

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2018] NZREADT 63

READT 029/18

IN THE MATTER OF

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

BETWEEN

JIAN XU
Appellant

AND

THE REAL ESTATE AGENTS
AUTHORITY (CAC 412)
First Respondent

AND

CHING (RONALD) LIM and GRANT
LYNCH
Second Respondents

On the papers

Tribunal:

Hon P J Andrews, Chairperson
Ms N Dangen, Member
Mr N O'Connor, Member

Submissions received from:

Mr Xu
Mr M Mortimer, on behalf of the Authority
Mr C Andrews, on behalf of Mr Lim and
Mr Lynch

Date of Decision:

25 October 2018

DECISION OF THE TRIBUNAL

Introduction

[1] On 28 August 2017, Mr Xu bought a property in Mission Bay, Auckland (“the property”). The listing and selling agent was Mr Lim, a licensed salesperson engaged by Unlimited Potential Limited, trading as UP Real Estate (“the Agency”). Shortly after confirming the agreement for sale and purchase, Mr Xu complained to the Agency as to Mr Lim’s conduct when marketing the property.

[2] Mr Xu subsequently complained to the Authority, including a complaint against Mr Lynch, the Branch Manager of the Agency, as to Mr Lynch’s conduct in dealing with his complaint.

[3] Pursuant to s 111 of the Real Estate Agents Act 2008 (“the Act”) Mr Xu has appealed against the decision issued by Complaints Assessment Committee 412 (“the Committee”) on 2 May 2018, in which, after inquiring into the complaint, it decided to take no further action on it.

Factual background

[4] The property was advertised for sale by negotiation, and was described (as relevant to the appeal), as a “substantial, now as new, five-bedroom home”, “the subject of a high-end rebuild”, and as “now thoroughly modern”.

[5] Mr Xu and his wife viewed the property with Mr Lim on 27 August 2017. That evening, Mr Lim emailed a property information file for the property, which included the LIM report, to Mr Xu. Initially, this was not received by Mr Xu, and Mr Lim re-sent the information, in two separate emails.

[6] Mr Xu sent an acknowledgement of receipt to Mr Lim, but his evidence to the Committee was that he had not been told that the second emails were different from the first. He said that when he received Mr Lim’s statements to the Authority’s investigator, he checked his email records, and found an email from Mr Lim in his “junk mail” box, which included the LIM report as an attachment.

[7] Mr Xu and his wife, together with a friend, viewed the property again the next day, 28 August. Later that day, Mr Lim called them and said that he had already received an offer on the property. He asked them to come to his office to talk about it, if they were interested in buying the property. Mr Xu and his wife went to Mr Lim's office, and after discussion with Mr Lim, and between themselves, signed an unconditional agreement for sale and purchase (including deletion of the condition as to provision of a LIM report) ("the agreement") of \$3.2m, which was accepted by the vendors.

[8] Mr Xu and his wife went to their solicitor's office the next day, 29 August. Their solicitor (Ms Nie) did not have a copy of the LIM report for the property, and Mr Lim emailed it to her. Mr Xu said that Ms Nie pointed out that the LIM showed that the property was not a brand new house, but had been re-clad in 2016. There was then a telephone discussion between Mr Xu and Ms Nie, and Mr Lim.

[9] Correspondence between Ms Nie and the solicitors for the vendors and the Agency followed. The agreement was confirmed, and settled on 8 December 2017.

Complaint to the Authority

[10] Mr Xu complained that:

- [a] Mr Lim represented to him that the property was a newly-built (brand new) house on existing foundations, when in fact the exterior of the house had been re-clad, and the interior refurbished;
- [b] Mr Lim misled him as to the vendor's price expectation, and as to the existence of another offer for the property (causing them to offer \$400,000 more than they would otherwise have made);
- [c] Mr Lim did not advise him to seek legal advice before entering into the agreement; and
- [d] Mr Lynch did not handle his complaint to the Agency in a proper manner.

Appeal issues

[11] As Mr Mortimer submitted for the Authority, the underlying principles as to licensees' conduct (set out in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules")) are clear, and were not contentious. A licensee must exercise skill, care, competence, and diligence (r 5.1), must act in good faith and deal fairly with all parties engaged in a transaction (r 6.2), and must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client (r 6.4).

[12] As the Committee decided to take no further action on any of the elements of Mr Xu's complaint, the issue to be determined in this appeal is, in general terms, whether the Committee was wrong to make the findings on which it made that decision. It is appropriate to consider the appeal by reference to each element of the complaint.

Mr Xu's general submission regarding the appeal

[13] Before considering the individual elements of Mr Xu's complaint, we note that Mr Xu's notice of appeal set out a number of grounds on which he submitted that the Committee's decision was wrong in fact and law.

[14] First, under the heading "The Decision – Form and Efficacy", Mr Xu submitted that the Committee:

- [a] failed to evaluate and consider what portions of the evidence available to it were admissible as evidence in a New Zealand court;
- [b] failed to set out a recital of the accepted evidence "establishing the fact pattern" on which the decision was founded;
- [c] failed to set out contested questions of fact to be determined, and it failed to recite and/or correctly apply the applicable statutory and regulatory law;
- [d] failed to set out the legal issues resulting in the complaint;

[e] failed to identify and/or determine legal issues arising from “the purported statements of evidence filed by the respondents”; and

[f] was in breach of s 81(2) of the Act which required it to record the reasons for its decision to take no further action.

[15] Then, in respect of each element of the appeal, Mr Xu asserted that the Committee had failed to correctly evaluate the available evidence, its findings were in conflict with the available evidence, the Committee had failed to identify and apply the applicable statutory and regulatory law, the Committee had failed to call for further information when it was empowered to do so, and it was reasonably necessitated for the just resolution of the complaint.

[16] In respect of Mr Xu’s general submissions, we record that as is the case for any complainant, it was for Mr Xu to establish that his complaint was justified, on the balance of probabilities. It was for him to submit all the evidence that was relevant to the subject of his complaint. Pursuant to s 88 of the Act, the Committee had the power to receive in evidence any statement, document, information, or matter that it considered would assist it to deal effectively with the matter before it, whether or not the evidence would be admissible in a court of law.

[17] We are satisfied that the Committee set out the evidence for each of Mr Xu’s complaints, and it set out the reasons for its decision on each complaint. Further, the Committee appropriately referred to the relevant Rules and provisions of the Act.

First issue: was the Committee wrong to find that Mr Lim did not mislead Mr Xu into believing that the property was brand new?

Evidence before the Committee

[18] Mr Xu’s evidence was that when he and his wife first viewed the property on 28 August, Mr Lim told him that he had watched the house being newly built by the vendor, and that it was a completely new house on the old foundations. He said that Mr Lim repeated this information when they viewed the property a second time, and again during the telephone discussion with Ms Nie on 29 August. Mr Xu’s evidence

was supported by statements by his wife (although we observe that this appears to have been written by Mr Xu), their friend who had viewed the property with them, and Ms Nie.

[19] Ms Nie's evidence was that the discussion was on speaker phone, and she heard Mr Lim tell Mr Xu, in Chinese (Mandarin), that the house was brand new except for the foundations, and that Mr Lim responded to a question from her by saying that everything was new, only the foundation was old.

[20] Mr Lim's evidence was that when he met Mr Xu and his wife at the property, he gave them a copy of the marketing flyer for the property (which described the property in the terms set out in paragraph [4], above) and explained that the property had recently been rebuilt by the owner. He denied that he had described it as a "brand new build" and said that he explained the nature of the work done.

[21] Mr Lim said that they spoke Mandarin together, and his evidence was that he used the phrase *chun jian* (roughly translated as "build again") not *chian xin* (roughly translated as "brand new build"). He suggested that he may have been mis-heard or misunderstood.

[22] A statement by a prospective purchaser of the property, Ms Lu, supported Mr Lim's evidence. Ms Lu said that when she and her husband viewed the property, Mr Lim told them that the owner had recently replaced all of the exterior cladding, and had almost completely rebuilt the interior of the house. While not recalling the details of the conversation, she said that at no time did Mr Lim say anything that led them to believe that the house had been completely rebuilt as a brand new house. She was in no doubt that the work done on the house was an exterior re-clad and internal rebuild.

[23] Regarding the telephone discussion with Mr Xu and his wife, and Ms Nie, Mr Lim's evidence was that he did not say that the property was brand new except for the foundations, but that he explained, as he had explained to Mr Xu during the first inspection, that it had been rebuilt the previous year with complete replacement of external cladding, and substantial new internal linings and replacement fixtures and fittings.

Committee's decision

[24] The Committee found that Mr Lim did not tell Mr Xu that the property was newly built, and did not mislead him about the work done to the property. It accepted that Mr Lim knew and understood the nature of the work done to the property. It recorded that this was supported by statements made by the vendor, the marketing material for the property, an on-line article (of which Mr Lim was aware) published by an agency that had marketed the property before Mr Lim, and Ms Lu's evidence.

[25] The Committee referred to Mr Xu's evidence of being told that the house was new except for foundations. It found that Mr Lim did not believe the property was newly built, and it was not convinced on the evidence that Mr Lim sought to deceive Mr Xu. It noted that Mr Xu's statement as to what he was told was in direct contradiction to other information provided by, or available to, him: that is, the advertising (including the Agency's flyer), and the fact that the LIM report recorded a consent for a re-clad, thus showing that the property was not a new build. The Committee further noted that the marketing material compared the property to a newly built property (by saying it was "as new"), but did not represent it as "new".

[26] Regarding the discussion with Ms Nie, the Committee accepted Mr Lim's evidence that she must have misheard or misunderstood him. The Committee considered it unlikely that Mr Lim would have sought to mislead Mr Xu and his lawyer in a discussion after the sale had been concluded, as there would be no advantage in his doing so.

[27] The Committee also referred to a letter from Ms Nie to the solicitors for the vendors on 29 August, in which she stated that "[Mr Lim] also advised [Mr Xu] that the property was demolished and total rebuilt with new power and water lines and new interior plan." The Committee accepted Mr Lim's evidence that if he had said the house was new, references to changes to internal plan would have been irrelevant, as it would simply be a new house.

[28] Finally, the Committee found that Mr Xu may have been confused about the type of work undertaken, and that language and the use of particular building or industry

terms may also have contributed to this. However, it found that there was no suggestion that Mr Xu had ever raised concerns with Mr Lim as to his ability to read and understand the documents and information supplied to him, or that any difficulty there was should have been apparent to Mr Lim.

Submissions

[29] Mr Xu submitted that Ms Lu's statement could not prove that Mr Lim did not tell him that the house was brand new, as she had no relationship with his contract, and Mr Lim may have told different stories to different viewers, and in his own case, did so. He submitted that there was no misunderstanding. He submitted that he, his wife, their friend, and Ms Nie all speak general Mandarin, as did Mr Lim, with no accent, such that there could be no misunderstanding as a result of "language".

[30] Mr Andrews submitted on behalf of Mr Lim that Mr Xu had not identified any error in the Committee's decision. He accepted that Ms Lu was not present during Mr Xu's dealings with Mr Lim, and that she had no relationship with Mr Xu's contract, but submitted that the Committee had rightly treated Ms Lu's statement as relevant circumstantial evidence establishing the improbability of Mr Lim's having described the work done on the property correctly to Ms Lu, but incorrectly to Mr Xu.

[31] Mr Andrews further submitted that the Committee was right to find that Mr Lim did not tell Mr Xu that the property was newly built, and did not mislead him about the work done on the property. He referred to the competing evidence before the Committee: the earlier on-line article describing the work done (which Mr Lim had read), the marketing material for the property, Ms Lu's evidence, its acceptance of Mr Lim's evidence that Mr Lim had sent Mr Xu a copy of the Lim report (which correctly described the nature of the work done), and Ms Nie's letter to the vendor's solicitor (referring to a "new interior plan"). He also submitted that there was no contemporaneous record of the discussion between Mr Lim, Mr Xu and his wife, and Ms Nie.

[32] He submitted that where the competing contentions were oral and without any contemporary written record, and where it was implausible that Mr Xu's account was

correct in the face of the surrounding circumstantial evidence, it was open to the Committee to find that Mr Lim did not tell Mr Xu that the property was newly built, and did not mislead him about the work done on the property.

[33] On behalf of the Authority, Mr Mortimer submitted that a licensee may breach the Rules if answers given or information provided are misleading, even if there is no intention to mislead. He also submitted that where a licensee has taken steps to explain matters accurately, and has provided supporting documentation, the licensee will not be responsible for all misunderstandings on the part of a client or customer.

[34] Mr Mortimer referred to the Tribunal's decision in *Wu v Real Estate Agents Authority (CA 20005)*.¹ In that case, the purchaser of a property, Ms Wu, complained that a house had been advertised as brand new, when it was actually a new house built on existing foundations. The Tribunal dismissed her appeal against a Complaints Assessment Committee's decision to take no further action on the complaint. The Tribunal accepted that the licensee who marketed the property had not misled Ms Wu, because the nature of the construction of the house had been accurately explained to her, and she had been provided with relevant documents.

Discussion

[35] We are not persuaded that the Committee failed to set out and analyse the competing evidence before concluding that Mr Lim did not tell Mr Xu that the property was newly built on existing foundations, and did not mislead him into thinking that was the case.

[36] There was no suggestion that Mr Xu did not have a copy of the marketing flyer for the property. We agree with the Committee that it is unlikely that Mr Lim would have made statements to a prospective purchaser that were contradictory to the marketing material for the property. In this case, as the Committee recorded, that material made it clear that the property was "as new", and that it had been "the subject of a high-end rebuild", but did not represent that the property was "newly built", or "brand new".

¹ *Wu v Real Estate Agents Authority (CA 20005)* [2103] NZREADT 79.

[37] Further, while Mr Xu may not have found the LIM report in his email inbox when it was sent to him by Mr Lim, it is clear that Mr Lim did send it, and it was evident from the LIM that the consent given the previous year had been for a re-clad, not a new build. Again, we agree with the Committee that it is unlikely that Mr Lim would have made statements to Mr Xu to the contrary effect, when he had sent the LIM report to him, and had received an acknowledgement of receipt.

[38] Information that the property was “as new”, but not “brand new”, was provided to Mr Xu. He could not have concluded from the marketing flyer that the house was “brand new”. As the Committee noted, there was no suggestion that Mr Xu raised with Mr Lim any issue as to a contradiction between the marketing material and what he says Mr Lim told him.

[39] Ms Nie’s evidence as to what Mr Lim said in the telephone discussion must be given weight, as it is directly relevant to the transaction, was as to Mr Lim’s response to a direct question from her, and independent. However, we are not satisfied that it tips the balance of probabilities towards a finding that Mr Lim told Mr Xu that the property was brand new.

[40] Mr Xu has not established that the Committee was wrong to find that Mr Lim did not mislead Mr Xu into believing that the property was brand new.

Second issue: was the Committee wrong to find that Mr Lim did not mislead Mr Xu as to the vendors’ expectations and the presence of another offer?

Evidence before the Committee

[41] Mr Xu’s evidence was that when he called Mr Lim to make an appointment to view the property, Mr Lim told him that the vendor was asking \$2.8m for the property. He said that Mr Lim also told him that another person wanted to make an offer on the property the next day. Mr Xu said that after he viewed the property a second time, Mr Lim called him and said that he had received an offer which was over \$3m (“the second offer”), and that if Mr Xu were interested in the property, they should come to his office to discuss it.

[42] Mr Xu further said that when he arrived at Mr Lim's office, Mr Lim said that the second offer was from a client of another branch office, and was at \$3.11m. He said Mr Lim told him that if he really liked the house he "should not care about a few thousand dollars", and suggested that he offer \$3.2m. Mr Xu then said that after his offer was accepted, Mr Lim told him that the second offer was just about \$10,000 dollars less than his offer. Mr Xu said that after the meeting with Ms Nie, he found earlier advertisements for the property. One, in March 2017, listed it at \$2.785m.

[43] Mr Xu's evidence was supported by statements from his wife (although, as noted earlier, this appears to have been written by Mr Xu) and a friend, Ms Ha.

[44] Mr Lim's evidence was that the vendor told him that advertisements by previous agencies had included an asking price, but the property had only been on the market for two days before they changed their minds and took it off the market. He said that his instructions from the vendor were quite clear: he was not to present any offers below \$3m, as he was not interested in anything below that. In fact, he wanted between \$3.2m and \$3.3m. He referred to an email from the vendor, dated 5 September 2017, in which the vendor confirmed having given Mr Lim those instructions.

[45] Regarding the second offer, Mr Lim's evidence was that he had conducted individual inspections and liaised with clients and a number of interested prospective purchasers during the marketing period. One of these was Ms Daniels, who told him that she had viewed the property when it was listed by a previous agency, and was still interested in it.

[46] Mr Lim said that he told Mr Xu, when he first viewed the property, that he would be speaking to other already interested parties the next day about making an offer, and that Mr Xu wanted to be told if there were any other parties interested in buying the property. He said that at their meeting, Mr Xu asked what the vendor's price expectations were, and he responded that although prospective purchaser feedback was in the range of \$2.8m to \$2.9m, his instructions were that the offer needed to be over \$3m for the vendor to even look at it, and he was wanting between \$3.2m and \$3.3m. Mr Lim also said that he told Mr Xu that he and his wife needed to put forward their best offer, as he had another purchaser's offer that he would present to the vendors that

evening. He said he did not (and would not) tell Mr Xu the terms of the second offer. He said that after a discussion with his wife, Mr Xu then signed an offer at \$3.2m.

Committee's decision

[47] The Committee found that there was insufficient evidence on which it could conclude that Mr Xu's offer was above the vendor's expectations. It also found that, in the absence of any evidence as to the authenticity (or lack thereof) of the offer from Ms Daniels, it could not determine whether there was no genuine offer, or whether a genuine offer had been made, but withdrawn.

Submissions

[48] Mr Xu submitted that Mr Lim first told him that the vendor's price expectation for the property was \$2.8m but then lured him (by way of a fabricated second offer) into making an offer at \$3.2m, \$400,000 above the vendor's expectation,

[49] He submitted Mr Lim had fabricated and imagined the second offer. He submitted that the inconsistency between Mr Lim's statement to him (that the second offer was from a colleague's client) and Mr Lim's evidence to the Committee (that the second offer was from his own client, Ms Daniels) pointed to the second offer having been fabricated. He also submitted that it was unreasonable for the Committee to accept that Ms Daniels had not made an offer during the earlier marketing (when the asking price was \$2.5m) but made an offer of \$3.11m six months later.

[50] Mr Xu submitted that Mr Lim had lied by saying there was another (non-existent) offer, and in order to make his lies look logically true, had asked the vendor to co-operate by sending an email in support. He also submitted:

- [a] if what Mr Lim said in evidence were true, why did Mr Lim tell him that the asking price was \$2.8m when he made the appointment to view the property?

[b] if Mr Lim and the vendor had discussed price expectations when the listing agreement was signed, why would the vendor be stating his price expectations when Mr Lim said he had an interested buyer?

[c] if Mr Lim had told him that an offer had to be over \$3m before the vendor would look at it (rather than that there was a (fabricated) offer at \$3.11m), why would he have immediately offered \$3.2m? He submitted that it would have been unreasonable and stupid for him to have made such a decision.

[51] Mr Andrews submitted that the Committee made no error in finding that Mr Xu had not provided sufficient evidence to satisfy his onus to prove his allegation on the balance of probabilities. He submitted that this was a substantial onus, given the seriousness of the allegation against Mr Lim.

[52] Mr Mortimer submitted that as there was no independent evidence regarding the second offer, it was open to the Committee to conclude that it was genuine or not genuine, or that there was insufficient evidence to reach any conclusion on the point. He also submitted that the Tribunal has previously acknowledged that it is a desirable selling technique for a salesperson to have prospective purchasers feel that they must make their best offer if there are others who are interested and likely to make offers, but it is dishonest on the part of a licensee to do so if there is no other verifiable interest.²

Discussion

[53] There was no independent evidence before the Committee, either as to what Mr Lim told Mr Xu regarding the vendor's price expectations, or as to the alleged second offer. Mr Lim provided a telephone number for Ms Daniels, but advised the Authority's investigator that he had not been able to contact her. The investigator also attempted to contact her, without success. The Committee was, and the Tribunal is, therefore, left with the competing evidence of Mr Xu and Mr Lim. Mr Xu's evidence

² Referring to *Mowlem v Real Estate Agents Authority (CAC 301)* [2015] NZREADT 44, at paragraph [66].

is supported by statements by his wife (although, as noted above, it appears to have been written by Mr Xu) and a friend. Mr Lim's evidence is supported by the email from the vendor (not contemporaneous, but sent during the investigation of the complaint).

[54] The Tribunal is not able to make a determination one way or the other as to whether Mr Lim misrepresented the vendors' price expectations, or as to whether Mr Lim fabricated a competing offer. Mr Xu has not established that the Committee was wrong to reach the same conclusion.

Third issue: was the Committee wrong to find that Mr Lim met his obligation to recommend that Mr Xu seek legal advice before entering into the contract to buy the property?

Evidence before the Committee

[55] Mr Xu's evidence was that Mr Lim did not advise him, before he signed the agreement, to seek legal advice. He said that after he had signed and initialled the agreement, Mr Lim asked him who his lawyer would be. He said he responded that he did not yet have a lawyer, but a friend would introduce one to him if his offer were accepted. He said that he gave Mr Lim Ms Nie's details later that evening. Mr Xu's evidence was that he forwarded the emailed house information to Ms Nie the next morning (29 August) then went to her office.

[56] In her statement to the Investigator, Ms Nie stated that she "did not know Mr Xu and did not receive his instruction until 29 August 2017".

[57] Mr Lim's evidence was in some respects inconsistent. At one point in his statement to the Committee he said that he wrote Mr Xu's name on the agreement together with the purchase price, and circled that a LIM was not required, and Mr Xu initialled each of the handwritten entries. He went on to say that when he asked Mr Xu who his solicitor was so that he could put those details in the agreement, Mr Xu gave him Ms Nie's Chinese name, and said that he would send her details later.

[58] Later in his statement Mr Lim said that before he had any contact with him concerning the property, Mr Xu had already engaged the services of Ms Nie, and had

apparently had her look at auction documents for a property they had bid on the previous week. He referred to an email from Mr Xu to Ms Nie on 28 August, which included the statement that “Our friend helped us contact you last week regarding 49 Victoria Ave, Remuera property with auction documents”.

[59] However, Mr Lim also said in his statement that he asked Mr Xu whether he had been to a lawyer, or sent his information to a lawyer. He said that Mr Xu did not answer yes or no, but simply shook his head and said he was happy with the agreement and wanted to sign the offer.

Committee’s decision

[60] The Committee concluded that Mr Lim had met his obligations. It considered that there is no requirement that a licensee “ensures a buyer has sought legal advice before signing an offer”. It considered that a buyer must be advised to seek advice and must be given the opportunity to make their own decisions whether to do so.

[61] The Committee was satisfied that Mr Lim gave Mr Xu the opportunity to seek legal advice, and he elected not to do so. It noted that no evidence had been presented to suggest that Mr Lim had encouraged Mr Xu not to seek legal advice.

Submissions

[62] In his notice of appeal, Mr Xu set out the general points referred to in paragraph [14] and [15], above, then repeated his evidence to the Committee in a written submission to the tribunal. He did not make any further submissions regarding the Committee’s decision on this point.

[63] Mr Andrews submitted that in the absence of any submissions in support of this appeal point, the Tribunal could safely rely on the Committee’s analysis and decision that Mr Lim did not breach r 9.7.

[64] Mr Mortimer submitted that “the onus is on licensees to ensure that [vendors and purchasers]³ are made aware of their entitlement to seek legal advice prior to signing a sale and purchase agreement...”. He further submitted (as with other appeal points) that the Tribunal’s assessment of this appeal point will turn on its assessment of the competing evidence.

Discussion

[65] Rule 9.7 provides:

Before a prospective client, client, or customer signs an agency agreement, a sale and purchase agreement, or other contractual document, a licensee must–

- (a) Recommend that the person seek legal advice; and
- (b) Ensure that the person is aware than he or she can, and may need to, seek technical or other advice and information; and
- (c) Allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).

[66] While it is open to a client or vendor not to seek legal advice before signing an agreement for sale and purchase or other contractual document, the obligation on a licensee to recommend that such advice is sought is a fundamental requirement for the purpose of meeting the Act’s consumer protection objectives.

[67] As the Committee said, there was no suggestion that Mr Lim encouraged Mr Xu not to seek legal advice. However, that does not establish that Mr Lim recommended that Mr Xu seek legal advice, and it does not assist in determining whether Mr Lim met his obligation under r 9.7.

[68] There is no dispute that legal advice was discussed between Mr Lim and Mr Xu, but the Committee had before it opposing evidence as to whether Mr Lim recommended that Mr Xu seek legal advice before the agreement was signed. We have summarised that evidence. In view of the (undisputed) evidence that Mr Lim and Mr Xu had a discussion concerning legal advice, and the evidence of Mr Xu’s email to Ms Nie referring to a previous occasion on which he had consulted her, it was open to the Committee to accept Mr Lim’s evidence that Mr Xu was asked if he had been

³ Mr Mortimer’s reference to “vendors”, only, in this submission is clearly a typographical error.

to a lawyer, or sent his information to a lawyer. Mr Xu has not established that the Committee was wrong to reach that conclusion, and to find that Mr Xu was given the opportunity to seek legal advice.

Fourth issue: was the Committee wrong to decide to take no further action on Mr Xu's complaint as to the Agency's handling of his complaint?

Evidence before the Committee

[69] Mr Xu's evidence was that after the meeting with Ms Nie on 29 August, he called Mr Lim and said that he wanted his deposit cheque back, because the house was not a new house. He said Mr Lim's response was that if Mr Xu wanted the deposit back, he needed to talk to Mr Lim's manager. Mr Xu then told Mr Lim he wanted to talk with Mr Lim's manager. He sent an email to the Agency, asking that the deposit cheque be held in the Agency's trust account until all issues had been clarified. Mr Xu said that on 30 August he asked Mr Lim to arrange a meeting with his manager, but Mr Lim first said he was busy, then did not reply further.

[70] Mr Xu said he went to the Agency office on 31 August, and asked to see Mr Lim and his manager. He was told that Mr Lim and his manager were at lunch, and expected back in half an hour. Mr Xu went away for 30 minutes and was told that the manager was not back. Mr Xu was asked why he was there and responded that he wanted the deposit cheque returned to him. He said he was told that the deposit cheque had been deposited into the Agency's trust account.

[71] Mr Lim's evidence was that when he learned that Mr Xu had visited the office (without prior arrangement) on 31 August, he sent Mr Xu a voicemail message apologising for missing the visit, and referring to information he had suggested that Mr Xu obtain. He said he did not hear from Mr Xu, directly, after that.

[72] Mr Lim's manager, Mr Lynch said in a statement to the Authority's investigator that he saw an exchange of emails between the respective lawyers for the vendor and Mr Xu concerning whether the house was "brand new built". He also referred to an email from Ms Nie to him on 1 September, seeking an urgent reply, and his response the same day refuting Mr Xu's allegations. Mr Lynch also noted that Mr Xu had come

to the Agency's office, without any prior arrangement or appointment. Mr Lynch said that he did not consider he could reasonably be criticised for not being present at those times to meet with Mr Xu.

Committee's decision

[73] The Committee noted that at the time of Mr Lynch's involvement the lawyers for the vendor and Mr Xu were in dispute as to whether the house was newly built, or re-clad, and the enforceability of the sale and purchase agreement. The Committee agreed that it was appropriate for the parties and their lawyers to address the issues, rather than the Agency.

[74] The Committee found that there was no evidence to suggest that Mr Lynch was obstructive, or that he did not provide information in a timely manner to assist in resolving the dispute with the vendor, or Mr Xu's concerns regarding Mr Lim's conduct or that of the Agency. Accordingly, the Committee decided to take no further action on this element of Mr Xu's complaint.

Submissions

[75] In addition to the general points referred to earlier, Mr Xu asserted in his notice of appeal that Mr Lynch had admitted being responsible for Mr Lim, but had then stated that he was unable to give any evidence of having directly supervised him. Mr Xu further stated that the Committee had failed to identify the resulting issue as to whether Mr Lynch had breached r 8.3 of the Rules, and should have found that Mr Lynch had breached r 8.3.

[76] Mr Xu further asserted that the Committee should have identified an issue as to whether in Mr Lynch's email of 1 September, he had engaged in conduct likely to bring the industry into disrepute, in breach of r 6.3 of the Rules. Mr Xu did not make any further submissions to the Tribunal addressing the grounds set out in his notice of appeal on this point.

[77] Mr Andrews submitted that Mr Xu’s original complaint was that Mr Lynch had “failed to address our complaint and failed to manage his agents.” He submitted that Mr Xu had not presented any submissions on that point. He further submitted that Mr Xu’s “relatively extensive point of appeal” went beyond the scope of what is permissible in his appeal, by effectively expanding or raising additional matters. Notwithstanding this submission, Mr Andrews submitted that Mr Xu had not demonstrated in any way that the Committee was wrong in not upholding the complaint against Mr Xu.

[78] In particular, Mr Andrews submitted that the Committee was correct to find that it was appropriate that the dispute as to whether the house was newly built or re-clad was being addressed by the lawyers for the parties. He submitted that by the time Mr Xu’s complaint against Mr Lim was referred to Mr Lynch, the matter had progressed beyond his office and his branch, to the respective lawyers.

[79] Mr Andrews further submitted that Mr Xu had overlooked or misinterpreted the extent of supervision required of a manager for the purposes of r 8.3 of the Rules and s 50 of the Act. He submitted that neither of these required a branch manager to oversee all direct interaction between a salesperson and a prospective purchaser. That is, Mr Lynch was not required to attend open homes with Mr Lim, was not required to be present and involved during the discussion and preparation of the sale and purchase agreement, and was not required to be immediately available at all times to receive an oral complaint from Mr Xu.⁴

[80] With respect to Mr Lynch’s email of 1 September, Mr Andrews submitted that it was not a relevant matter for consideration by the Committee of Mr Xu’s complaint, and it is not a relevant matter for consideration in this appeal.

[81] Mr Mortimer agreed that Mr Xu’s broader submissions on appeal were not part of Mr Xu’s original complaint. The issues raised were not before the Committee, and should not, therefore, be considered on appeal.⁵ Mr Mortimer also referred to the

⁴ Mr Andrews referred to the Tribunal’s decision in *Maserow v Real Estate Agents Authority* (CAC 404) [2016] NZREADT 19, at paragraphs [24]–[26].

⁵ Mr Mortimer referred to the judgment of the High Court in *Wyatt v Real Estate Agents Authority* [2012] NZHC 2550, at paragraph [64].

purposes of the Act, and the means by which that purpose is achieved, as set out in s 3 of the Act. He submitted that consistent with the purpose of the Act, r 12.1 of the Rules provides that agents and agencies are required to develop and maintain written in-house procedures for dealing with complaints and dispute resolution.

[82] *Discussion*

[83] We accept the submissions made by Mr Andrews and Mr Mortimer. The Committee's investigation and decision was as to Mr Xu's complaint. The matters set out in Mr Xu's grounds of appeal were not part of his complaint, and were not required to be considered by the Committee, and did not, therefore, form part of the Committee's decision. The Committee considered Mr Xu's complaint that Mr Lynch "failed to address our complaint", and dealt with it in its decision.

[84] In particular, the Committee was not required to address any issue concerning an email sent by Mr Lynch to Ms Nie and the vendor's solicitors (copied to Mr Xu and the vendor) on 1 September 2017. While Mr Xu was critical, in his notice of appeal, of Mr Lynch's language and statements, he did not put those concerns to the Committee, and cannot raise any such concerns on appeal.

Natural justice

[85] Mr Xu's notice of appeal concluded with a section headed "The Decision – Natural Justice". Having set out the standard requirements of natural justice, Mr Xu stated that the Committee's decision pertained to extensive written and documentary evidence, was incorrect in its evaluation of the available evidence, preferred the evidence of Mr Lim without providing a considered explanation calibrated against the available counter-factual evidence, and purported to prefer Mr Lim's evidence on the ground of credibility without evaluating and considering the admissibility of the evidence available to it and without having conducted an in-person hearing.

[86] The above points have either been considered already in the context of the individual issues, or are misconceived.

[87] Regarding Mr Xu's complaint that there was no in-person hearing, we refer to s 90 of the Act, pursuant to which a hearing to consider a complaint (under s 89(1) of the Act) is to be a hearing on the papers, unless the Committee directs otherwise. Complaints Assessment Committees are well used to considering complaints which involve extensive written and documentary material, and they are usually required to accept some evidence and reject other evidence. The Committee in the present case was not at fault in not directing an in-person hearing, and it set out a considered explanation for reaching the conclusions it did. As with all decisions of Complaints Assessment Committees, the Committee's decision in this was subject to scrutiny by the Tribunal, and Mr Xu exercised his right to seek such scrutiny.

Outcome

[88] Mr Xu has not established that the Committee was wrong in making any of the findings, or reaching any of the conclusions, he has challenged on appeal. Accordingly, his appeal is dismissed

[89] 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 N Dangen
Member

Mr N O'Connor
Member