

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 61

READT 003/18

IN THE MATTER OF

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

BETWEEN

GRAEME HASTINGS BRIDGE
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 409)
First Respondent

AND

HEATHA EDWARDS
Second Respondent

Hearing:

25 September 2018, at Palmerston North

Tribunal:

Hon P J Andrews, Chairperson
Mr G Denley, Member
Ms N Dangen, Member

Appearances:

Mr Bridge
Mr M Mortimer, on behalf of the Authority
Mr A Darroch, on behalf of Ms Edwards

Date of Decision:

17 October 2018

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Bridge has appealed against the decision of Complaints Assessment Committee 409 (“the Committee”), dated 28 September 2017, in which the Committee made a finding of unsatisfactory conduct against Ms Edwards (“the substantive decision”). He has also appealed against the Committee’s decision dated 13 December 2017, in which it made penalty orders against Ms Edwards (“the penalty decision”).

Factual background

[2] Ms Edwards is a licensed salesperson engaged by Harcourts Waipukurau (“the Agency”), and was the listing and selling agent for a property at Waipawa (“the property”). Mr Bridge bought the property pursuant to an agreement for sale and purchase, dated 4 May 2016. The purchase was settled on 6 July 2016.

[3] Mr Bridge did not view the property before making an offer to buy it. He was living in Northland at the time and was not able, for health reasons, to travel to Waipawa to view it. He had a friend who lived near the property and asked the friend to look at the property on his behalf. The friend was leaving the country the day after being asked to look at the property, so went there at once. However, he was turned away by the tenants as he had not arranged an appointment through Ms Edwards. Accordingly, the friend left the property without seeing it, except from the door.

[4] Mr Bridge therefore bought the property “sight unseen”, on Ms Edwards’ marketing material. The marketing flyer described the property as follows:

A little starter Lifestyle

Would you look at this? over half an acre, all flat land with a paddock, big garage with auto door, lock up workshop, store shed, laundry room and a 3-bedroom home with office! Separate lounge has heat pump and opens out to the patio. Modern bathroom, separate loo, kitchen has a wet back chippie and the entire property is very tidy indeed! Come and have a look!

- Built 1964
- Galley style original kitchen with dining has loads of bench space and cupboards, with wet back chippie
- Separate lounge gets all the afternoon sun, and has a new heat pump, and sliders out to the patio in the afternoon sun
- Separate toilet

- Separate office at the back door
- 3 double bedrooms, master is very large
- Standard chattels included, SKY TV dish
- Garage has power, concrete floor, new auto door, separate lock up workshop, woodshed bunker and laundry room
- Circular driveway
- Securely fenced all round with new solid fence
- An easy walk to town
- Separate flat paddock at the back

[5] Ms Edwards made his offer conditional on a due diligence clause. He engaged a building surveyor, who provided a report on 5 May 2106 (“the building report”). The report’s findings included (as relevant to this appeal):

The boundary fences are mostly corrugated iron, some need remedial work and the front fence is steel pipe and wire netting.

The garage is clad and roofed with corrugated iron, the spouting needs to be replaced as it is corroded and the roof needs a rust treatment as soon as possible.

There is no hot water in the laundry as the hot water cylinder has been removed, the water pipes have been capped off at the wall.

The house is roofed with original corrugated iron, it is showing its age, some of the roof nails have lifted, these need to be replaced.

The chip heater is not safe to use as there is a small hole in the metal flue.

The kitchen range hood has not been ducted to the exterior of the house.

The heating is supplied by a heat pump above the unused fireplace.

[6] Ms Edwards referred the report to the vendors on 6 May 2016. She referred to the hole in the chip heater flue, the lack of hot water in the laundry, and the garage spouting (describing it as “buggered”). She did not refer to the fence.

[7] On 9 May, Mr Bridge’s solicitors requested a price reduction of \$7,500 from the vendors’ solicitors:

...

Our client put in an offer on a “sight unseen” basis, relying upon representations by the agent.

A building report has identified that the property is not concrete block as represented by the agent, it is of masonry block veneer structure. The property is not securely fenced, contrary to the agent’s advertisement, and does not have a compliant wood burner, not only is the wood burner covered by a book shelf and unable to be inspected, it is highly unlikely to comply with Clean Heat requirements regulated by Hawkes Bay Regional Council. Our client tells us

that the agent informed him that the Central Hawkes Bay District Council does not impose the Clean Heat requirements/regulations that operate in Napier and Hastings. This is incorrect.

Despite there being a number of obvious issues identified by the report, and not disclosed by the agent, our client still wishes to purchase the property, however, our client seeks a reduction of \$7,500.00 which will help contribute towards replacement of the wood burner with a compliant one, fencing and other items requiring attention which had not been contemplated by our client when the offer was made. Please advise whether your clients are agreeable to this reduction.

[8] The vendors' solicitors responded on 11 May, refusing a reduction:

...

Our clients instruct that the property is made with concrete blocks and not a masonry block veneer structure. The property is fully and securely fenced as advertised.

Our clients instruct the fireplace was removed and a heat pump installed in replacement at the end of 2014. The chimney was then sealed both internally and externally. The property was not advertised as having a fireplace. Your client was advised from the start that the fireplace had been removed and the heat pump installed in replacement. We note the Hawkes Bay Regional Council clean heat requirements extend to air sheds in Napier and Hastings and do not extend to Waipawa properties.

Our clients do not accept that any incorrect representations have been made by them or the Agent. Our clients instruct that they do not accept the reduction of \$7,500.00 as sought by your client.

[9] On 22 June 2016, Ms Edwards advised Mr Bridge that the vendors had, themselves, repaired the flue.

[10] Mr Bridge proceeded with the purchase. At his request, Ms Edwards did a pre-settlement and reported that "everything looks very tidy to me". She attached a number of photographs to her report. Mr Bridge later told the Authority's investigator that he proceeded with the purchase having no idea of the extent of the problems with the fencing, and had no idea of the difference between the real state of the property and the agent's advertisement or the cost of remedying it. He was prepared to accept an estimated \$5,000 for items other than the fence. In the event, he found that the \$5,000 estimate was significantly short.¹

¹ As an aside, we record that Mr Bridge advised the Tribunal that the fence was significantly damaged as a result of "quite modest winds" in April 2017.

[11] Mr Bridge made a complaint to the Agency's Regional Manager in Wellington on 14 September 2016. He considered that the Agency and Ms Edwards did not respond adequately, and on 30 October 2016 lodged a complaint with the Authority. This included a complaint as to the manner in which the Agency had responded to his complaint. He sought compensation of \$49,381 for the cost of bringing the property up to consistency with the advertised description of it. The major component of this was the fencing, which was estimated (as at October 2016) to cost \$38,000.

The substantive decision

[12] The Committee inquired into the complaint and issued the substantive decision on 28 September 2017. It made a finding of unsatisfactory conduct against Ms Edwards, and decided to take no further action with regard to the Agency. Mr Bridge has not appealed against the Committee's decision regarding the Agency. We set out below the Committee's findings in respect of the elements of Mr Bridge's complaint against Ms Edwards.

Fences

[13] The Committee found that Ms Edwards had breached r 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), in that her description of the fencing in the on-line advertising was misleading:

3.7 The Committee considers the fencing at the Property could not be described as new or solid and arguably not be described as secure. It finds the online advertisement is very misleading even when read in conjunction with the on-line photos as they do not focus on the fencing and do not give an overall picture of its condition.

3.8 The Committee does not accept that a mere "typo" in the advertisement could mis-describe the fencing to this extent. [Ms Edwards] admits that she made an error, or failed to notice a remedy an error made, and the Committee finds that the error in describing the fencing in the online advertisement was misleading.

[14] However, the Committee went on to say:

3.9 The Committee also finds, however, that it is disingenuous for [Mr Bridge] to claim that he was still misled about the condition of the fencing after receiving the report and current photos of the Property and fencing from his building surveyor. [Mr Bridge] was in receipt of that report prior to making the

ASP unconditional and the Committee considers he knew the fencing was far from new and solid at that time.

Chip heater

[15] The Committee found that Ms Edwards breached rr 5.1 and 6.2:

3.19 The Committee finds [Ms Edwards] could not reasonably have known of the fault in the chippie flue when the Property was advertised, but that she did not exercise skill, care and competence ... in following up on the repair and subsequent advice to [Mr Bridge]. The Committee considers [Ms Edwards'] passive approach to her professional duties in this respect resulted in less than satisfactory service to [Mr Bridge] and was a failure of her obligation to act in good faith and deal fairly with all parties to the transaction. ...

Hot water

[16] The Committee noted a head-on conflict between what Mr Bridge alleged Ms Edwards said, and what Ms Edwards said she said, about the hot water in the laundry. It preferred Ms Edwards' evidence. It said:

3.24 There is a head-on conflict here between what [Mr Bridge] alleges was said by [Ms Edwards] and what [Ms Edwards] says she said about hot water in the laundry. The Committee considers it unlikely that, in the face of a building report stating that there is no hot water in the laundry, no hot water cylinder and that the feed pipes have been capped off, Ms Edwards would make a statement that the building surveyor was wrong and she had tested the hot water in the laundry. It preferred Ms Edwards' evidence.

[17] The Committee also said that it:

3.25 ... considers it disingenuous for [Mr Bridge] to say he believed [Ms Edwards] over the building surveyor and that he thought there might be hot water coming from the house across a beam and into the laundry.

...

3.26(b) It is disingenuous for [Mr Bridge] to say he believed [Ms Edwards] when she said (as alleged by him) there was hot water in the laundry in the face of a building report which says "The laundry in the garage shed does not have any hot water as the hot water cylinder has been removed".

[18] However, the Committee considered:

3.27 ... there is a general sloppiness here in the way the issue was handled by [Ms Edwards]. [Ms Edwards] did not ask the question of the vendors at the time of listing although it was apparent to her on viewing the Property that there was no facility for hot water to the laundry.

3.28 The Committee considers that most people would assume a laundry would have hot water and the absence of hot water should have been noted in

the property details in the agency agreement and notified to prospective purchasers including [Mr Bridge]. The Committee finds [Ms Edwards'] failure to flag in the advertising and to advise [Mr Bridge] there was no hot water in the laundry is misleading by admission and is a breach of Rule 6.4

[19] The Committee then repeated its finding that Mr Bridge ceased to be misled once he received the building report.

Roof

[20] The Committee considered whether Ms Edwards' advertising the roof as being "a long run roof" was a breach of r 10.7, as to disclosure of defects:

Disclosure of defects

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] The Committee noted Ms Edwards' evidence that she is not a registered builder, did not climb on the roof to assess it and made no other representations about it, and her evidence that Mr Bridge "did not want to even come and view the house before making an offer", and that she had strongly advised he have every report required.

[22] The Committee also noted, however, that:

3.34 The roofing sheets are not long run which are continuous sheets running from the roof ridge to the guttering. This would have, or should have, been obvious to [Ms Edwards] on inspection of the Property, even if she did not climb on the roof.

3.35 From the photos available with the building report, the online advertising and the additional photos provided by [Mr Bridge] it is clear that the roof is not long run. Whilst [Ms Edwards] is not expected to have the knowledge of a registered builder, it is reasonable to expect that she would have correctly recorded the roof material as corrugated iron rather than long run which it clearly isn't.

3.36 The garage spouting shown in the building surveyor's photo is clearly corroded at one end and would have been visible to [Ms Edwards] at the time of listing the Property. The building surveyor's photo of the garage roof showing rust appears to have been taken from above the garage area and it is

not clear to the Committee that this area would have been easily visible to [Ms Edwards].

[23] The Committee found (at paragraph 3.37) that “obvious issues such as the corroded spouting” would be noted and advised to prospective purchasers. It found that Ms Edwards’ failure to note and disclose these matters to Mr Bridge, particularly as she was aware that he was not able to view the property before the sale and purchase agreement became unconditional, was a breach of r 10.7. It considered that Ms Edwards had:

3.38 ... relied on Mr Bridge obtaining a building inspection report, rather than taking responsibility for correctly establishing, and disclosing (at the outset of the marketing) the correct relevant facts in respect of the Property.

[24] The Committee found that Ms Edwards had breached rr 5.1 and 6.4:

3.39 ... has not exercised skill, care, care and competence ... in completion of the agency agreement details in respect of the roof and that the advertising for the property was misleading as to the roof material of the house.

[25] The Committee went on to say (in paragraph 3.40) that it was, however, satisfied that Mr Bridge was aware of the nature and condition of the roof before making the sale and purchase agreement unconditional.

Range hood

[26] The Committee noted (at paragraph 3.43) Ms Edwards’ evidence that the vendors did not make any comments about the range hood other than that it was included in the sale. The Committee said (at paragraph 3.44) that it considered that her “lack of observation and attention to detail [was] symptomatic of her casual approach to the Property details”, and found that she had breached rr 5.1 and 10.7:

3.45 The Committee finds [Ms Edwards] did not exercise skill, care and competence ... when she failed to notice or check that the range hood was fully functional at the time of listing the Property, or subsequently, and that she failed to discover and disclose to [Mr Bridge] the defective range hood.

[27] Again, however, the Committee recorded (at paragraph 3.46) that it was satisfied that Mr Bridge was aware of the condition of the range hood before the sale and purchase agreement became unconditional.

Log fire

[28] The Committee accepted (at paragraph 3.53) that Ms Edwards did not directly tell Mr Bridge that there was a log fire in the blocked off fireplace, but considered that her comments about compliance caused some confusion for Mr Bridge. It considered that the responsibility was on Ms Edwards to make it clear to Mr Bridge that the fireplace was not only out of use, but had breached rr 5.1 and 6.4 in failing to exercise skill and care in the matter, and was misleading by omission in failing to clarify the issue to Mr Bridge.

Observation as to the Committee's finding of unsatisfactory conduct

[29] Although there was no appeal against the Committee's substantive findings that Ms Edwards had breached a number of Rules when marketing the property to Mr Bridge, we observe that the Committee was right to make those findings. Any licensee must know and understand the property being marketed, must know of both the good and the bad features of the property, and must represent the property fairly so that a prospective purchaser (whether viewing the property or not) can make an informed decision as to whether to commence the process of considering a purchaser.

[30] In this case, had Ms Edwards known and understood the property she was marketing, she could not have thought there was a reasonable basis to, for example, represent the fence as "new" and "solid", or the roofing as "long run". Nor would she have failed to observe, for example, the corroded spouting or to realise that there was no hot water to the laundry. The Committee was correct to find that Ms Edwards' approach was "casual" and "sloppy", and it was correct to make the finding of unsatisfactory conduct against her.

Other elements of Mr Bridge's complaint

[31] We note that the Committee decided to take no further action in respect of Mr Bridge's complaints regarding Ms Edwards' representations regarding the construction of the house; the description of the house as "contemporary", having

“loads of bench space”; as having a “separate shower”, and an “office”; and the reference to a “separate paddock”, and a “landscaped garden”.

[32] With regard to Mr Bridge’s complaint as to the reference to a “separate shower”, the Committee found (at paragraph 3.68) that it was “disingenuous and an exaggeration” for Mr Bridge to suggest that advertising a “separate shower” implied a “separate shower room”.

[33] The Committee also decided to take no further action on Mr Bridge’s complaint regarding the “very personal” tone of an email from Ms Edwards to the vendors which he alleged implied a close personal relationship with the vendors which might have “clouded Ms Edwards’ professional judgment”. It found that the tone of the email communication between Ms Edwards and the vendors was a reflection of their personality and trust in Ms Edwards, rather than of any impropriety.

The penalty decision

[34] The Committee correctly rejected (at paragraph 3.3 of the penalty decision) a submission on behalf of Ms Edwards that Mr Bridge “was not in fact misled about the fences, the hot water, the roof and the range hood”. It recorded (at paragraph 3.4) that it had found that the misleading statements and omissions were corrected as a result of the photographs and information contained in the building report before he made the agreement for sale and purchase unconditional.

[35] The Committee censured Ms Edwards and ordered her to pay a fine of \$5,000, and to undergo training or education by completing Unit Standard 23136: “Demonstrate knowledge of misleading and deceiving conduct and misrepresentation”.

[36] The Committee said:

3.8 The Committee considers that [Ms Edwards’] response [in penalty submissions on her behalf] indicates a failure to fully understand her professional obligations in regard to accuracy and disclosure, and is a failure to accept responsibility for the mistakes for which findings of unsatisfactory conduct were made. The Committee’s order that [Ms Edwards] complete an

education unit on misleading and deceiving conduct and misrepresentation is in direct relation to her conduct in this matter.

3.9 Counsel for [Ms Edwards] submits that, as there was extremely minimal loss suffered and no deliberate dishonesty on the part of [Ms Edwards], a small fine is adequate. The Committee points out that the quantum of loss that may or may not be suffered by a complainant is not a measure of the degree of unsatisfactory conduct finding. A minor failure or breach on the part of a licensee could have a major impact on a client and, conversely, a major failure with several breaches may have little or no impact.

3.10 The Committee found that [Ms Edwards] displayed a general “sloppiness” in respect of the transactions for the Property and that there was a cumulative aspect to the several issues found to be unsatisfactory conduct. Contrary to [Mr Bridge’s] belief the Committee did not find she had deliberately misled him.

3.11 It considers [Ms Edwards’] breaches of the Rules, her lack of attention to detail and her level of indifference to her professional responsibilities is mid-range unsatisfactory conduct and the order of a \$5000.00 mid-range fine is in response to that conduct as is the order of censure.

[37] The Committee declined to make an order sought by Mr Bridge for payment by way of rectification or relief under s 93(1)(f) of the Act. It noted that Mr Bridge and counsel for Ms Edwards had referred to the judgment of his Honour Justice Brewer in *Quin v Real Estate Agents Authority*,² concerning a Complaints Assessment Committee’s powers under that provision. The Committee said (at paragraph 3.16) that it had a “specific and limited power to order licensee to rectify an error or omission or if it is not possible to do so then to provide relief, in whole or in part, from the consequences of the error or omission”.

[38] The Committee considered (at paragraph 3.22) that for every misrepresentation by Ms Edwards that something existed when it did not, it was empowered to order her to incur the costs of rectification, where rectification was possible, but there needed to be a cause-and-effect, and if there were an intervening event where a misrepresentation was corrected, then it was not appropriate to order the licensee to incur the cost of rectification.

[39] With regard to the fence, the Committee considered (at 3.23) that there was enough of a “red flag” in the building report to show the fence was not new and not solid for Mr Bridge to have made further inquiry, which he did not do. It found that he proceeded with the purchase of the property in spite of being aware that the fence

² *Quin v Real Estate Agents Authority* [2012] NZHC 3557, [2013] NZAR 38.

was not new and solid, and that there was no cause and effect between the misrepresentation as to the fence and Mr Bridge's decision to purchase the property. It went on to say, however, that if the misrepresentation had not been corrected, it would have considered it appropriate to order rectification (albeit perhaps not at the level sought by Mr Bridge).

Appeal issues

Substantive decision

[40] Mr Bridge acknowledged that the Committee had for the most part upheld his complaint. He submitted that the primary issue in his appeal was that while making findings of unsatisfactory conduct against Ms Edwards, the Committee went on to characterise his complaints as "disingenuous". He submitted that this implied that he lacked integrity, was a liar, and given to making frivolous complaints. He strongly submitted that the characterisation was inappropriate, and wrong. His purpose in appealing against the substantive decision was to restore his integrity.

[41] Having seen and heard Mr Bridge, we agree that it was not appropriate for the Committee to characterise his complaints as "disingenuous". There was no evidence that his complaint was not genuine, as demonstrated by the findings that Ms Edwards breached a number of Rules, and the overall finding of unsatisfactory conduct. Mr Bridge made a genuine complaint, and he was entitled to be treated with due consideration and with dignity.

[42] We refer, also, to the Committee's findings, following their findings as to Ms Edwards' breaches, as to Mr Bridge having "ceased to be misled", or having become aware of a particular matter before making the sale unconditional. As the Committee recognised in the penalty decision, such observations do not determine, or affect, the finding as to whether a breach occurred, although they may become relevant at the penalty stage.

[43] Further, in the light of the vendors' solicitors assertions that no incorrect representations had been made by them or Ms Edwards, and Ms Edwards' pre-

settlement report to Mr Bridge that “everything looks tidy”, the Committee did not have a sound basis to conclude that Mr Bridge had “ceased to be misled” when he settled the purchase.

Penalty decision

[44] Mr Bridge submitted that the quantum of any fine was “of little significance as punishment, as [Ms Edwards] is insured”.

[45] The Tribunal has no evidence as to whether Ms Edwards is or is not insured. It is not relevant to the assessment of her conduct. The fine of \$5,000 and the orders of censure and completion of further training were commensurate with the Committee’s assessment of Ms Edwards’ conduct as being mid-range unsatisfactory conduct, justifying a starting point of \$6,000, and its application of mitigation factors to reduce the fine to \$5,000.³ We agree that the penalty orders properly take the seriousness of Ms Edwards’ conduct, as well as relevant mitigating factors, into account.

Relief

(a) The relevant statutory provision

[46] The focus of the appeal submissions was on the Committee’s decision not to order Ms Edwards to provide rectification or relief for the consequences of her errors or omissions, pursuant to s 93(1)(f) of the Act.

[47] Section 93(1)(f) of the Act provides:

Power of Committee to make orders

(1) If a Committee makes a determination under s 89(2)(b), the Committee may do 1 or more of the following:

...

(f) Order the licensee—

(i) to rectify, at his or her own expense, any error or omission; or

³ Ms Edwards has held a licence since 2010, and has no previous unsatisfactory conduct findings against her.

- (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her own expense, relief, in whole or in part, from the consequences of the error or omission.

[48] We referred earlier to the judgment of his Honour Justice Brewer in *Quin v Real Estate Agents Authority*.⁴ In that judgment, his Honour distinguished between compensatory damages (such as for loss in value, or loss on re-sale) (which the Committee does not have jurisdiction to make), and rectification of errors or omissions or relief from the consequences of errors or omissions (which the Committee may order under s 93(1)(f)). His Honour observed that in determining whether to make an order for rectification, the Committee could consider matters such as the cost of rectification or relief, the licensee's culpability (as compared with the culpability of others), as well as the complexity of issues of causation, and the remedies available to the complainant under general law.⁵

(b) *Committee's findings*

[49] In setting out its decision as to Mr Bridge's claim for relief, the Committee referred to its findings in respect of the elements of his complaint. As relevant to Mr Bridge's appeal, it found as follows:

[a] Fence: the claim was denied on the grounds that Mr Bridge had proceeded with the purchase, despite knowing of the fence's condition, and there was no causal connection between Ms Edwards' representation and Mr Bridge's decision to buy the property. The Committee recorded that had the misrepresentation not been corrected, it would have considered it appropriate to order rectification, albeit perhaps not in the amount sought by Mr Bridge.

[b] Hot water: the claim was denied on the grounds that Ms Edwards had not misrepresented the issue, and Mr Bridge was aware there was no hot water in the laundry before making the agreement for sale and purchase unconditional. The Committee further found that there was no causal

⁴ *Quin v Real Estate Agents Authority*, fn 2, above.

⁵ At paragraph [68].

connection between Ms Edwards' failure to flag the absence of hot water and Mr Bridge's decision to buy the property.

[c] Garage spouting: the claim was denied on the grounds that any failure by Ms Edwards to flag defects in respect of the spouting was corrected by the building report, which clearly pointed out the condition of the garage roof and spouting, and advised on the action required.

[d] Chip heater flue: the claim was denied on the grounds that Ms Edwards did not misrepresent the condition of the chip heater, and made no representation as to the repair work done by the vendors. The Committee also took into account that Mr Bridge did not take any action to satisfy himself as to the quality of the repair work.

(c) Submissions

[50] Mr Bridge submitted that his claim was for relief, not compensation, and that the Committee was wrong to say that the representation as to the state of the fence had been corrected, because it had not been corrected. He submitted that the Committee should, therefore, have ordered relief.

[51] Mr Darroch submitted on behalf of Ms Edwards that Mr Bridge's claim was a claim for compensatory damages under another name, as it was a claim for compensation for a loss in value, arising from the condition of the house, and cannot be ordered by the Committee. He acknowledged that there was misleading advertising, but submitted that it was corrected after Mr Bridge received the building report

[52] Mr Mortimer submitted that rectification is only available if there is a misrepresentation as to a state of affairs of a property, and steps can be taken to effect rectification. He submitted that if there is an intervening event which has the effect that there is no longer a misleading representation, then there may be nothing to rectify or to provide relief for. He submitted that in principle, rectification or relief may have been available to the Committee in the present case, but whether it was ordered was a matter for the Committee's discretion.

(d) *Discussion*

[53] It was not appropriate in this case to undertake an exhaustive review of the application of s 93(1)(f). However, as made clear in *Quin*, a claim should be rejected if it is a claim for a monetary loss, such as for loss of value or capital gain, or loss of rental income.⁶ But orders have been made where rectification or relief is sought in respect of tangible work that can be rectified (sub-paragraph (i)) or, when it is not practicable to rectify the error or omission, to provide relief from the consequences of the error or omission (sub-paragraph (ii)).⁷

[54] In this case, by the time of the hearing before the Committee, it was not practicable for Ms Edwards to rectify any of her errors or omissions (that is, the breaches of the Rules as found by the Committee), so the Committee was concerned only with its power to order “relief, in whole or in part, from the consequences of” her errors or omissions. The Committee was required to consider what “consequences” (that is, effects) arose from Ms Edwards’ errors and omissions.

[55] We have concluded that the Committee’s focus on the fact that Mr Bridge “ceased to be misled”, and made the agreement for sale and purchase unconditional, then settled the purchase, was too narrow.

[56] Mr Bridge was misled as to, or did not have disclosed to him, that the fence was not “secure” “new” or “solid”, that the advertised “laundry room” did not have hot water, that the advertised “long run” roofing was in fact the original corrugated iron, and that the spouting was corroded and needed to be replaced. As the builders’ inspection was not carried out until 5 May 2016, Mr Bridge had no knowledge of these matters when he made an offer to buy the property, which was accepted on 4 May 2016. At that time he was relying only on the advertising material and his friend’s (unsuccessful) attempt to see the property.

⁶ See, for example, *Brooks v Real Estate Agents Authority (CAC 20002)* [2013] NZREADT 112; *Tong v Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 3; *Tan v Real Estate Agents Authority (CAC 20005)* [2015] NZREADT 12; *Li v Real Estate Agents Authority (CAC 408)* [2017] NZREADT 33.

⁷ See, for example, *Hamilton Family Trust v Real Estate Agents Authority (CAC 403)* [2017] NZREADT 54; *Zhou v Real Estate Agents Authority (CAC 412)* [2017] NZREADT 49.

[57] The action of making an offer and entering into an agreement for sale and purchase should not be conflated with that of settling the purchase. Leaving aside for the moment the situation at the time Mr Bridge made the agreement unconditional, we accept that there is a causal connection between Ms Edwards' errors and omissions in the advertising and Mr Bridge's decision to make an offer to buy the property, that the cost of addressing the errors and omissions may properly be seen as consequences, and that an order may, in principle, be made that Ms Edwards must provide relief, in whole or part, from those consequences.

[58] Whether an order for relief should have been made and if so, in what amount, would remain to be determined, but the Committee was wrong to decline claims on the basis that Ms Edwards' errors or omissions had been "corrected", or that Mr Bridge was aware of them and "ceased to be misled" when he made the agreement for sale and purchase unconditional then settled the purchase. Those matters may be relevant to the quantum of the order, but they do not necessarily preclude an order being made.

(i) *The fence*

[59] With regard to the fence, the Committee said that it would have considered it appropriate to order relief in respect of the fence, "if the misrepresentation had not been corrected". However, all advertising material included in the documents before the Committee (including material advertising the fact that the property had been sold) included "Securely fenced all round with new solid fence". No "corrected" advertising material was produced to the Tribunal. There was no reference to advertising material being corrected in any correspondence between Ms Edwards and Mr Bridge after she received the building report, in the solicitors' correspondence after the agreement for sale and purchase was signed (and well after the building report was sent to Ms Edwards),⁸ or in Ms Edwards' transaction report following settlement.

[60] The only reference to a "correction" appears to have been in a report by Ms Edwards to her Regional Manager on 18 October 2016 where Ms Edwards said:

⁸ The respective assertions were: "The property is not securely fenced, contrary to the agent's advertisement" (Mr Bridge's solicitor) and "The property is fully and securely fenced as advertised" (Vendors' solicitor).

Fencing – it does have fencing all round, however there was a typo in the ad saying NEW, sadly not picked up by me or the vendors, despite the photos showing the fences in various shots, and I changed it immediately the buyer pointed it out and thanked him for telling me.

[61] However, although Ms Edwards’ response to questions from the Authority’s investigator on 18 May 2017 was substantially the same as her response to the Regional Manager, her response as to the fence was different:

Why did you advertise the fence as being new and solid when clearly it was neither?

It was a typo and my own fault that I never picked it up. I only have myself to blame but there was never any intent to deliberately mislead, the photos of the fence that were online for all viewers to see. And showed the fence as it was.

[62] We accept Mr Bridge’s evidence that the advertising was not “corrected”, and reject Ms Edwards’ assertion to the contrary. Accordingly, the Committee’s basis for not ordering relief (that is, that the misrepresentation had been corrected) did not exist. The Committee should have found that Mr Bridge’s decision to buy the property, notwithstanding the condition of the fence, was a consequence of Ms Edwards’ misleading advertisement.

(ii) Hot water in the laundry

[63] In its substantive decision, at paragraph 3.28, the Committee found that Ms Edwards’ breach of the Rules regarding this issue was her failure to flag in the advertising that there was no hot water in the laundry. It described this as being “misleading by omission”. The Committee’s statement in its penalty decision, at paragraph 3.26, that the Committee was “satisfied that she did not misrepresent the issue” is inconsistent with its earlier finding. Having found that “most people would assume a laundry would have hot water”, the Committee should have found that Mr Bridge’s decision to buy the property, notwithstanding the absence of hot water in the laundry, was a consequence of Ms Edwards’ misleading omission.

(iii) The spouting

[64] The Committee found that Ms Edwards should have noticed and flagged to Mr Bridge that the spouting was corroded. The Committee specifically referred to the fact

that Ms Edwards was aware that Mr Bridge was not able to view the property. It found that Ms Edwards was in breach of r 10.7 as to disclosure of defects. In the light of those findings, the Committee should have found that Mr Bridge's decision to buy the property, notwithstanding the condition of the spouting, was a consequence of Ms Edwards' failure to disclose the defect to him.

(iv) The chip heater flue

[65] The Committee found that Ms Edwards could not reasonably have known of the fault in the chip heater flue when she advertised the property. Mr Bridge's decision to buy the property cannot therefore have been a consequence of a breach of the Rules by her. The Committee found that she had failed to follow up on repairs made by the vendors, but that failure occurred after Mr Bridge had agreed to buy the property, and is not one that could lead to an order for relief.

[66] We find that Mr Bridge's claims are not for compensation for a monetary loss, but are properly claims for relief from the consequences of Ms Edwards' errors or omissions. It is therefore necessary to consider whether orders for relief should be made in the amount claimed by Mr Bridge (in total, \$41,921), and if not, in what amount.

[67] The following factors must be taken into account:

- [a] Although not aware at the time he made his offer to buy the property, Mr Bridge became aware of the defects in the property, to a limited extent, when he received the building report. There is no suggestion that he sought further time to consider the report, and he made the agreement for sale and purchase unconditional.
- [b] When Mr Bridge raised the matters referred to in the building report with Ms Edwards, there was no response as to the fence or the spouting, and other conclusions in the report were challenged.

[c] Mr Bridge was not able to carry out a pre-settlement inspection. He asked Ms Edwards, and she agreed to do it for him. However, by doing so she immediately put herself into a conflict of interest between her obligations to her vendors and her obligations to Mr Bridge. In those circumstances, Ms Edwards should have told Mr Bridge that she could not do a pre-settlement inspection. But having accepted the task, Ms Edwards had an obligation to do it fairly. She had seen the building report, and was aware of the defects noted in it. However, the photographs she sent Mr Bridge do not include any that would have shown Mr Bridge that the defects noted in the building report had been addressed and remedied. This further disadvantaged Mr Bridge.

[d] Mr Bridge's request for a reduction in the purchase price from the vendors was to "help contribute towards replacement of the woodburner with a compliant one, fencing, and other items requiring attention" for which he sought \$7,500. While this was a request made to the vendors for a reduction in the purchase price, as opposed to a claim for relief against Ms Edwards, an order for relief to be provided to Mr Bridge should not be out of all proportion to what he was prepared to accept from the vendors.

[68] Taking the above matters into account, we have concluded that an order for the whole amount sought by Mr Bridge is not appropriate. We have concluded that the proper order is for a contribution of \$10,000 towards relief from consequences of Ms Edwards' errors and omissions.

Orders

[69] Ms Edwards is ordered to pay Mr Bridge the sum of \$10,000 as relief in part from the consequences of her errors and omissions. The payment must be made to the Authority within 20 working days of the date of this decision, for forwarding to Mr Bridge.

[70] 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

Mr G Denley
Member

Ms N Dangen
Member