**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2018] NZREADT 45**

**READT 018/18**

| | |
|---|---|
| IN THE MATTER OF | An appeal under section 111 of the Real Estate Agents Act 2008 |
| BETWEEN | STEPHEN BEATH<br>Appellant |
| AND | THE REAL ESTATE AGENTS AUTHORITY (CAC 409)<br>First Respondent |
| AND | WAYNE KEMP, MARINA SCOBLE, and MIKE PERO REAL ESTATE LIMITED<br>Second Respondents |

| | |
|---|---|
| Hearing: | 16 August 2018, at Wellington |
| Tribunal: | Hon P J Andrews, Chairperson<br>Ms C Sandelin, Member<br>Mr N O'Connor, Member |
| Appearances: | Mr P Bremer, on behalf of the Appellant<br>Mr J Simpson, on behalf of the First Respondent<br>Mr P Napier, on behalf of the Second Respondents |
| Date of Decision: | 31 August 2018 |

---

**DECISION OF THE TRIBUNAL**

---

## Introduction

[1] On 3 October 2017, Complaints Assessment Committee 409 ("the Committee") found that Mr Kemp, Ms Scoble, and Mike Pero Real Estate Limited ("MPRE") had engaged in unsatisfactory conduct under s 72 of the Real Estate Agents Act 2008 ("the Act"), in relation to their marketing of a property in Mount Victoria, Wellington, bought by Mr Beath in June 2015 ("the property"). Mr Beath has appealed against the Committee's decision, in respect of Mr Kemp and Ms Scoble (together, "the licensees"). Mr Beath contended that the Committee was wrong to make findings of unsatisfactory conduct, and that the licensees' conduct constituted misconduct.

[2] A Complaints Assessment Committee's powers to determine a complaint do not include making a finding of misconduct. If a Committee considers it appropriate to do so, it may determine that a complaint or allegation be considered by the Tribunal.[1] Mr Beath's appeal is, therefore, against the Committee's decision to make findings of unsatisfactory conduct, rather than to refer his complaint to the Tribunal for determination, on a charge of misconduct.

[3] Neither of the licensees cross-appealed. If Mr Beath's appeal is allowed, the Tribunal must refer his complaint back to the Committee for further consideration. If his appeal is dismissed, the findings of unsatisfactory conduct stand, as do the penalty orders subsequently made by the Committee.

[4] Accordingly, the sole issue to be determined by the Tribunal is whether, having regard to the factual determinations made by the Committee, it was wrong to make a finding of unsatisfactory conduct, rather than to lay charges of misconduct to be determined by the Tribunal.

## Factual Background

[5] Mr Kemp and Ms Scoble are licensed salespersons, engaged by MPRE. They marketed the property in 2012, when they were engaged at a different agency. We will refer to this as "the 2012 sale". They also marketed the property in March 2015,

---

[1] Section 89(2)(a) of the Act.

at which time a sale agreement did not proceed. We will refer to this as "the March 2015 transaction". As recorded earlier, Mr Beath bought the property in June 2015.

[6] In December 2016, Mr Beath made a complaint to the Real Estate Agents Authority ("the Authority") that the licensees had failed to disclose a defect in the property; namely, that a party wall shared with a neighbour was at risk of collapse during an earthquake ("the non-disclosure issue").

[7] Mr Beath referred to an email sent to Mr Kemp on 11 May 2015:

> Hi Wayne
>
> We will be putting an offer to your vendor for [the property] and as part of that process can you please confirm when each of the following activities have been done on the property and how much of each has been done:
>
> 1) Repiling
> 2) Rewiring
> 3) Replumbing
> 4) Roofing
>
> If there is any other important disclosure's we should know of as a buyer please advise so as to make this process a quick one …

[8] Mr Beath also referred to Mr Kemp's response:

> Hi Stephen
>
> Thanks for coming back to us – this is what we understand.
>
> The repiling was done in 1998 as per the LIM.
> There has been rewiring done at some stage in the property looking at the circuit board in the entrance looks could be around the 80's. Couldn't confirm whether or not all old wiring has been replaced.
> With the Kitchen and bathroom being upgraded and the gas infinity hot water on the property you would think the plumbing has been done at some stage but you would need a plumber to check this.
> The roof has been replaced the owners seem to think early 2000's.
> The retaining wall at the rear of the property was replaced in 2003.
> The partition wall between properties is of brick construction as per the era of the home.
>
> The owner is aware the garage is not water tight currently and the home is in generally good condition for the era.
>
> We would recommend obtaining a builders report on the property which will give you a good overview as to the condition and how much of the above work has been done.
>
> Let me know if you have any further questions. …

[9] Mr Beath's complaint was also as to the response by Mr Kemp to particular questions asked of them shortly after the sale.

[10] The Committee inquired into the complaint as to the non-disclosure issue. In the course of the inquiry Mr Beath became aware of further defects in the property, and raised as part of his complaint that the licensees had failed to disclose asbestos in the roof and leaks in the living room, and that the property had "Dux Quest" plumbing ("the further complaint").

**The Committee's findings**

*The non-disclosure issue*

[11] The Committee found that at the time the licensees marketed the property to Mr Beath, they were aware of safety concerns relating to earthquake risk. In particular:

[a] Mr Kemp recalled a prospective purchaser during the 2012 sale stating that he had concerns about the party wall between the adjoining properties, and had spoken to an engineer and been advised that "if" the party wall required strengthening it would cost $50,000 if the issues were severe. The vendor at that time advised Mr Kemp that there were no issues, so Mr Kemp made no further inquiries.[2]

[b] The March 2015 transaction did not proceed as the prospective purchasers obtained a preliminary opinion from an engineer, on the advice of a building inspector. The Committee noted that the engineer had not visited the property, but relied on publicly available information, including information from the MPRE website. His opinion was that the wall was most likely constructed of brick masonry, there was no sign of seismic strengthening, and the wall was likely to have a compliance of between 10 and 20% of the new building standard.[3]

2 Committee's decision, at paragraph 3.13.
3 At paragraph 3.5.

[c] One of the prospective purchasers rang Ms Scoble on two occasions: first, about extending time to satisfy the building report condition in their agreement for sale and purchase and advising her that the building inspector had recommended an engineer look at the wall, and secondly, telling her what the engineer had told her about the safety of the wall. Ms Scoble was advised that the party wall was a risk to life as it did not have any safety bracing. Mr Kemp was present and heard both conversations. He understood that the engineer's preliminary advice was that the wall could be at risk in a serious earthquake.[4]

[d] The solicitor for the March 2015 prospective purchasers sent letters to the solicitor for the vendors, dated 27 and 30 March 2015, advising, first, that the building inspection had raised a number of issues, including as to the safety of the party wall, and an engineering inspection was to be arranged, and secondly, that the prospective purchasers were dissatisfied with the condition of the building. These letters were copied to MPRE, for the attention of Ms Scoble, and were uploaded into the MPRE Central Relationship Management System ("CRM").[5]

[e] The solicitor's letters were in the MPRE CRM, to be seen by anyone looking, and the licensees would have been aware of them if they had exercised reasonable diligence. Neither licensee recalled the letters, and the Committee was not satisfied on the evidence that they were aware of them[6]

[12] The Committee summarised its findings regarding the party wall as follows:[7]

> The Committee is satisfied the Licensees knew that on two occasions prior to the sale of the property to the Complainants a prospective purchaser had been concerned about the safety of the party wall. They were aware engineers had been consulted for advice. They were aware the safety concerns related to risk during an earthquake. If they had seen the [solicitor's] letters their knowledge would have been no greater than what was acquired during the two telephone discussions with one of the 2015 purchasers. They did not know how the party wall was unsafe and they had not seen the [engineer's] report.

---

4 At paragraphs 3.14 and 3.15.
5 At paragraphs 3.10 and 3.11.
6 At paragraphs 3.11 and 3.22.
7 At paragraph 3.21.

[13] The Committee assessed the licensees' conduct as follows:

> The Licensees could have discovered more about the party wall if they had exercised reasonable diligence and looked. On the information they did have there was a large red flag attaching to the party wall. They knew that two prior purchasers had expressed concerns about the safety of the party wall and that those concerns related to risk during an earthquake.[8]
>
> …
>
> The Licensees knew there was a concern about the risk to the party wall in an earthquake and therefore the safety of the party wall. They chose not to investigate further. They relied on unverified assurances by their vendor client(s). If they had been exercising a proper degree of care and skill they would have advised the vendor(s) to obtain specialist advice about the party wall and the risk to it during an earthquake. If the vendor had refused to take such action then they were required to advise any prospective purchaser of the concerns that had been identified to them about the party wall and the risk of collapse in an earthquake. …[9]
>
> …
>
> The way the Licensees dealt with the party wall demonstrates a wilful blindness. It is high level unsatisfactory conduct and very close to misconduct. It is a fine margin short of being seriously incompetent or seriously negligent real estate agency work. The risk to the party wall in an earthquake was a hidden defect and it was also information that in all fairness should have been disclosed to a prospective purchaser.[10]

*The further complaints as to the "Dux Quest" plumbing, leak, and asbestos*

[14] As recorded in paragraph [10], above, Mr Beath learned of further defects in the course of the investigation and raised as part of his complaint that the licensees failed to disclose asbestos in the roof and leaks in the living room, and that the property had "Dux Quest" plumbing.

[15] The Committee said, first, that Mr Beath knew of the Dux Quest plumbing before they made their offer to buy the property. The Committee decided to take no further action in respect of this issue, pursuant to s 80(2) of the Act.[11]

[16] The Committee recorded that the licensees had not responded to the complaint that they failed to disclose a roof leak or re-roofing over asbestos. It observed that if they were aware of these matters they were obliged to disclose them to prospective

---

8 At paragraph 3.26.
9 At paragraph 3.29.
10 At paragraph 3.33.
11 At paragraph 3.46.

purchasers. It also observed that it could be inferred from the property description sheet and sale transaction report from the 2012 sale that they knew there was a potential problem with a leaking roof and that there was asbestos in the roof, but it might not be unreasonable for them to have forgotten these things between 2012 and 2015.[12]

[17] The Committee then said:[13]

> The Committee could defer making this decision and seek further information from the Licensees and from the vendor in the 2012 sale but it has decided not to do so. The focus of the complaint is the licensees' failure to make disclosure of the risk of collapse of the party wall in an earthquake. Also, several years have passed since the 2012 sale.
>
> For the complaint about the failure to disclose a leaking roof and asbestos in the roof the Committee take no further action pursuant to section 80(2) of the Act.

*The complaint as to Mr Kemp's response to Mr Beath's questions*

[18] On 24 August 2015 (and after a discussion with a neighbour), Mr Beath sent an email to the licensees, asking if they or the previous owner were aware of any issues with the wall, to which Mr Kemp responded:

> Certainly not aware of any issues with the inter-tenancy wall as it is a standard for a home of this era. Our owners also were not aware of the issues – so not sure what the neighbour on about?

[19] The Committee stated that Mr Kemp's response to the 24 August email was:[14]

> … misleading because again it only tells part of the story – and it is probably dishonest because licensee Kemp knows a prior prospective purchaser and a purchaser of the property have raised an issue about the safety of the party wall and that safety relates to risk during an earthquake.

[20] On 30 September 2015, Mr Beath sent a further email, referring to the 2012 sale, and advising that a prospective purchaser had an engineer's report done and it was found that there were significant structural issues and to remedy would cost $50,000. Mr Kemp's response was "this is news to us".

[21] The Committee stated regarding this email:[15]

---

12 At paragraphs 3.47 and 3.48.
13 At paragraphs 3.49 and 3.50.
14 At paragraph 3.36.
15 At paragraph 3.38.

> This response is also misleading. … the answer "this is news to us" again only tells part of the story. Licensee Kemp was aware of a 2012 purchaser being concerned about the party wall and having engineering advice that "if" required strengthening might cost $50,000.

[22] The Committee decided not to investigate this aspect of Mr Beath's complaint. It said (referring to s 72 of the Act) that Mr Kemp's responses:[16]

> …are not part of the complaint, but are part of the information considered whilst investigating the complaint. The Committee has not specifically asked Licensee Kemp to explain his responses. The responses cannot be incorporated in a finding of unsatisfactory conduct because they do not relate to Licensee Kemp carrying out real estate agency work – a response to a complaint so long after the transaction is not the carrying out of real estate agency work.
>
> …
>
> As the Committee has not investigated a complaint of misconduct relevant to how Licensee Kemp responded to the complaint it is a matter for the Complainants if they wish to make a specific complaint about this conduct.

**Submissions**

[23] Counsel approached this appeal as being against the Committee's exercise of its discretion whether to lay charges of misconduct against the licensees: that to succeed in his appeal Mr Beath was required to establish that the Committee was wrong in law, took irrelevant matters into account or failed to take relevant matters into account, or was "plainly wrong" (that is, not open to the Committee to make on the information before it).

[24] We note that insofar as counsel's submissions were as to whether the licensees' conduct actually amounted to misconduct, they were not relevant to the Tribunal's consideration of the appeal. If the Tribunal were to find that the Committee erred in the exercise of its discretion, then (if on reconsideration the Committee were to refer the complaint to the Tribunal for determination), it would then be for the Tribunal to hear evidence and determine whether the charges have been proved.

[25] Mr Bremer submitted for Mr Beath that having assessed the licensees' conduct as "very close to misconduct" and "a fine margin short of being seriously incompetent or seriously negligent real estate agency work", the Committee should have referred

---

16 At paragraphs 3.39 and 3.41.

the complaint to the Tribunal for determination. He referred to the Tribunal's decision in *Maketu Estates Ltd v The Real Estate Agents Authority (CAC 403)*[17] in support of this submission. He submitted that in failing to refer the non-disclosure complaint to the Tribunal for determination, the Committee made an error of law.

[26] He further submitted that this matter should be referred back to the Committee for investigation of Mr Beath's further complaint as to non-disclosure of the Dux Quest plumbing, the roof leak, and the asbestos in the roof, and to investigate his complaint as to Mr Kemp's responses to the questions asked of him. He submitted that in not investigating these matters, the Committee failed to recognise the cumulative nature of the further conduct, and therefore failed to take relevant matters into account.

[27] Mr Napier submitted that Mr Beath had not established that the Committee's decision was plainly wrong. He submitted that the licensees' conduct did not constitute disgraceful conduct, seriously incompetent or seriously negligent conduct, nor a wilful or reckless breach of the Act or Rules.

[28] Mr Napier also referred to the Tribunal's decision in *Maketu*. He submitted that the Tribunal held in that decision that a Complaints Assessment Committee should only refer a complaint to the Tribunal for determination if it is "on the cusp" of misconduct. He submitted that conduct that is "very close to misconduct", or "a fine margin short of being seriously incompetent or seriously negligent real estate agency work" could not be said to be "on the cusp" of misconduct.

[29] Mr Simpson also referred to the Tribunal's decision in *Maketu*, and further submitted that the public interest does not support conduct being referred to the Tribunal, and the associated cost of a full evidential hearing, if there is "only a marginal prospect of misconduct being established".

[30] Mr Simpson also submitted that it was appropriate for the Committee not to consider Mr Beath's further complaints, as they were made at a late stage, and neither of the licensees was given an opportunity to respond to them. He submitted that to

---

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

make any findings on those complaints would have called into question the Committee's natural justice obligations under s 84(1) of the Act.

## Discussion

*The non-disclosure issue*

[31] It is appropriate to start with the Tribunal's decision in *Maketu*. In that case, a Complaints Assessment Committee decided to lay a charge of unsatisfactory conduct against a licensee who had failed to disclose to his client vendors (the directors of Maketu), when they were considering an offer, that another potential buyer had confirmed his interest in the property concerned. The directors of Maketu appealed to the Tribunal on the grounds that the Committee had erred in its discretion as to the nature of the charge laid against the licensee.

[32] Submissions were made to the Tribunal as to the matters to be considered by the Committee when deciding whether to lay a charge, and the nature of any such charge. Counsel's submissions in the present case did not reflect the Tribunal's findings. The Tribunal said:[18]

> [50] We turn to Ms Lawson-Bradshaw's submission that Mr Robb's conduct should be characterised as being "on the cusp". While Ms Lawson-Bradshaw may be correct in that characterisation (and we make no comment in that respect), conduct that is "on the cusp" should be left for the Tribunal to determine: for a CAC to decide that finely balanced circumstances should result in an unsatisfactory conduct finding is to deprive the Tribunal of its proper role in considering whether particular conduct within the industry amounts to misconduct or unsatisfactory conduct.
>
> [51] In such a case a CAC should lay alternative charges, or allow the Tribunal the opportunity to exercise its power, under s 110(4) of the Act, to find unsatisfactory conduct rather than misconduct, if it is not satisfied as to misconduct, but is satisfied that the licensee has engaged in unsatisfactory conduct: that is, to "downgrade" the charge from misconduct to unsatisfactory conduct.

[33] The Committee expressly did not find that conduct must be "on the cusp" before a Committee should refer a complaint. The Tribunal's decision on that point is in the second half of paragraph [51]:

---

[18] *Maketu*, at paragraphs [51] and [52].

> … for a CAC to decide that finely balanced circumstances should result in an unsatisfactory conduct finding is to deprive the Tribunal of its proper role in considering whether particular conduct within the industry amounts to misconduct or unsatisfactory conduct.

[34] In this case, the Committee found, with respect to the non-disclosure issue, that the conduct of both licensees:[19]

> … demonstrates a wilful blindness. It is high level unsatisfactory conduct and very close to misconduct. It is a fine margin short of being seriously incompetent or seriously negligent real estate agency work. The risk to the party wall in an earthquake was a hidden defect and it was also information that in all fairness should been disclosed to a prospective purchaser.

[35] Those findings are inconsistent with the Tribunal's decision in *Maketu*. The Committee has deprived the Tribunal of its proper role in considering whether the licensees conduct constituted misconduct or unsatisfactory conduct. We are satisfied that the Committee made an error of law.

*The Committee's decision not to investigate Mr Beath's further complaint*

[36] It is relevant that Mr Beath's further complaint, as to a failure to disclose the roof leaks, and asbestos in the roof, was made during the course of the investigation of the complaint. It was not made after the investigation was completed. We reject Mr Simpson's submission that the Committee would have been in breach of its natural justice obligations if it had made a decision on the further complaints. While it goes without saying that a Complaint Assessment Committee must comply with its natural justice obligations, there was ample opportunity for it to do so in this case. All that was required to comply with the natural justice obligation was to seek the licensees' responses.

[37] We note that Mr Beath's complaint was received in December 2016. The Committee decided to investigate it in February 2017. It held a hearing on the papers on 13 and 27 June 2017. The period between February and June 2017 would have been sufficient for the licensees' responses to be sought. Even if it were not, consideration of Mr Beath's further complaints would not have been unduly delayed by obtaining those responses, so that the Committee could have considered them.

---

[19] Committee's decision, at paragraph 3.33.

[38] We are satisfied that the Committee failed to take a relevant consideration into account by failing to consider the further complaint.

*The Committee's decision not to investigate Mr Beath's complaint as to Mr Kemp's responses*

[39] The grounds on which the Committee made this decision were that Mr Kemp's responses:[20]

> … are not part of the complaint, but are part of the information considered whilst investigating the complaint. The Committee has not specifically asked Licensee Kemp to explain his responses. The responses cannot be incorporated in a finding of unsatisfactory conduct because they do not relate to Licensee Kemp carrying out real estate agency work.

[40] The Committee went on to say:[21]

> As the Committee has not investigated a complaint of misconduct relevant to how Licensee Kemp responded to the Complaint it is a matter for the Complainants if they wish to make a specific complaint about his conduct.

[41] We observe that it is evident from Mr Beath's complaint that Mr Kemp's responses to his questions were "part of his complaint". Mr Kemp's responses could (and should) have been sought in the course of investigating Mr Beath's complaint.

[42] Further, it appears that the Committee's decision not to investigate this issue, or to ask Mr Kemp to provide an explanation, was made after it had made its finding of unsatisfactory conduct on the non-disclosure issue. The proper process for a Complaints Assessment Committee is to consider all aspects of a complaint before making its findings. Further, it is not in the public interest to require a complainant to make a fresh complaint if the complainant wishes to have an aspect of an original complaint investigated.

[43] Again, we find that in not considering this aspect of Mr Beath's complaint, the Committee failed to take a relevant matter into account.

---

[20] At paragraph 3.39.
[21] At paragraph 3.41.

**Decision**

[44] The appeal is allowed. Mr Beath's complaint is referred back to the Committee, for further investigation and consideration.

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

______________________
Hon P J Andrews
Chairperson

______________________
Ms C Sandelin
Member

______________________
Mr N O'Connor
Member