

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2016] NZREADT 60**

**READT 081/15**

IN THE MATTER OF an appeal under s111 of the Real Estate Agents Act 2008

BETWEEN FRANK VOSPER AND VOSPER REALTY LIMITED  
Appellants

AND THE REAL ESTATE AGENTS AUTHORITY (CAC 402)  
First Respondent

AND MATT BIDDLE  
Second Respondent

Hearing: 3 August 2016 (at Tauranga)

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

Appearances: Mr P J Crombie, on behalf of the Appellants  
Mr M Hodge, on behalf of the First Respondent  
No appearance by or on behalf of the Second Respondent

Date of Decision: 26 August 2016

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**DECISION OF THE TRIBUNAL**

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**Introduction**

[1] The appellants, Frank Vosper and Vosper Realty Ltd, have appealed against the decision of Complaints Assessment Committee 402 (the Committee) issued on 8 September 2015 (the substantive decision), in which the Committee found pursuant to s 72(d) of the Real Estate Agents Act 2008 (“the Act”) that the appellants had

breached provisions of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (“the Rules”) and had therefore engaged in unsatisfactory conduct (“the substantive decision”). The appellants also appealed against the Committee’s decision issued on 9 November 2015, in which each of the appellants was reprimanded, ordered to apologise to the complainant (Mr Biddle) in writing, and fined (“the penalty decision”).

[2] The issues raised in the appeal have their genesis in Mr Biddle’s purchase of a property in Tauranga in 2013. The appellants are Mr Frank Vosper and his real estate agency, Vosper Realty Limited (“the agency”). Frank Vosper and the agency collectively will be referred to in this decision as “the licensees”. The vendor of the property was Vosper Property Limited, which is owned and operated by Frank Vosper’s son, Kirk, and Kirk’s partner. Vosper Property Limited will be referred to as “the vendors”.

[3] The appeal against the substantive decision concerns the Committee’s finding that the licensees had engaged in unsatisfactory conduct by misleading Mr Biddle as to their role in the purchase transaction, by failing to exercise due care and skill to ensure that the parties knew and agreed as to the boundaries of the property, and by failing to make a disputes resolution process available to Mr Biddle. The appeal against the penalty decision is as to whether, if the Committee was correct in finding unsatisfactory conduct, the penalty was appropriate.

### **Background to the complaint**

[4] In March 2013 Mr Biddle viewed a section in Tauranga, (“the section”) with Mr Frank Vosper. The section was at the rear of a larger property and at the time of sale, was in two sections with a cross-lease between the front and rear sections. It was intended that there was to be a subdivision so as to produce two freehold parcels of land. There was a house on the front (western) part of the property, at the rear of which was a garage and carport. A driveway ran down the northern side of the property. The front boundary of the rear section was to run along the rear of the garage and carport to the driveway, and include the driveway, together with a splayed area where the boundary met the driveway, to ease access to the driveway.

[5] The vendors had listed the section with the agency. There was a sole agency agreement between the agency and the vendors and the section was advertised for sale by the agency by way of an agency sign at the property, and on the TradeMe, open2view, and realestate.co.nz websites.

[6] There is a dispute as to what was said when Mr Biddle first viewed the section. Mr Biddle stated in his complaint that Frank Vosper told him that the boundaries of the section could be altered to suit Mr Biddle's plans for building on the section, that he should draw up plans showing the boundaries he wanted, and attach the plans to any offer he made. Frank Vosper stated in his response that he had not said this to Mr Biddle, and that there was no mention of a boundary change when Mr Biddle first viewed the section.

[7] Mr Biddle made an offer to buy the rear section in August 2013, on an Agreement for Sale and Purchase ("the agreement"). When Mr Biddle made the offer to buy the section, he and Mr Biddle went, at Frank Vosper's suggestion to Mr Biddle's solicitor for the purpose of drawing up the agreement. Frank Vosper remained there while the agreement was prepared by Mr Biddle's solicitor.

[8] The agreement had attached to it a "Flat Plan" which showed the boundary between the front and rear sections abutting the rear of the carport, then splaying slightly to allow access to the driveway. The boundaries of the area to be subdivided were identified on the first page of the agreement, in terms corresponding to the Flat Plan.

[9] Mr Biddle's offer was to buy the rear section, driveway, and splayed area as shown on the Flat Plan, but subject to a right of way and services easement over the driveway and splayed area. It was common ground that the offer was made on the basis that Mr Biddle would be responsible for obtaining resource consent for the subdivision, and for the costs of the subdivision, including consent and surveying costs. The agreement was conditional on (among other things) Mr Biddle obtaining consent to the subdivision by 31 October 2013.

[10] Frank Vosper told Mr Biddle and his solicitor at that time that he would not be charging the vendor a commission and that the agreement should not, therefore, refer to the sale being conducted through the agency. The agreement recorded on its front page that the sale was by “private treaty” and on its back page “N/A” was recorded beside the “Agents Name”. Frank Vosper told Mr Biddle that he was acting solely in the capacity as father and adviser to Kirk Vosper and his partner, and Vosper Property Ltd.

[11] A further document was attached to the agreement. This document was identified as a “Site/Drainage” plan. Kirk Vosper’s understanding was that the purpose of this document was to show how Mr Biddle intended to address the issue of a sewer line that ran across the back of the rear section.

[12] Mr Biddle’s offer was accepted on 14 August 2013.

[13] Mr Biddle did not obtain consent by 31 October 2013. Kirk Vosper asked Frank Vosper to arrange a meeting with Mr Biddle, and the parties met at Frank Vosper’s office. Mr Biddle said he was making good progress in obtaining consent. In November, Mr Biddle provided copies of his house plans and other documents for the vendors to sign. Kirk Vosper’s understanding was that these related to Mr Biddle’s application for building consent, and that he was being asked to consent to aspects which did not comply with local planning rules. The vendors signed the documents. Kirk Vosper said that he did not notice that the plans showed that the boundary between the front and rear sections had been moved.

[14] When nothing further was heard from Mr Biddle, Kirk Vosper asked Frank Vosper to obtain a progress report. Frank Vosper reported back that Mr Biddle said he was experiencing delays with obtaining consent to the subdivision but that progress was being made.

[15] Mr Biddle met with Frank and Kirk Vosper at the section in December 2013. Mr Biddle was wanting to build a block party wall along the boundary between the front and rear sections. Frank and Kirk Vosper had removed spouting and guttering from the eastern side of the carport and a small workshop behind the carport. Mr

Biddle told Frank and Kirk Vosper that he wanted them to demolish the carport and workshop so that he could fit his garage on the section. There was a discussion between Frank Vosper and Mr Biddle, in which (according to Frank and Kirk Vosper) Mr Biddle said that he needed the boundary to be moved so that he could accommodate his garage. In order to preserve the sale, the vendors agreed to the boundary being moved.

[16] In January 2014 Mr Biddle put in concrete footings for the block wall alongside the garage. The vendors did not object to this, because Mr Biddle's request to move the boundary had been accepted. However, Kirk Vosper was concerned at Mr Biddle's ongoing delay in obtaining resource consent. He contacted the Tauranga City Council and learned that while Mr Biddle had applied for a building consent for the house to be built on the section, he had not applied for resource consent for the subdivision.

[17] There was then correspondence between the solicitors for the vendors and Mr Biddle. On 7 April 2014 the vendors' solicitor terminated the agreement on the grounds of Mr Biddle's delay in complying with the condition requiring him to obtain resource consent for the subdivision.

[18] Mr Biddle contended that the termination had occurred because of delays in sorting out boundary issues, which had caused him to lose \$30,000 spent on preparing the site to construct the block wall. He asked for a copy of the agency's dispute resolution process. He said that he was told that there was no such process, and the agency would not accept any responsibility for any loss Mr Biddle had suffered.

### **Mr Biddle's complaint and the licensees' response**

[19] Mr Biddle's complaint was that Frank Vosper knew there was an issue as to the location of the boundary, yet had not passed this on to the vendors. He also complained that Frank Vosper had portrayed himself as the vendors' agent, but would not accept responsibility for his actions, would not confirm discussions as to the location of the boundary, hid the fact that there was an issue as to the location of

the boundary, and refused him the opportunity to engage in a dispute resolution process.

[20] In detailing the complaint, Mr Biddle said that he was told by “the agent” (a reference to Frank Vosper) that the size of the section could be “altered to suit our requirements”, and that his designs were done on a larger section size than that shown on the Flat Plan. He said that when he started the foundations for the block wall, the vendors questioned that location of the boundary, and the agent refused to comment as to where the boundary was supposed to be. He further said that this created an issue and cancellation of the agreement. He went on to say that the agent was aware of the boundary issue prior to the agreement being signed, and failed to point this out clearly to both parties, and did nothing to rectify the matter.

[21] Mr Biddle also complained that when he approached the agent for a copy of the licensees’ dispute resolution process he was told that the agent had no process and would not accept responsibility.

[22] The licensees responded by way of a letter to the Authority, signed by Frank Vosper for himself and for the agency. Frank Vosper said that while he was the vendors’ agent, that agency came to an end when the agreement was signed. At that time, he said, the parties agreed that no agent was involved in the sale, it being a sale by private treaty. Thereafter, he said, his involvement was solely as Kirk’s father, and father-in-law of Kirk’s partner. He went on to “acknowledge that Mr Biddle may have still considered me to be the vendor’s agent after the date of the agreement.”

[23] Frank Vosper also contended that he was not aware, before the agreement was signed, that Mr Biddle wanted the boundary moved. He said that Mr Biddle did not mention anything about the boundary, and he was sure that he did not say that the size of the section could be altered. He added that he would not have said anything to that effect, and that if Mr Biddle had mentioned extending the boundary, he would have passed that on to the vendors.

[24] Frank Vosper said, further, that Mr Biddle did not say anything about moving the boundary at the time the agreement was drawn up, and there was no communication by Mr Biddle's solicitor to the vendors' solicitor raising any issue as to the boundary until February 2014. He said he first became aware that Mr Biddle had an "issue" as to the boundary at the meeting at the section in December 2013.

[25] Frank Vosper denied that he had told Mr Biddle that the agency had no dispute resolution process. He said that he told Mr Biddle that he did not believe there was any dispute for the purposes of the Act, as the agency had expired when the agreement was signed. The licensees contended to the Committee that after that time there was no "dispute" for the purposes of the Act which could trigger the process.

[26] He acknowledged that he should have been willing to engage in a dispute resolution process, even though he held this view. He offered an apology for not engaging in a dispute resolution process, and enclosed a copy of the agency's Complaints and Dispute Resolution Process Procedure.

### **The Committee's decision**

[27] The Committee concluded, first, that all of the work and services provided by Frank Vosper and the agency was real estate agency work, as defined in the Act. The Committee referred to the advertising and signage provided for this purpose, on behalf of the vendors. The Committee found that Frank Vosper continued to engage in real estate agency work after the agreement was signed, and observed that a licensee should not be able to act in a professional capacity up to a certain point of time, then withdraw, while not altering their role in any practical sense. The Committee concluded that the licensees had misled Mr Biddle as to their role in the transaction, in breach of r 6.4.

[28] Secondly, the Committee found that, while it was unlikely that Frank Vosper had told Mr Biddle that the boundary could be changed to suit Mr Biddle's purposes, the licensees had a duty to ensure that all parties were in agreement as to important aspects of the transactions, such as boundaries, before the agreement was signed.

The Committee found that the licensees had failed to exercise skill, care and competence, and that this resulted in confusion which led to the transaction eventually failing. In making this finding, the Committee referred to a decision of the Disputes Tribunal, which concluded that the boundary issue was the result of a mutual mistake between the vendors and Mr Biddle. The Committee therefore found that the licensees were in breach of r 5.1.

[29] Thirdly, regarding the dispute resolution process, the Committee noted that the licensees accepted, in hindsight, that they should have made their in-house Complaints and Dispute Resolution Process Procedure available to Mr Biddle. The Committee agreed that it would have been appropriate to do so, and found the licensees in breach of r 12.1. The Committee found that the licensees' breach in misleading Mr Biddle as to their role and obligations was compounded by their not making the dispute process available to Mr Biddle.

[30] In the penalty decision, the Committee declined to make the order sought by Mr Biddle for compensation for losses and emotional stress. The Committee noted that compensatory damages cannot be awarded on a finding of unsatisfactory conduct.<sup>1</sup> The Committee also found that the agreement had eventually failed because Mr Biddle had not fulfilled the terms of the agreement, and that the costs he claimed were incurred in the normal manner of purchasing a property.

[31] Taking those matters into account, together with its finding that the licensees had failed to exercise care, skill and competence in ensuring that the parties knew and agreed as to what was being bought and sold, the Committee determined that the appropriate penalty was to order a reprimand for both Frank Vosper and the agency, to order both to apologise to Mr Biddle in writing, and to order Frank Vosper to pay a fine of \$2000, and the agency to pay a fine of \$1500.

### **The appeal**

[32] The appeal proceeded by way of a re-hearing on the material before the Committee. The Tribunal also heard evidence from Kirk Vosper.

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<sup>1</sup> Referring to *Quin v Real Estate Agents Authority* [2012] NZHC 3357.



[33] The issues on appeal were:

- [a] Whether the licensees had misled Mr Biddle as to their role (that is, by contending that Frank Vosper was not acting as a real estate agent at the time of, and after, the agreement was signed), and were in breach of r 6.4;
- [b] Whether the licensees had not met their responsibilities to ensure that the parties knew and agreed as to what was being bought and sold, and were in breach of r 5.1; and
- [c] Whether the licensees failed to make a copy of their in-house procedure for dealing with complaints and dispute resolution available to Mr Biddle, and were in breach of r 12.1.

**First issue: Were Frank Vosper and the agency acting as real estate agents and, if so, did they mislead Mr Biddle as to their role?**

*Submissions*

[34] Mr Crombie first submitted on behalf of the licensees that Mr Biddle's complaint did not include an allegation that Mr Biddle had been misled as to whether Frank Vosper was acting as a real estate agent throughout, and that the licensees had therefore not been given an opportunity to respond to such an allegation.

[35] Mr Crombie also submitted that there was insufficient evidence before the Committee from which it could conclude that Frank Vosper intended to mislead Mr Biddle as to the nature of his role. He further submitted that, if there were sufficient evidence for such a conclusion, that would not justify an unsatisfactory conduct finding, given that Mr Biddle believed that Frank Vosper was acting as a real estate agent.

[36] On behalf of the Authority, Mr Hodge submitted that the Committee was correct to find that Frank Vosper had acted as a real estate agent. Regarding whether Mr Biddle's complaint had specifically made an allegation to this effect, Mr Hodge

submitted that it is not necessary for a complainant to particularise complaints so as to point to specific provisions of the Act and Rules.<sup>2</sup> He further submitted that the licensees had in fact been on notice as to Mr Biddle's complaint as to Frank Vosper's role, as the complaint contained a statement that Frank Vosper had "[portrayed] himself as the vendors' agent yet won't accept responsibility for his actions".

[37] Mr Hodge also submitted that the licensees had in fact addressed the role of Frank Vosper in their response to the complaint by saying the parties agreed that no agent was involved in the sale, it being a sale by private treaty, then going on to say that Frank Vosper's involvement thereafter was solely in his capacity as Kirk Vosper's father and adviser. Mr Hodge also noted, however, Frank Vosper's acknowledgement that Mr Biddle may have still considered him to be the vendors' agent after the date of the agreement.

[38] Finally, Mr Hodge submitted that reliance on a representation (or lack thereof) is not necessary to establish a breach of r 6.4.<sup>3</sup>

#### *Our assessment*

[39] To paraphrase r 6.4, a licensee must not mislead a customer, provide false information, or withhold information that should by law or in fairness be provided. It recognises a basic obligation not to mislead or act dishonestly in relation to all parties in a transaction. Misleading a customer as to whether a licensee is, or is not, acting as a real estate agent is a breach of r 6.4.

[40] We note that at the appeal hearing it was no longer disputed that Frank Vosper was at all times acting as a real estate agent. The licensees' submission focussed on whether Frank Vosper misled Mr Biddle as to his role.

[41] Frank Vosper's argument was, in essence, that because Mr Biddle believed throughout that Frank Vosper was acting as a real estate agent, that Frank Vosper did nothing to change that belief, and (as the Committee found) Frank Vosper in fact

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<sup>2</sup> Referring to *Graves v Real Estate Agents Authority (CAC 20003)* [2012] NZREADT 66, at [46]-[47].

<sup>3</sup> Referring to *Wright v Complaints Assessment Committee* [2011] NZREADT 21, at [41].

continued to act as a real estate agent, Mr Biddle cannot say that he was “misled”, because his understanding of Frank Vosper’s role was correct at all times.

[42] We reject that argument. As submitted by Mr Hodge, it is not necessary to establish that a complainant has relied on a representation (or lack of one). So it is irrelevant that Mr Biddle believed Frank Vosper to be acting as a real estate agent, and Frank Vosper did nothing to change that belief.

[43] We endorse the Committee’s observation that, in the light of the Act’s purpose of consumer protection, it makes no sense that licensees should be able to engage in real estate agency work up to a certain point in time, then withdraw while not altering their role in any practical sense. In this case, after the agreement was signed, Frank Vosper arranged meetings involving himself, Kirk Vosper and Mr Biddle, he obtained progress reports from Mr Biddle and reported back to Kirk Vosper, and he spoke directly to Mr Biddle about his purchase of the property. We are satisfied that Frank Vosper did not alter his role in any practical sense, and continued to engage in real estate agency work.

[44] We are satisfied that Mr Vosper continued to act as a real estate agent, and he could not purport to withdraw from that role. In continuing to act as a real estate agent, while maintaining that he was not acting in that capacity, he misled Mr Biddle as to his role.

[45] We are not persuaded that the Committee was wrong to find that the licensees misled Mr Biddle as to Frank Vosper’s role, and were in breach of r 6.4. The licensees’ appeal on this aspect of the appeal is dismissed.

**Second issue: Did Frank Vosper and the agency fail to ensure that the parties were aware of, and agreed as to, what was being bought and sold?**

*Submissions*

[46] Mr Crombie submitted that the Committee had wrongly relied on a finding of the Disputes Tribunal that the boundary issue was a result of a mutual mistake between the vendors and Mr Biddle in finding that there was confusion as to the

boundary which caused the transaction to fail. He further submitted that the Committee had been wrong to find that the agreement was cancelled because of such confusion.

[47] Mr Crombie further submitted that as there was contentious evidence from Mr Biddle and Frank Vosper as to what was said about the boundary, the Committee should not have found in favour of Mr Biddle, but should have found in favour of the licensees. In support of this submission, Mr Crombie referred to the Committee's finding that it was unlikely that Frank Vosper had told Mr Biddle that the boundaries could be altered to suit Mr Biddle's requirements. He submitted that this was a credibility finding against Mr Biddle. He also referred to Frank Vosper's statements in his response to the complaint, that Mr Biddle and he had met with Mr Biddle's solicitor two days before the agreement was signed and Mr Biddle had not mentioned a boundary change, and that there was no communication between solicitors regarding a boundary change until February 2014.

[48] Finally, Mr Crombie submitted that if the Committee did not consider it could find in favour of the licensees, it should have required a hearing to assess the evidence, or referred the complaint to the Tribunal, and, in any event, not made an adverse finding against Frank Vosper.

[49] Mr Hodge submitted that given the value and importance of any transaction for the sale and purchase of land, it is crucial for licensees to ensure that the parties to the transaction agree as to exactly what is being bought and sold. He submitted that the Committee's finding that it was unlikely that Frank Vosper had said that the boundaries could be altered did not affect licensees' obligation to ensure that the parties were in agreement as to what they were buying and selling.

[50] Mr Hodge also submitted that while the Committee was entitled to rely on the findings of the Disputes Tribunal, if it considered that would assist them in determining the issue before it, the Committee had placed little if any reliance on it. He noted that the reference to the Disputes Tribunal was at the end of the Committee's consideration of this aspect of the complaint, and after the Committee had set out its decision that the licensees were in breach of r 5.1.

*Our assessment*

[51] Rule 5.1 sets out the basic standard of professional competence required of licensees. The Committee correctly stated that upon accepting the listing for the property the licensees had a responsibility both to their vendor client and to all potential purchasers to ensure that both knew exactly what the property being offered for sale was.

[52] It cannot be disputed that the boundaries of a property is crucial to both the vendors of the property, and to potential purchasers. There can be no doubt, in this case, that the licensees had an obligation to ensure that the vendors and Mr Biddle were in agreement as to the boundaries of the section on offer.

[53] We do not accept Mr Crombie's submission that the Committee's finding that it was unlikely that Frank Vosper told Mr Biddle that the boundaries could be altered to suit Mr Biddle's requirements should necessarily preclude the Committee from finding that the licensees were in breach of their obligations. Notwithstanding contentious evidence the Committee can make a finding, if it concludes that that finding is justified.

[54] Further, we accept Mr Hodge's submission that the Committee was entitled to refer to and rely on the Disputes Tribunal findings, if it considered that would assist it to deal effectively with the complaint. Section 88(1) of the Act expressly gives a Committee that power. That said, it is apparent from the Committee's decision that the Disputes Tribunal's findings did not play a significant part in the Committee's reasoning.

[55] The following matters are relevant to our consideration of whether the Committee was correct to find the licensees in breach of their obligations under r 5.1:

- [a] The agreement was prepared by Mr Biddle's solicitor, after a meeting with Mr Biddle, and it identified the boundaries of the section as they were shown in the Flat Plan;

[b] Mr Biddle did not raise any issue as to the boundary at time the agreement was prepared by his solicitor. If Mr Biddle considered at the time that the boundaries were wrong (in that he had drawn up designs which could not be accommodated within the boundaries shown in the Flat Plan) it would be expected that any dispute as to what was being bought and sold would have been sorted out between the parties and their solicitors at the time of the agreement.

[c] At the time of the December 2013 meeting, the agreement was still conditional, yet Mr Biddle did not raise any boundary issue with his solicitor. The signed agreement was by then in the hands of the solicitors for the parties, and any “resolution” of a boundary issue would have to have been by way of a variation of the agreement. There is no evidence of communication between solicitors regarding the boundary before February 2014.

[56] This is not a case where, as frequently occurs, the agreement for sale and purchase was drawn up by the licensees prior to the involvement of Mr Biddle’s solicitor. It is significant that Mr Biddle’s solicitor drew up the agreement. After the hearing, at our request, counsel filed submissions as to the effect on a licensee’s liability (in a professional disciplinary sense) of involvement by a solicitor in the preparation of an agreement for sale and purchase. Counsel were not able to refer us to a decision specifically addressing this issue. Mr Hodge accepted, as a general proposition, that such involvement may affect the liability of the licensee for any defects in the agreement. He submitted, however, that the issue must be determined on the particular facts of a case.

[57] There has been no suggestion that the agreement was negligently or incompetently prepared. There has been no suggestion that the agreement was prepared in terms that were contrary to Mr Biddle’s instructions. Mr Biddle did not raise any issue as to the boundary at that time. We have concluded that this is a case where, on the specific facts of this case, the fact that Mr Biddle’s solicitor drew up the agreement affects the extent of the licensees’ obligations.

[58] We have concluded that in this case the Committee erred in finding that the licensees were required to meet the obligation to ensure that the parties knew and agreed as to what was being bought and sold, to the same extent as would be the case in transactions where agreements for sale and purchase are signed before solicitors are involved.

[59] We find that the Committee erred in finding that the licensees were in breach of their obligations under r 5.1. The appeal against this finding is allowed.

### **Third issue: did Frank Vosper and the agency refuse to engage in a disputes resolution process?**

#### *Submissions*

[60] The licensees did not challenge the Committee's finding that their refusal to engage in a dispute resolution process was a breach of r 12.1. Mr Hodge submitted that in that case, the Committee's finding of unsatisfactory conduct should stand, regardless of the Tribunal's findings in respect of the alleged breaches of rr 6.4 and 5.1. He referred to the Tribunal's decision in *Ryan v Real Estate Agents Authority*, in which the Tribunal said that any breach of the rules would, prima facie, result in a finding of unsatisfactory conduct.<sup>4</sup> He also referred to *Pollett v Real Estate Agents Authority*, in which the Tribunal said that "if a Committee is satisfied on the balance of probabilities that an Agent has breached the Rules, then a finding of unsatisfactory conduct must follow ..."<sup>5</sup>

[61] We accept Mr Hodge's submission. We find that the Committee did not err in finding that the licensees had engaged in unsatisfactory conduct.

### **Appeal against the penalty decision**

[62] Mr Hodge submitted that if the Tribunal were to reverse the Committee's findings, then the acknowledged breach of r 12.1 would require no more than a reprimand and an order for an apology. Mr Hodge acknowledged that if the Tribunal

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<sup>4</sup> *Ryan v Real Estate Agents Authority* [2013] NZREADT 45, at [48].

<sup>5</sup> *Pollett v Real Estate Agents Authority* [2013] NZREADT 4, at [32].

were to disagree with the Committee's findings, then the appropriate penalty should be reconsidered.

[63] We have upheld the Committee's findings that the licensees breached r 6.4 (misleading conduct as to Frank Vosper's role) and r 12.1 (refusal to engage in a dispute resolution process), but we have allowed the licensees' appeal against the Committee's finding that the licensees breached r 5.1 (failure to exercise skill, care, competence, and diligence by not meeting their responsibility to ensure that the parties knew and agreed as to what was being bought and sold). Neither counsel addressed that situation.

[64] While we have concluded that some adjustment must be made to the penalty, we do not agree with Mr Crombie's submission that a reprimand and order for an apology is an adequate penalty. The licensees' breaches in misleading Mr Biddle as to their role, and their refusal to make a dispute resolution process available to him are not at the lowest level of culpability. Both rules address the purpose of the Act, as set out in s 3 of the Act, "to promote and protect the interests of consumers in respect of transactions that relate to real estate agency work and to promote public confidence in the performance of real estate agency work."

[65] We have concluded that the appropriate penalty is to censure each of the licensees, to order that each of them is to pay a fine of \$500, and to order that each of them is to apologise in writing to Mr Biddle.

## **Outcome**

[66] The Committee's substantive decision:

- [a] The licensees' appeal against the Committee's finding that they were in breach of r 5.1 is allowed;
- [b] The licensees' appeal against the Committee's finding that they were in breach of rr 6.4 and 12.1 is dismissed.

[67] The Committee's penalty decision:



- [a] The penalty set out in section 2 of the penalty decision is quashed;
  
- [b] In place of that penalty, each of the licensees is:
  - [i] Censured;
  
  - [ii] Ordered to apologise in writing to Mr Biddle by 16 September 2016; the letter of apology to be approved by the Committee before it is released to Mr Biddle; and
  
  - [iii] Ordered to pay to the Authority a fine of \$500, to be paid within 21 days of this decision.

[68] The Tribunal draws the parties' attention to s 116 of the Real Estate Agents Act 2008.

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Hon P J Andrews  
Chairperson

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Ms N Dangen  
Member

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Ms C Sandelin  
Member