

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2024] NZREADT 09

Reference No: READT 020/2023

IN THE MATTER OF

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

BETWEEN

WQ
Appellant

AND

**THE REAL ESTATE AGENTS
AUTHORITY (CAC 2201)**
First Respondent

AND

NN
Second Respondent

On the papers

Tribunal:

D J Plunkett (Chair)
G J Denley (Member)
F J Mathieson (Member)

Representation:

The appellant: Self-represented
The first respondent: S McMullan, E Mok
The second respondent: R B Hern, I J McPhail

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 02 April 2024

INTRODUCTION

[1] The appellant was one of the purchasers (the purchaser) of a property (the property). Her husband was the other purchaser (the co-purchaser).

[2] The purchaser alleges the second respondent licensee (the licensee) failed to inform her that the property's monolithic cladding had a risk of weathertightness issues and therefore that obtaining finance would be difficult. As a result of the cladding, the purchaser had difficulty financing the purchase which delayed the settlement and led to a penalty being charged.

[3] A complaint made to the first respondent, the Real Estate Agents Authority (the Authority), was referred to Complaints Assessment Committee 2201 (the Committee). It was dismissed by the Committee, which decided to take no further action.

[4] The purchaser appeals to the Tribunal, arguing that the presence of monolithic cladding and its effect on financing the purchase should have been expressly added as a special clause in the sale and purchase agreement (the purchase agreement).

BACKGROUND

[5] The property is in Auckland. It has monolithic cladding, but there is no evidence it has weathertightness issues. It was listed with CU (the agency) on 22 July 2021. The licensee, NN, was recorded in the agency (listing) agreement as the relevant agent. The vendors disclosed in the agency agreement the presence of monolithic cladding.

[6] On 30 October 2021, the co-purchaser viewed the property with the licensee. According to the licensee, he was told the property had monolithic cladding and a building report should be obtained.

[7] On 31 October 2021 (at 10:00 am), the licensee sent an email to the purchaser, WQ, attaching the agency's 'Consents and disclosure – buyer acknowledgement' (disclosure form). One of the statements to be acknowledged by the purchaser (listed under the heading "Advised") was:

The property is of a cladding type that may be at risk of weathertightness problems and that it was recommended that they seek the expert advice of a suitably qualified person.

[8] The purchaser returned the disclosure form to the licensee by email on 1 November 2021 (at 8:29 am). The purchaser had changed another statement (or item of advice) concerning the deposit from 10 per cent to five per cent. She initialled the

deposit statement, and signed and dated the form (the date being 1 November 2021). The other statements, including that relating to cladding, had not been initialled.

[9] In response, the licensee sent an email to the purchaser on the same day (at 9:05 am) asking her to initial all of the acknowledgements. The purchaser immediately emailed the form back to the licensee (at about 9:14 am), having initialled the statements, including that relating to cladding. The form still bore the purchaser's signature and date of 1 November 2021. The licensee then signed the form herself and also dated it 1 November 2021.

[10] At the auction on 3 November 2021, the property was purchased by purchaser and co-purchaser for \$1,762,000. The settlement date was to be 19 January 2022.

[11] On 3 November 2021 (at 3:09 pm), shortly after the auction, the licensee sent an email to the purchaser asking for her initials on the disclosure form at the places marked with an 'x'. The licensee asked that both of the purchasers sign and date the form. On the attached form an 'x' was marked against the statement concerning the cladding risk. It was returned by the purchaser who was the only person who signed and initialled it at the marked places, including the cladding statement. She wrote the date as 3 November 2021. It was countersigned and dated 3 November 2021 by the licensee.

[12] An internal agency 'Transaction report – Sales and Purchase Agreement' was completed by the licensee on an unknown date after the auction. Under the heading 'Compliance', the licensee has ticked 'Yes' to the question:

If the sale is a monolithic clad house, the customer has been informed and advised to obtain their own specialist advice.

[13] The purchaser later obtained a building inspection report (23 December 2021). It stated that the exterior wall cladding was monolithic without a cavity. It was of a type which had a record of weathertightness failures. The report identified specific items concerning the cladding which could cause moisture penetration. It was recommended that the cladding be investigated by a qualified weathertightness surveyor.

[14] The purchasers had difficulty obtaining finance, but were able to do so. Settlement occurred on 8 February 2022.

Complaint to Authority

[15] On 31 August 2022 (form dated 25 July 2022), the purchaser made a complaint to the Authority. In her covering letter (31 August 2022), she stated that following the purchase, they became aware the property had monolithic cladding and was therefore

at risk of weathertightness issues. As a result, it was very difficult to obtain finance. At no time did the licensee inform her of the type of cladding or identify the risk.

[16] The purchaser acknowledged that before the auction, she had been sent the disclosure form, but it was a general form with many irrelevant clauses. It was not specific to the property. It did contain reference to the property being made of a material prone to weathertightness issues, however she had not been advised of the risk with this sort of cladding. The purchaser therefore assumed the cladding disclosure was irrelevant. It was not until after the auction that the licensee provided the completed disclosure form, as she said the previous one was incomplete. The purchaser signed and returned that form.

[17] Following the auction, the bank requested a weathertightness report due to the monolithic cladding. The purchaser had never heard of a cladding issue before the bank informed her. The vendors provided her with two thermal imaging reports which did not identify any problems.¹ The bank then informed her it would not provide finance until work was completed on the cladding. The immediate works would have cost \$104,000 and \$300,000 was likely required in the future for recladding. Fortunately, she was able to find alternative finance to complete the purchase.

[18] An explanation was provided by the licensee to the Authority on 6 April 2023. She said that when the co-purchaser viewed the property on 30 October 2021, she told him it was plaster clad and did not have a cavity, which was not a requirement when it was built. She recommended that a building report be obtained, advice she gave to every prospective buyer. The licensee said she provided the co-purchaser with the email address of the vendors who offered to provide a digital copy of a thermal imaging report (a hard copy was available at the viewing).

[19] The licensee said she emailed the disclosure form to the purchaser on 1 November 2021 and received the form back incomplete on the same day. The licensee therefore emailed the form to her again that day requesting that she initial all the acknowledgements. The purchaser did so, also on 1 November. No disclosure form was sent after the auction.

Decision of the Committee

[20] The Committee considered rr 6.4 and 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules):

¹ Thermal imaging moisture reports dated 5 November 2015 and 18 February 2021 were provided to the Authority. Both conclude the moisture readings were normal and no further investigation was required.

6 Standards of professional conduct

...

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

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 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.

...

[21] On 5 September 2023, the Committee issued its decision deciding to take no further action on the complaint.² It noted that the disclosure form, with the advice concerning cladding, had been completed by the purchaser on 1 November 2021, two days before the auction. The purchaser contended this did not represent adequate disclosure because she had assumed the reference to cladding was irrelevant. According to the purchaser, the licensee should have advised her that the cladding would affect her ability to obtain finance. The Committee found that disclosure by way of the disclosure form was adequate. Rule 10.7 would not extend to requiring a licensee to advise that a particular type of cladding might affect the ability to obtain finance.

[22] Relying on the transaction report, the Committee further found that it was more likely than not that the licensee did verbally advise the purchaser to get a building report because of the cladding. It concluded that the licensee did ensure the purchaser was made aware the property might be subject to weathertightness issues due to the monolithic cladding. The purchaser chose not to get a building report. There was no evidence the licensee misled the purchaser in relation to weathertightness. There was no breach of rr 6.4 and 10.7.

² Complaint No: C49957 (5 September 2023).

THE APPEAL

[23] On about 29 September 2023, the purchaser appealed to the Tribunal against the Committee's decision of 5 September 2023.

Submissions of the purchaser

[24] There are submissions from the purchaser on the notice of appeal (undated). She contends a special clause about monolithic cladding and its effect on finance should have been added to "the agreement", as most agencies do. It was never mentioned verbally by the licensee. The purchaser acknowledges she ticked and initialled the "S&P" (the purchase agreement), but she was not aware that monolithic cladding could cause financing issues.

Submissions of the Authority

[25] In her submissions (12 February 2024), Ms Mok notes the Authority's usual neutral role as to the outcome of the appeal.

[26] It is contended that the licensee was aware of the property's monolithic cladding, though it has no known weathertightness issues. The licensee's position is that she informed the co-purchaser at a viewing that the property was plaster clad and did not have a cavity. She recommended that a building report be obtained. But the purchasers did not obtain a report. Prior to the auction, the licensee sent the disclosure form to the purchaser, which included the notification of a risk of weathertightness problems due to the cladding and a recommendation that expert advice be obtained.

[27] Counsel notes the Committee found that the licensee had verbally advised the purchaser to obtain a building report. The purchaser says on appeal that the licensee did not give her any such advice. However, according to the licensee, she did give that advice to the co-purchaser. This evidence is not contested. The Authority therefore accepts the Committee made a factual finding that was not available to it. This error is not material, since it is questionable whether the licensee has breached the disclosure requirements in circumstances where one of the purchasers was informed of the risks associated with the cladding issue and advised to get a report.

[28] The purchaser acknowledges signing the disclosure form, but she states it included disclosures that were irrelevant, so she assumed the disclosure regarding cladding was irrelevant. The requirement for licensees to disclose defects does not obviate the need for prospective buyers to undertake their own inquiries and due diligence.

[29] The purchaser contends the licensee ought to have put her on notice of the potential issue with securing finance due to the cladding. The purchaser says a special clause ought to have been put into the purchase agreement. The licensee says she was not required to do so. It is submitted by the Authority that rr 6.4 and 10.7 do not require licensees to provide technical or specialist advice. Rather, the onus is on licensees to ensure adequate disclosure of defects, so prospective buyers have the opportunity to obtain the necessary advice.

Submissions of the licensee

[30] In his submissions (1 February 2024), Mr Hern submits that the licensee acted at all times in accordance with her fiduciary and professional obligations. The Committee did not err in its decision.

[31] Counsel observes that the licensee informed the co-purchaser at a viewing that the property was plaster clad and did not have a cavity, so a building report should be obtained. However, the purchasers declined to do so. Furthermore, the purchaser signed the disclosure form which contained a statement concerning cladding and a recommendation as to obtaining expert advice.

[32] The purchaser says the acknowledgement form did not represent adequate notification because she assumed the reference to cladding was irrelevant. However, she cannot have reasonably held that expectation, given the specific written disclosure referencing the cladding type, its risk of weathertightness problems and recommendation that expert advice be obtained. It is unclear why the purchaser thought the reference in the disclosure form was irrelevant.

[33] The purchase was made with full disclosure of the potential weathertightness issue due to the monolithic cladding. There is no evidence suggesting the purchasers were misled or that a known defect was not disclosed.

[34] As for the purchaser's submission that the licensee should have informed her that the cladding might cause financing issues, it is rejected. The licensee was under no obligation to provide the purchaser with such advice. Licensees are not lawyers or building consultants and do not give legal or building advice. It is not the role of any licensee to advise that a particular cladding might affect the ability to obtain finance.

[35] It is submitted the purchasers failed to undertake their own due diligence. They failed to carefully review the auction documents and to obtain a building report.

JURISDICTION AND PRINCIPLES

[36] This is an appeal pursuant to s 111 of the Real Estate Agents Act 2008 (the Act).

[37] The appeal is by way of a rehearing.³ It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.⁴ After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.⁵ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.⁶

[38] A hearing may be in person or on the papers.⁷ A hearing in person may be conducted by telephone or audiovisual link.

[39] 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.⁸ 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.⁹

[40] The Tribunal issued a procedural Minute on 1 November 2023 as to the conduct of the appeal. The Authority filed in the Tribunal a paginated bundle of the documents that were before the Committee.

DISCUSSION

[41] The purchaser really only makes one point on appeal. She contends that the licensee should have put a special clause in the purchase agreement as to how the monolithic cladding could affect obtaining finance.¹⁰ The licensee did not even mention this verbally.

[42] The Committee found that r 10.7 would not extend to requiring a licensee to advise that a particular cladding might affect the ability to obtain finance.

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

⁴ *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] and [83].

⁵ Real Estate Agents Act, s 111(4).

⁶ Section 111(5).

⁷ Sections 107 and 107A.

⁸ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] and [16]; and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112].

⁹ *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22], citing *Stichting Lodestar*, above n 8, at [4]–[5]; and *Scandrett*, above n 8, at [112].

¹⁰ The uncompleted purchase agreement was one of the auction documents received by the purchasers prior to the auction.

[43] We agree with the Committee. A licensee is not required to give financing advice. What a licensee is obliged to do is to refrain from withholding information that in fairness should be provided (r 6.4) and to disclose known defects (r 10.7). The evidence of the licensee is that she did verbally inform the co-purchaser at a viewing prior to the auction of the plaster cladding, that there was no cavity and a building report should be obtained. The purchaser does not contest that her husband was told about the cladding and desirability of obtaining a report. The licensee's evidence that the co-purchaser was so informed is corroborated by her entry in the internal agency transaction report after the auction.

[44] Additionally, and critically, the purchaser initialled an acknowledgement prior to auction that the property had a cladding type which risked weathertightness problems and that expert advice should be obtained.

[45] The purchaser cannot blame the licensee for her incorrect assumption that the acknowledgement was irrelevant. Her husband, a co-purchaser, had been told of the plaster cladding. We agree with the respondents that the purchasers failed to undertake what seems to us to be common sense due diligence.

[46] It is not clear to us why the licensee sent the disclosures form to the purchaser on 3 November 2021, after the auction, asking for initials and a signature, given that it had been completed by the purchaser on 1 November 2021, prior to the auction. The licensee denies sending the form after the auction, but plainly she did.¹¹ The Committee does not deal with this discrepancy in the licensee's narrative. Ms Mok suggests it was to enable both of the purchasers to sign the form, as the licensee expressly requested on 3 November (though in fact only the purchaser ultimately did). In any event, there is clear evidence that the purchaser signed the form and initialled the item of advice concerning cladding prior to the auction.

[47] The Authority points out that the Committee wrongly found that the licensee informed the purchaser of the cladding type and recommended obtaining a report. As the Authority submits, this error is not material, since the co-purchaser was so informed.

Conclusion

[48] The licensee discharged her obligation to inform the purchasers of the defective cladding and of the risk of weathertightness issues, and hence the need to obtain a report, by way of the verbal notification to the co-purchaser and the statement in the disclosure form. It was up to the purchasers to assess what effect that might have on

¹¹ See email licensee to purchaser (3 November 2021) at 107 of the Authority's bundle.

their financing. The licensee was not required to insert a special clause in the purchase agreement or disclosure form concerning the possible effect of monolithic cladding on financing. There was no breach of rr 6.4 or 10.7 and no other unsatisfactory conduct or misconduct.

OUTCOME

[49] The appeal is dismissed. The Committee's decision to take no further action is confirmed.

[50] 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.

PUBLICATION

[51] In light of the outcome of this appeal and having regard to the interests of the parties and of the public, it is proper to order publication of the decision of the Tribunal without identifying any party or the agency.

D J Plunkett
Chair

G J Denley
Member

F J Mathieson
Member