate professional, Mr Hynes did not take on the position of advisor or guarantor for the benefit of a purchaser, and was not required to be a quasi-building inspector or construction professional. He further submitted that Mr and Mrs Brook had not taken the opportunity, before making their purchase offer, to obtain a building inspection report, or a LIM, or adequate legal advice.

[38] Mr Parker also submitted that it is unrealistic for a real estate professional to be expected to look for, and advise prospective purchasers of, potential "red flags", particularly when Mr and Mrs Brook, or anybody else who viewed the property, did not detect them. He submitted that no cogent evidence had been presented to underpin the "persistence of this allegation" by Mrs Brook against Mr Hynes.

[39] Mr Parker submitted that Mr Finnie's and Mr Chisholm's evidence did not advance Mrs Brook's appeal. He submitted that Mr Finnie's statement as to finding sub-floor rot when the hole was cut in the rear bedroom floor underlined the fact that if Mr and Mrs Brook had obtained a building inspection report, they would have been armed with information about the presence of sub-floor rot when deciding whether to proceed with the purchase.

[40] Mr Parker also submitted that Mr Chisholm did not refer to any evidence that would have put a visitor on notice of the latent defects in the house: he could not say what would have alerted visitors to notice dampness, but only confirmed the "obvious"

possibility of a musty odour in a house that had been left unoccupied, and the difficulty of distinguishing an odour resulting from timber decay from other unpleasant odours.

[41] Mr LaHood submitted that failing to check the title to a property will not invariably amount to either unsatisfactory conduct or misconduct, and the Committee correctly identified Mr Hynes' conduct on the title issue as not being at a level that required a charge of misconduct. He referred to cases where a licensee was charged with misconduct in relation to a failure to obtain or check the title to a property being marketed, but the Tribunal made findings of unsatisfactory conduct.

[42] Mr LaHood also submitted that the Committee was correct to decide to take no further action on the other elements of Mrs Brook's complaint. He submitted that Mrs Brook had not established that the Committee had erred in its reasoning, so as to warrant the appeal being allowed and the complaint remitted back to the Committee for reconsideration.

[43] Mr LaHood further submitted that the Committee was correct to say that a reasonably competent licensee was not required to take steps that would have revealed a potential risk of a dampness issue, and a potential risk of sub-floor rot, which should then have been disclosed to Mr and Mrs Brook and other prospective purchasers.

[44] In particular, Mr LaHood submitted:

- [a] The odour that was present was of cat urine, and was not an indicator of dampness or rot.
- [b] Mr Hynes was not reasonably expected to inspect the sub-floor area before listing it or, if he had done so, to be automatically concerned by the presence of black polythene.
- [c] There is no evidence that black mould would have been apparent to a reasonably competent licensee (who would not be expected to pull up flooring). He referred to Mrs Brook's statement that there was no indication of black mould when she viewed the property before buying it.

[45] Mr LaHood further submitted that it would in any event have been difficult to discover the dampness issue:

- [a] Mr and Mrs Brook looked as far as they could into the sub-floor area, and the property appeared clean and dry, and Mr Finnie confirmed that the sub-floor had completely dried out by the time they bought the property.
- [b] The Government-subsidised insulation installed in the sub-floor area concealed the sub-floor timber structure. Installers were not permitted to install insulation over rotten timber, so the presence of insulation could be taken as an indicator that there were no issues as to sub-floor rot. Further, the insulation made it difficult to inspect the area for sub-floor rot.
- [c] No indications of sub-floor rot were visible from the trapdoor into the sub-floor area. The sub-floor rot was only discovered after a hole was cut in the flooring.
- [d] Other offerors had a building inspection of the property, and no issues were identified.

[46] Accordingly, Mr LaHood submitted, the Committee was correct to find that the sub-floor rot was a “hidden or underlying” defect, and not one where it would have appeared likely to a reasonably competent licensee that the property may be subject to such a defect.

The title issue

[47] We accept Mr LaHood’s submission that there was no error in the Committee’s finding of unsatisfactory conduct in relation to the title issue. That finding was well open to it on the evidence before it, and it is consistent with the Tribunal decisions referred to by Mr LaHood. The Committee’s finding was not challenged by Mr Hynes. We comment only on whether the Committee was wrong to make a finding of unsatisfactory conduct, rather than to refer the matter to the Tribunal on a charge of misconduct.

[48] In *LB v Real Estate Agents Authority (CAC 10058)*,²⁰ the Tribunal discussed the standards expected of licensees with respect to the title to a property they are marketing. The Tribunal said, as relevant:²¹

We consider that a licensee, upon taking instructions for a sale of a property, should search its title, or have some competent person search it for the licensee, and be familiar with the information gained from such a search. ... We do not accept that a licensee can simply regard [matters as zoning and compliance with town planning regulations or Council requirements] as within the realm of a vendor or purchaser's legal adviser. Licensees should be familiar with and be able to explain clearly and simply the effect of any covenants or restrictions which might affect the rights of a purchaser. ...

Indeed, it seems to us to be fundamental to effect such a search in order to ensure that the apparent vendor actually has title to the property.

[49] The Tribunal went on to say that failure to search the title could well be unsatisfactory conduct, or “even” misconduct.²²

[50] The Tribunal confirmed this approach in its decision in *M v Real Estate Agents Authority (CAC 20004)*.²³ Mr LaHood submitted that these cases establish that failing to check the title to a property will not invariably amount to either unsatisfactory conduct or misconduct. Further, as Mr LaHood submitted, the Tribunal has made findings of unsatisfactory conduct, rather than misconduct, in relation to a failure to obtain or check the title to a property being marketed.²⁴

Opportunities to obtain technical advice

[51] We also accept that the Committee was not in error in dismissing this element of the complaint. The five-day due diligence period gave Mr and Mrs Brook the opportunity to take such advice (whether technical or legal) that they considered appropriate.

²⁰ *LB v Real Estate Agents Authority (CAC 10058)* [2011] NZREADT 39.

²¹ At [18]–[20].

²² At [22].

²³ *M v Real Estate Agents Authority (CAC 20004)*, [2011] NZREADT 63.

²⁴ See, for example, *Real Estate Agents Authority (CAC 10017) v Sherburn* [2013] NZREADT 105, *Complaints Assessment Committee 302 v Crockett* [2017] NZREADT 5; *Wang v Real Estate Agents Authority (CAC 409)* [2017] NZREADT 29.

Failure to to provide (or withholding) names of open home attendees

[52] Mrs Brook submitted that Mr Hynes had withheld names of attendees at open homes, who may have provided evidence as to the condition of the property.

[53] The Tribunal is not persuaded that Mr Hynes deliberately did not provide, or withheld, lists of open home attendees. In his evidence to the Tribunal Mr Hynes satisfactorily explained how he was unable to retrieve his open home records.

Failure to disclose to Mr and Mrs Brook the possibility of a potential risk of a hidden or underlying defect

Analysis of a licensee's obligation under r 10.7 of the Rules

[54] We refer, first, to the Committee's comment (in paragraph 3.35 of the substantive decision), that:

[Mr and Mrs Brook] did not discover [the sub-floor rot issue] when they inspected the property prior to making their offer. They did not discover it during the due diligence period. [Mr and Mrs Brook] are in essence saying that a problem they were unable to find on inspection must have been obvious to others when on the balance of probabilities it is in our opinion more likely than not that the problem was not discoverable by anyone on simple observation. Had it been, [Mr and Mrs Brook] would have discovered it at their first viewing.

[55] The Committee's reasoning was that if Mr and Mrs Brook were not themselves alerted to a potential sub-floor of rot issue, then there was no reason why Mr Hynes should have been alerted to it. That is not the correct approach. The Committee appears to have misunderstood r 10.7 of the Rules, which provides:

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.

[56] Liability under r 10.7 is not determined on the basis of whether the customer (prospective purchaser) was himself or herself aware of the possibility of a risk of there

being a hidden or underlying defect, nor is it determined on the basis of whether the customer could or should have been aware of that risk. The correct approach is to consider whether there were in the particular case indicia, recognisable to a reasonably competent licensee, from which it would appear likely to the licensee that the land may be subject to a hidden or underlying defect.²⁵ Liability is not determined on whether a customer would have recognised those indicia.

[57] Nor is liability determined on the basis of whether the licensee found evidence of the existence of a specific defect. A licensee will be found to have breached r 10.7 if it “would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects”, and the licensee fails to comply with paragraph (a) or (b) of the Rule.

[58] The proper analysis in the present case is to consider whether the “red flags” identified by Mrs Brook should have alerted Mr Hynes to the risk of sub-floor rot. If that is answered in the affirmative, then the second step is to consider whether Mr Hynes complied with r 10.7 (a) or (b). We therefore turn to consider those “red flags”.

The “red flags” identified in Mrs Brook’s submissions

(a) A 38-year history of dampness

[59] Mrs Brook said in her complaint that “the vendor had lived [in the property] for approximately 38 years with a history of dampness and mustiness”. She did not provide any direct evidence to support this assertion. She submitted that the house was built in 1975, and as it was advertised as being the “first time on the market in over 30 years”, the vendors must have been aware of dampness. In support of this submission, she referred to the installation of various methods of heating installed in the house (which because of its small size and sunny location, should have been easily heated), Mr Finnie’s advice to the vendors to when he installed the double glazing, and the presence of black polythene in the sub-floor area.

²⁵ See, for example, the Tribunal’s comments in *Munley v Real Estate Agents Authority* (CAC 402) [2016] NZREADT 53, at [41], [42] and [53]; and *Complaints Assessment Committee 302 v Crockett* [2017] NZREADT 5, at [9] and [37].

[60] On the basis of Mr Chisholm's evidence (set out in paragraphs [23] to [26] above), and Mr Finnie's advice to the vendors, it can reasonably be inferred that the vendors must have been aware of dampness issues. However, we could not reasonably infer that the vendors must have associated dampness with sub-floor dry rot. Nor, unless there were indicia of dampness that a reasonably competent licensee would have noticed and would have associated with a potential risk of sub-floor rot, could a licensee be found in breach of r 10.7.

(b) *Odour:*

[61] Mrs Brook did not suggest that the odour (caused by cat urine) indicated a house with sub-floor rot. However, she told the Tribunal that Mr Hynes told her and Mr Brook (when they raised the issue of the sub-floor rot after the purchase was settled) that he had asked the vendors what the odour was at the time he listed the property. Her evidence was that Mr Hynes said vendors told him that it was because the house had been vacant and shut up for some months.

[62] We note Mrs Brook's account of Mr Hynes' response is contrary to his response to the complaint (referred to in paragraph [11], above), which appears to suggest that he did not notice any odour. However, there was no challenge to Mrs Brook's submission on this point. In the light of the evidence of an odour of cat urine and a musty odour (which was not disputed), we are satisfied that it is more likely than not that Mr Hynes did notice an odour, of some sort, when he listed the property. We would expect Mr Hynes to have raised it with the vendors. His evidence as to whether he did so was ambiguous. Even if he did raise the odour with the vendors, there is no evidence that he made any further enquiry, or that he raised the matter with any prospective purchasers.

[63] Mrs Brook submitted that in order to meet his obligations under r 10.7, Mr Hynes should not have accepted a response from the vendors as to the odour arising simply from the property having been shut up. She submitted that Mr Hynes should have asked further questions and, if he did not receive a satisfactory answer, he should have refused to list the property or advised prospective purchasers to obtain their own advice.

[64] Mr Chisholm's evidence was that a musty odour, or a feeling of damp air, would be a "red flag". That is, if you were looking to buy a house, and noticed a musty smell, you would think "it's a damp house". However, he accepted that there could be a musty odour in any house if it had been shut up and unoccupied for a prolonged period of time. He also accepted that it would be difficult to detect a musty odour if it was masked by another odour, such as that of cat urine. He further accepted that a musty odour does not necessarily indicate dampness or sub-floor rot.

[65] On the basis of Mr Chisholm's evidence, we are not persuaded that a reasonably competent licensee would have been expected, on the basis of a musty odour alone, to suspect that there may be a possible risk of a hidden or underlying defect.

(c) Should Mr Hynes have considered whether the odour of cat urine masked another odour?

[66] Mr Chisholm's evidence was that it would be difficult to detect an odour resulting from timber decay if there were a smell of cat urine. We are not persuaded that a reasonably competent licensee would reasonably be expected to suspect that, or investigate whether, a smell of cat urine masked any other odour.

(d) The presence of black polythene in the sub-floor area

[67] Both Mr Finnie and Mr Chisholm accepted that the purpose of installing a layer of black polythene in the sub-floor area is to seal off the ground, and reduce moisture drawn out of the ground. Mr Finnie added that it was not unusual to install polythene when under-floor insulation is installed, and that it does not necessarily indicate that there is in fact a moisture issue.

[68] While the presence of the black polythene layer may (but not necessarily) have indicated dampness, it was only discovered when a hole was cut in the rear bedroom floor. Mrs Brook acknowledged in her notice of appeal that Mr Hynes was not required to inspect the sub-floor area of the house before listing it. We are not persuaded that in the present case, a reasonably competent licensee would be expected to inspect the sub-floor area, unless there were other indicia of a dampness.

(e) Black mould on the floor of the rear bedroom wardrobe

[69] Mrs Brook submitted that there was black mould on the floor of the wardrobe in the rear bedroom, and that it was visible because pieces of the carpet had been used to patch areas where the carpet in the bedroom had been damaged by cat urine. She submitted that Mr Hynes' inspection of the property before listing it should have included looking inside wardrobes. She submitted that "only a blind person" could have missed seeing the mould.

[70] While many licensees will inspect wardrobes in a property before listing it, we are not persuaded that a reasonably competent licensee is expected to do so, for every listing.

Our assessment

[71] There can be no "one size fits all" approach as to what will alert a reasonably competent licensee to the possibility of a risk of a defect in a property. It will always depend on the particular circumstances involved.

[72] In this case, Mrs Brook submitted that there was a combination of three possible "red flags" that should have been recognised by Mr Hynes. She submitted that if he had carried out a proper inspection of the property, he would have recognised them, and he would have been put on notice of the possibility of a risk of a hidden or underlying defect.

[73] We are satisfied that there were indicia of the possibility of dampness in the property. The presence of a musty smell and mould on a wardrobe floor may have indicated that the property was "damp". However, we understand from Mr Chisholm's evidence that a musty smell and the presence of mould does not necessarily indicate dampness, and that dampness does not necessarily indicate sub-floor rot.

[74] In the circumstances, we cannot find that it would have appeared likely to a reasonably competent licensee in Mr Hynes' position that the property may be subject to a hidden or underlying defect. Accordingly, but for different reasons, we are not

satisfied that the Committee was wrong to dismiss Mrs Brook's complaint that Mr Hynes should have informed them of such a risk.

[75] Mrs Brook's appeal against the Committee's decision to dismiss her complaint on this point must therefore be dismissed.

Appeal against the penalty decision

[76] The Committee ordered Mr Hynes to pay a fine of \$1,500 to the Authority, and publication of its decision, including Mr Hynes' name. we are not persuaded that that was not an appropriate penalty. At the appeal hearing, Mrs Brook maintained her submission that Mr Hynes should be ordered to pay compensation, damages, and cancellation of Mr Hynes' licence.

[77] Section 93(1) of the Act does not give the Committee the power to make orders as to compensation, damages, or cancellation of Mr Hynes' licence. The Tribunal upheld the Committee's finding of unsatisfactory conduct in relation to the title issue, and it is also bound by s 93(1) as to the orders it may make. In the circumstances, the appeal against the penalty decision must also be dismissed.

Outcome

[78] Mrs Brook's appeals against the Committee's substantive and penalty decisions are dismissed.

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

Hon P J Andrews
Chairperson

Ms N Dangen
Member

Ms C Sandelin
Member