

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2020] NZREADT 17**

**READT 036/19**

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	JENNIFER LEITH Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1903) First Respondent
AND	JULIANNE COBHAM Second Respondent
Hearing:	17 March 2020, at Wellington
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Mr N O'Connor, Member
Appearances:	Ms Leith, Appellant Mr D Green, on behalf of the Authority Mr G Dewar, on behalf of Ms Cobham
Date of Decision:	20 April 2020

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**DECISION OF THE TRIBUNAL**

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## **Introduction**

[1] Ms Leith has appealed under s 111 of the Real Estate Agents Act 2008 (“the Act”) against the decision of Complaints Assessment Committee 1903, dated 19 September 2019, in which the Committee decided to take no further action on her complaint that Ms Cobham had failed to disclose defects, and non-compliance with the provisions of the Unit Titles Act 2010, when marketing a property.

[2] We record that Ms Cobham’s counsel was inadvertently omitted from the Tribunal’s confirmation of the hearing date. As a result, although written submissions were filed by or on behalf of all parties to the appeal, Ms Cobham’s counsel appeared at the hearing at short notice, after being contacted by the Tribunal.

[3] Ms Cobham subsequently advised the Tribunal that she had intended to attend the hearing, and had worked with her counsel to prepare her submissions on the appeal. She was waiting to be advised of the hearing date. The Tribunal accepts that Ms Cobham intended to attend the hearing, and assures her that no adverse inference has been taken as a result of her absence.

## **Background**

[4] Ms Cobham is a licensed branch manager, and at the relevant time was engaged at Leaders Real Estate Ltd (“the Agency”).

[5] All relevant events occurred between 29 August and 23 September 2016. Pursuant to an agency agreement dated 29 August, Ms Cobham was the listing and selling agent of a two-unit property in Khandallah, Wellington. The vendor owned both of the units. The property was to be sold by tender, with tenders closing at 1 pm on 22 September. Prospective purchasers could tender for either one or both of the two units.

[6] When completing the agency agreement, the vendor advised Ms Cobham of only one “known, hidden or underlying defect/s or hazard/s” in relation to the property, as follows: “The power point in garage of Unit 1, is connected into the power source for

unit 2". The agency agreement records the "General Property Condition" of the property as being "Good", and that there were "Nil Known to Vendor" disclosures affecting the property.

[7] The vendor also completed a "Form 18 Pre-contract disclosure statement" ("the Form 18 disclosure"), pursuant to s 146 of the Unit Titles Act 2010, dated 5 September. In the section headed "Information about the unit", the vendor entered "NA" against questions relating to body corporate contribution levies, proposed maintenance, a body corporate bank account, and a notification that a buyer could request further information under s 148 of the Unit Titles Act.

[8] Ms Cobham advised that she questioned the vendor about her responses on the Form 18 disclosure, and was told the vendor had sought advice from her lawyer, and had been directed to note "NA" on the form and complete the declaration as she had done. Ms Cobham also said she had, herself, telephoned a lawyer to seek advice as to how best to deal with the absence of a formal body corporate structure. She said she was advised that such a scenario was not uncommon with small body corporates, particularly where there was common ownership in one registered owner, and that provided adequate disclosure was given there was no need to insist on pre-contract compliance with the Unit Titles Act.

[9] Ms Leith viewed the property at an open home conducted by Ms Cobham on 11 September. She told Ms Cobham that she would be commissioning a building report on the property.

[10] Ms Leith obtained a building inspection report from Total Home Inspection Services Ltd, dated 15 September ("the building inspection report"). In the Inspection Summary of the report, the property is described as being in "reasonable condition" for its age, although particular issues were identified in respect of a rear retaining wall, corrosion on the roof, blistering paint, decay and corrosion in window frames and fixings, and the handrails to decks on the property (which were noted as an "identified risk").

[11] On 16 September, Ms Cobham emailed to Ms Leith a number of documents, identified by her as follows:

Attached:

- 1/ Tender docs for Units 1 & 2 combined.
- 2/ Pre disclosure forms for Units 1 & 2 No body corp set up as same owner.
- 3/ Updated building and general disclosure form to replace the one included within the Tender docs.
- 4/ Purchaser's Guide (REAA Booklet).

Please contact me any time if you need further info etc.

Look forward to talking again soon.

...

[12] Ms Leith viewed the property a second time at an open home on 18 September.

[13] Later that day, Ms Cobham emailed to Ms Leith "another updated form which you should replace the previous with please", noting that she "had to amend it again". Ms Cobham did not identify the particular amendments made on 16 or 18 September, but it is apparent from the final version of the documents, that there was a further disclosure in the section "General Disclosures", recording "known, hidden, or underlying defect/s or hazard/s" of "The door (garage) on unit 2 does not lock". Also, the section "Building Report Disclosures" was amended to record that the property had been the subject of a building report by Total Home Inspection Services Ltd, and that neither the vendor, nor to the vendor's knowledge, the Agency, was aware whether or not the report had identified any defects.

[14] In her email, Ms Cobham expressed a concern which appears to have arisen from a comment made by Ms Leith regarding the condition of the property:

Nice to see you again today.

I feel a little concerned about "who" was saying "what" to you upstairs. As I wasn't there I can't comment further than to say perhaps they may not necessarily be correct.

Total House Inspection Services is a company which can usually be relied upon and so if you now have questions raised I suggest you give the Inspector a call and discuss.

Attached is another updated form which you should replace the previous with please, I had to amend it again.

Look forward to talking again soon.

...

[15] Ms Leith responded to Ms Cobham:

I think there were some things missing from in the builders report which I shall take up with them. I did speak about that with you, however an architect did contribute to my deeper understanding on a couple of things.

I shall have to physically obtain the documents from you as I do not have access to a printer.

I am off to visit the bank tomorrow.

I shall get back to you and make an appointment for Thursday before midday if all goes well at the bank.

...

[16] Tender offers were received by the Agency and presented to the vendor. Ms Leith submitted an unconditional tender to buy unit 1. Ms Cobham advised the Committee that another tender, to buy unit 2, was conditional on the prospective purchasers being satisfied that the purchaser of unit 1 would be a suitable neighbour who would co-operate with the process of establishing a functioning body corporate. Ms Cobham said that she then convened a meeting between Ms Leith and the prospective purchasers of unit 2 at the Agency, where they talked and agreed they would work together. Both tenders were then sent to the vendor, who countersigned them. Ms Leith's purchase was settled in October 2016.

[17] Following her purchase, Ms Leith discovered other defects in the property, not referred to in the building inspection report. These included that the roof leaked, and had to be replaced. Although she and the purchasers of unit 2 established a body corporate, they were not able to agree on a maintenance plan

[18] In March 2018, Ms Leith complained to the Authority about Ms Cobham. As described by the Committee, her complaint was that:<sup>1</sup>

- a) [Ms Cobham] did not identify the defects of the property in the agency disclosure form. The defects included a leaking roof, a major leak in the garage, leaky spouting, blistering paint work, as well as leaky windows and balcony. [Ms Leith] says that the Vendor knew about these defects and [Ms Cobham] should have disclosed them to her as the purchaser of the property.
- b) [Ms Cobham] did not comply with her legal obligations under the [Unit Titles Act]. She did not provide completed pre-sale disclosure documents

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<sup>1</sup> Committee's decision, at paragraph 1.5.

required under [that Act] including the body corporate operating rules, information on levied contributions, levy for the following 12 months and the maintenance plan. [Ms Cobham] was given legal advice from a property solicitor who used the statement “do not comply” and regardless of this, [Ms Cobham] proceeded with the tender process with the knowledge that the agreement for sale and purchase was non-compliant. [Ms Leith] believes [Ms Cobham] should have stopped the tender process.

## **The Committee’s decision**

### *Disclosure of defects*

[19] The Committee considered Ms Cobham’s obligation to make disclosure of defects under r 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”). It found that Ms Cobham did not know that the defects discovered by Ms Leith existed, and that except for the defective power point, the vendor did not inform her about any other defects.<sup>2</sup> It further found that the defects were not visibly obvious to Ms Cobham and she was not, therefore, prompted to do anything about them.

[20] The Committee noted that Ms Leith had obtained a building inspection report, although she was not satisfied with it. The Committee observed that the fact that the report was possibly sub-standard was unfortunate, but did not change the fact that Ms Cobham was not aware of the defects.

[21] The Committee concluded that:<sup>3</sup>

... [Ms Cobham] did not have a duty to disclose the underlying defects as the vendor did not inform her of them, and they were not immediately apparent to her.

The [Committee] consider [Ms Cobham] did not breach Rule 10.7 or any other rule and will therefore be taking no further action under this head of the complaint.

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<sup>2</sup> We note that, as recorded at paragraph [13] of this decision, the vendor also disclosed a defect in the garage door of unit 2, which Ms Cobham disclosed in the tender documents.

<sup>3</sup> At paragraph 3.4.

### *Unit Titles Act*

[22] The Committee found that Ms Cobham had turned her mind to the fact that because there was no body corporate, required detail such as body corporate rules could not be provided to Ms Leith. It concluded that:<sup>4</sup>

... it is unlikely that [Ms Cobham] would have neglected to discuss the absence of a body corporate with [Ms Leith] as she would have had to explain the “NA” notations in the disclosure material.

[23] The Committee also noted that Ms Cobham had sought legal advice, and that Ms Leith had also obtained legal advice before signing the tender documents. The Committee considered that a property subject to the Unit Titles Act which does not have a body corporate can be validly sold, and that it was understandable (as both units 1 and 2 had been owned by one owner) that body corporate rules had never been developed.

[24] The Committee considered it appropriate for Ms Cobham to proceed with the tender process, and that the tenders proceeded to settlement. The Committee noted that Ms Leith had an opportunity to review her decision whether to tender for the property, knowing that the body corporate was not in place or documented, and proceeded to purchase the property knowing there was no body corporate. The Committee concluded that Ms Cobham had complied with her professional obligations and that it would take no further action on that head of Ms Leith’s complaint.<sup>5</sup>

### **Submissions**

#### *Disclosure of defects*

[25] Ms Leith submitted that the Committee was wrong to find that the defects in the property (with the exception of the roof, which she accepted could not be seen) were not visibly apparent to Ms Cobham. She submitted that the defects were obvious to her, and to the building inspector, and that she had spoken to Ms Cobham about “things missing from the builders report” when she attended a second open home on 18

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<sup>4</sup> At paragraph 3.7.

<sup>5</sup> At paragraphs 3.8–3.11.

September 2016. She submitted that Ms Cobham was, therefore, obliged to make disclosure of them pursuant to r 10.7, and the Committee was wrong to find that she had no such obligation.

[26] In response to questions from the Tribunal, Ms Leith submitted that Ms Cobham should have disclosed that there were defects in the property, for example, that there was a major crack in a retaining wall, defects in the paint work, and decay and corrosion visible in window frames and balcony fixings.

[27] Mr Dewar submitted that Ms Cobham had complied with r 10.7 by disclosing defects made known to her by the vendor, then disclosing that a builders report had been obtained by a prospective purchaser. In answer to a question from the Tribunal, he submitted that a licensee does not have a duty to make an assessment as to a property's condition and to make disclosure of that assessment. He submitted to impose an obligation to disclose the general condition of a property would be "to open a Pandora's box". He submitted that where (as in this case) a prospective purchaser had obtained a building inspector's report, the obligation of disclosure has been satisfied by disclosing that the report was obtained.

[28] Mr Green submitted for the Authority that an inquiry as to disclosure of defects is always fact-specific, and it is for the Tribunal to determine, on the facts, whether licensees have complied with their obligations.

[29] He submitted that r 10.7 does not require a licensee to discover hidden or underlying defects with a property, or to carry out an inspection of a building in the same way that a building inspector would do in the course of preparing a building report.

[30] In answer to questions from the Tribunal, Mr Green accepted that if the Tribunal were to conclude in this case that the defects Ms Leith referred to should have been disclosed, then it would follow that the Committee may not have been correct to dismiss that aspect of her complaint.

*Disclosure of absence of body corporate structure*

[31] Ms Leith submitted that the Committee was wrong to find that it was unlikely that Ms Cobham neglected to discuss the absence of a body corporate. She submitted that Ms Cobham did not explain the vendor's "NA" notations on the Form 18 disclosure. She submitted that the only reference to the issue in the material before the Committee was Ms Cobham's email of 16 September 2016, in which she stated "No body corp set up as same owner", and submitted that this is not an "explanation" as to non-compliance with the Unit Titles Act.

[32] Ms Leith referred to her interactions with Ms Cobham in the period between her first viewing of the property on 11 September and her submitting her tender on 22 September. She submitted that there was no discussion of the Unit Titles Act with Ms Cobham at either the first or second open home she attended, or when she attended at the Agency to collect printed tender documents at 12 pm on 22 September in order to submit a tender before the deadline of 1 pm.

[33] Ms Leith referred to Ms Cobham's statement to the Committee that she had spoken to her by phone about the lack of body corporate fund, operating rules, and maintenance fund, and was very clear as to why this existed, and that she had explained that the vendor's lawyer had approved the "NA" notations on the Form 18 disclosure, and that Ms Leith understood and acknowledged this. Ms Leith submitted that there had been no such discussion or explanation, and there had been no opportunity for any such discussion in the period before she submitted her tender. Ms Leith agreed that she had met with the prospective purchasers of unit 2 at the Agency's office, but submitted that this was after she had submitted an unconditional offer to buy unit 1.

[34] Ms Leith also submitted that it was clear from the material before the Committee that she had proactively followed up building report issues. She submitted that the Committee should have accepted that she would similarly have followed up the body corporate issue, if Ms Cobham had discussed it with her, as she did not understand the significance of the Unit Titles Act and the rules as to body corporates.

[35] In answer to a question from the Tribunal, Ms Leith advised that this was her first purchase on her own, and she was not familiar with the Unit Titles Act or body corporate structure.

[36] Mr Dewar submitted that it is key that the Form 18 disclosure is made by the vendor, not the licensee. He submitted that Ms Cobham had appropriately questioned the vendor as to the “NA” notation, and had been diligent in obtaining legal advice herself. That advice was that a “NA” notation was “quite common” in similar circumstances.

[37] Mr Dewar accepted that Ms Leith was not familiar with the Unit Titles Act, but submitted that she had clearly been told that there was “no body corp set up as the same owner”.

[38] Mr Dewar also referred to the meeting between Ms Leith and the prospective purchasers of unit 2 at the Agency in relation to establishing a body corporate for the property. He accepted that this occurred after Ms Leith had submitted an unconditional tender for unit 1, but submitted that there was no confirmed contract until after the discussion with the prospective purchasers of unit 2 and the vendor accepted the tender. He submitted that Ms Leith therefore was fully aware of the position before her tender became binding.

[39] Mr Green submitted that it was necessary to bring home to a prospective purchaser that there was no body corporate structure in place for the property. That is, it was not enough to rely on the vendor’s “NA” notations on the Form 18 disclosure. He submitted that Ms Cobham’s email of 16 September (that there was “no body corp set up as same owner”) was sufficient.

[40] Mr Green submitted that a licensee is not required to go further and explain the significance of the absence of a formal body corporate structure. He submitted that the Committee’s conclusion that Ms Cobham had not breached her obligations in this case was consistent with the evidence before it.

## Discussion

### *Disclosure of defects*

[41] Rule 10.7 provides, as to a licensee’s obligation to disclose defects to a customer:

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.

[42] Rule 10.7 provides a footnote to the phrase “where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects”, as follows:

For example, houses built within a particular period of time, and of particular materials, are or may be at risk of weathertightness problems. A licensee could reasonably be expected to know of this risk (whether or not a seller directly discloses any weathertightness problems). While a customer is expected to inquire into risks regarding a property and to undertake the necessary inspections and seek advice, the licensee must not simply rely in 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.

[43] It is important to note that although the footnote to r 10.7 refers to properties that are at risk of being subject to weathertightness issues, it makes it clear that the range of issues to be taken into account under r 10.7 is not limited to “leaky home” situations.

[44] On appeal, the Tribunal makes its own assessment of merits of the case.<sup>6</sup> Determination of this aspect of Ms Leith’s appeal comes down to the Tribunal’s assessment of whether the Committee was wrong to find that defects in the property were not apparent to Ms Cobham, such that they were “known” to her and required to be disclosed.

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<sup>6</sup> See *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] NZLR 141, at [3] and [5].

[45] Counsel did not refer to any Tribunal decisions concerning the application of r 10.7. At the hearing, the Tribunal referred to two decisions which, while of course dependent on their particular facts, contain statements of principle as to licensees' obligations.

[46] The Tribunal's decision in *Munley v Real Estate Agents Authority (CAC 402)*,<sup>7</sup> was concerned with a licensee who accepted advice from a vendor that a property was not subject to weathertightness issues, and marketed it as such. Mr Munley, a prospective purchaser, formed a different view, and raised the matter with the licensee. The vendor subsequently agreed to commission a building inspection report, in which it was concluded that the property suffered from moderate exterior envelope defects, albeit not to the extent of disastrous systemic cladding failure. Mr Munley complained to the Authority. A Complaints Assessment Committee inquired into the complaint and decided to take no further action on his complaint as to the licensee's failure to disclose the weathertightness issues. Mr Munley appealed to the Tribunal.

[47] In its decision, the Tribunal stated:<sup>8</sup>

... A licensee, particularly an experienced licensee, should be able to read the signs of a building that needs maintenance and may have some issues associated with a plaster-type exterior. Real estate managers must be aware, from personal inspection, that a new property coming onto the market may require the licensees marketing the property to disclose issues, including (but not limited to) a possible weathertightness problem. As a matter of good practice in the advertising for such a property, a licensee should incorporate some wording which would alert a potential purchaser as to the possibility of such a problem. In the present case, although we express no firm view on this point, the advertisement may have achieved this by using the word "roughcast", given that it was highlighted in the listing agreement.

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... When licensees can see from their own knowledge and experience that a property may be subject to hidden or underlying defects (such as that it may be a leaky home), it is simply not sufficient for licensees to rely on representations from a vendor, and to recommend that potential buyers obtain their own building report.

[48] In the circumstances of that case, in particular the efforts Mr Munley went to in his due diligence regarding the property, and the fact that following his intervention, the vendor obtained a building inspection report which was then provided to to all

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<sup>7</sup> *Munley v Real Estate Agents Authority (CAC 402)* [2016] NZREADT 53.

<sup>8</sup> *Munley*, at [42] and [53].

prospective purchasers, the Tribunal concluded that the Complaints Assessment Committee was not wrong in declining to take no further action on Mr Munley's complaint.

[49] The Tribunal's decision in *Li v Real Estate Agents Authority (CAC 408)*,<sup>9</sup> focussed on a licensee's failure to inspect the south wall of a property because of difficulties with access. The licensee relied on the vendors' representations about the property, and did not tell the prospective purchasers that she had not been able to view part of the property. After the complainants bought the property, they found that the south wall had weathertightness issues. They appealed to the Tribunal against the Committee's decision not to inquire into their complaint. By consent, the appeal hearing proceeded as a *de novo* hearing on the merits of the complaint.

[50] The Tribunal found that the licensee's conduct in failing to tell the complainants that she had not been able to inspect the south wall was unsatisfactory under s 72 of the Act. The Tribunal did not accept a submission for the licensee that she was exonerated by virtue of the appearance of the property, or the vendors' failure to tell her about areas of concern.<sup>10</sup>

[51] We note Ms Leith's statements to the Committee that defects in the property were apparent to her. We have viewed the photographs annexed to the building inspection report. There was no suggestion that the photographs did not accurately depict the condition of the property. The defects in the property, in particular, the crack in the rear retaining wall, decay and corrosion in window frames and fixings and the handrails to decks, and blistering paint, were apparent to us. We have concluded that they would have been apparent to a reasonably competent licensee – in particular, one with Ms Cobham's length of experience in the industry. Further, Ms Cobham should have disclosed that she had not been able to view the roof of the property, so was unable to make any assessment of it.

[52] We accept that licensees are not practising lawyers or building consultants and should not give legal or building advice. However when a property such as in this case

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<sup>9</sup> *Li v Real Estate Agents Authority (CAC 408)* [2017] NZREADT 9.

<sup>10</sup> *Li*, at [53], [54], and [66].

presents with defects or deferred maintenance then a licensee cannot rely on a vendor's statement that the property has no defects, and in fairness to prospective purchasers defects should be pointed out to prospective purchasers, at least in general terms (for example, that the condition of the property is consistent with its age and there may be issues of deferred maintenance) in the formal property information packs for the property, and to recommend that prospective purchasers obtain a building inspection report.

[53] However, in this case, the defects were apparent to Ms Leith, and she obtained a building inspection report that disclosed defects to her. We are not persuaded that in the particular circumstances of this case, Ms Cobham's failure to disclose the defects required a finding of unsatisfactory conduct. Accordingly, we are not persuaded that the Committee was wrong to decide to take no further action on this aspect of Ms Leith's complaint.

*Disclosure of absence of body corporate*

[54] We accept Mr Green's submission that Ms Cobham was obliged to advise Ms Leith that there was no body corporate structure in place for the property. That is, she had to go beyond the "NA" notations on the Form 18 disclosure.

[55] While Ms Cobham could have gone further than her email of 16 September (that there was "no body corp set up as same owner"), and in particular should have recommended to Ms Leith that she seek legal advice as to the significance of there being no body corporate in place, we have concluded that she complied with her obligations regarding disclosure of the absence of a body corporate – albeit by a very small margin. Ms Cobham's email provided the minimum amount of information required to be given (that there was no body corporate structure in place for the property) with the minimum statement of the reason why there was no body corporate (that the two units were owned by a single owner). Ms Leith had this information before she submitted her unconditional tender to buy unit 1.

[56] In the light of that finding, we are not required to consider Ms Cobham's statement (denied by Ms Leith) that she explained the lack of a body corporate by

telephone, and was clear as to why this was so, and that Ms Leith understood and acknowledged the position.

[57] We are not persuaded that the Committee was wrong to decide to take no further action on this aspect of Ms Leith's complaint.

### **Decision**

[58] Ms Leith's appeal is dismissed.

[59] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews  
Chairperson

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Mr G Denley  
Member

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Mr N O'Connor  
Member