**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2019] NZREADT 26**

**READT 005/19**

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| IN THE MATTER OF | An appeal under section 111 of the Real Estate Agents Act 2008 |
| BETWEEN | AH T'NG KEK, MICHAEL BAYLEY and BAYLEYS REAL ESTATE LIMITED<br>Appellants |
| AND | THE REAL ESTATE AGENTS AUTHORITY (CAC 409)<br>First Respondent |
| AND | CARLTON MORRIS and SUSAN MORRIS<br>Second Respondents (not participating in the appeal) |
| Hearing: | 30 May 2019, at Auckland |
| Tribunal: | Hon P J Andrews, Chairperson<br>Ms C Sandelin, Member<br>Mr N O'Connor, Member |
| Appearances: | Ms J Keating, on behalf of the appellants<br>Ms L Lim & Mr M Hodge, on behalf of the Authority |
| Date of Decision: | 20 June 2019 |

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**DECISION OF THE TRIBUNAL**

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## Introduction

[1] The appellants have appealed against decisions of Complaints Assessment Committee 409 in which findings of unsatisfactory conduct were made against them ("the substantive decision") and penalty orders were made ("the penalty decision"). The Committee's decisions followed an investigation into a complaint made by the second respondents (Mr and Mrs Morris) regarding the appellants' conduct in relation to their purchase of a property in Auckland.

## Background

[2] In January 2014 the owners of the property entered into an agency agreement with Bayleys Real Estate Limited (trading as Bayleys Remuera) ("the Agency") for the sale of the property. Ms Kek, a licensed salesperson engaged at the Agency, was the listing salesperson.

[3] Ms Kek marketed the property with written advertising material which included the following statements:

> High 3.2 metre stud ceilings make the enormous open-plan living and dining feel even more generous …
>
> … expansive level lawn – where there's room for a pool –
>
> It was completed with piling and full cavity system with H5 treated timber.

[4] On 17 March 2014, Mr and Mrs Morris entered into an agreement to buy the property for $2.5 million, subject to a satisfactory building report. A non-invasive inspection was carried out City Line IR Ltd. City Line IR reported that the property was "constructed of a timber frame with both a brick cavity cladding and a solid plaster system on an early cavity system", and that the house and cladding were "in good condition and well maintained". Mr and Mrs Morris completed settlement of the purchase on 23 April 2014.

[5] Mr and Mrs Morris subsequently approached the Auckland Council, with regard to installing a swimming pool at the property. They were advised they would be required to apply for a resource consent. They then found that some neighbours would raise an objection to such an application, so did not pursue it.

[6] In March 2017, Mr and Mrs Morris listed the property for sale with Megan Jaffe Real Estate Ltd (trading as Ray White Remuera). They provided the listing salesperson, Ms Butler, with the advertising material from their purchase of the property. Ray White's marketing included the statement "… the upper level is plaster with cavity system with H5 treated timber…".

[7] Shortly before a scheduled auction of the property, a prospective purchaser advised Ms Butler that he had learned that the house was not built with H5 treated timber. In fact, the timber framing for the property was manufactured out of untreated timber. Following this advice, the auction was cancelled.

[8] Mr Morris telephoned Ms Kek. She told him to contact her office manager, Ms Dovey. Ms Kek also told Mr Morris the vendor had confirmed that all of the timber in the entire house was treated timber, and said "everything was treated, the piles, the wall framing, the roof, the window linings, everything". Ms Kek recommended that Mr Morris have an independent investigation carried out. He arranged for invasive testing, in which it was found that a surface insecticide treatment had been applied, to a depth of 5 mm to samples of timber taken from the external framing.[1] This was not an "H5" timber preservative.

[9] The property was re-marketed. Ray White checked the earlier marketing material and discovered that the stud height, advertised by the Agency as 3.2 metres, was in fact 2.93 metres on the ground floor, and 2.7 metres on the first floor.

[10] Mr Morris set out his complaint in emails to Ms Kek, then to Ms Dovey. At Ms Dovey's request, he made an official complaint to Mr Bayley. This was responded to by Bayleys' solicitors. Mr Morris considered that they had not addressed the misrepresentation or misconduct issues he had complained of. He made a formal complaint to the Authority on 29 March 2018, that Ms Kek had misrepresented the property as being built with H5 treated timber, misrepresented the stud height of the living areas, and represented that a swimming pool could be installed at the property, when it was likely it could not be.

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[1] Mr Morris's statement that the samples were taken from the external timber framing was not challenged.

[11] On 2 May 2018, the Committee decided to inquire into the complaint. It considered that the complaint also raised issues in respect of the supervision of Ms Kek and the structure for management and supervision at the Agency, and decided to inquire into both of those issues, pursuant to s 78(b) of the Act.

## A. Ms Kek's appeal

### The Committee's substantive decision

*H5 treated timber*[2]

[12] The Committee recorded that Ms Kek accepted that the marketing material describing the house as having been built with H5 treated timber was incorrect and a misrepresentation. It referred to Ms Kek's statement in response to the complaint (through the Agency's solicitors) that she had obtained all information directly from the vendor, who had overseen the building of the property, and reassured her that H5 treated timber had been used.

[13] The Committee concluded that Ms Kek had an obligation to "look further and obtain verification of the timber treatment". This was, first, because timber treatment was not usually a detail that the Agency would have included in its marketing material. The instruction to include the treatment was unusual, and should have raised a red flag for Ms Kek to seek confirmation of the facts before proceeding.

[14] Further, with the awareness of leaky buildings in 2014, whether the house framing was treated or not was of particular importance. The plaster cladding and flat roof of the house were elements that were identified with a leaky home profile. Another element associated with leaky buildings was untreated timber. Thus any representation by Ms Kek that the timber was treated to the H5 standard would have been relevant to any prospective purchaser (and was of particular relevance and significance to Mr and Mrs Morris).

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2 Committee's substantive decision, at paragraphs 5.12–5.34.

[15] The Committee considered that had Ms Kek sought further detail, or asked her Agency supervisor for advice when the matter of H5 treated timber first arose, it was likely the mistake would have been discovered. It appeared to the Committee that Ms Kek might have misconstrued advice given to her by the vendor, but regardless of any misunderstanding by her, she had an obligation to verify information given to her by the vendor, and passed on by her to Mr and Mrs Morris, or to "caveat" it as being unverified.

[16] The Committee found that Ms Kek's failure to seek further detail or ask for advice in respect of timber treatment was a breach of her duty to exercise skill, care, competence, and diligence under r 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, and a breach of r 6.4, under which she had an obligation not to mislead Mr and Mrs Morris by misrepresenting that all timber used in building the property was H5 treated.

*Stud height*[3]

[17] Ms Kek said that she relied on the floor plans for the house, which gave a measurement of 3.3 metres from the floor level of the ground floor to the floor level of the first floor. The Committee noted that this measurement incorporated floor/ceiling joists and considered that "clearly", the stud height (the floor to ceiling measurement) for the ground floor was less than 3 metres. It was subsequently measured at 2.93 metres.

[18] The Committee rejected Ms Kek's statement that the plans were inaccurate. It found that her interpretation of them was inaccurate, that she did not physically measure the stud height, did not interpret the plans correctly, and did not caveat the advice in the marketing material. The Committee found that Ms Kek had breached rr 5.1 and 6.4.

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3 Paragraphs 5.20 to 5.27.

*Room for a pool*[4]

[19] The Committee recorded that Ms Kek stood by her assessment that the property had potential for a pool, but that further investigation as to what would be required to install one was the responsibility of a purchaser. It rejected her statement (made after the investigator's report was provided but not in her initial response to the complaint) that she had specifically advised Mr Morris that he needed to obtain expert advice and to check with Auckland Council about whether a pool could be built on the property. The Committee preferred the evidence of Mr and Mrs Morris, that they made clear to Ms Kek that a property with a swimming pool, or room to install one, was an important purchasing point for them, and that she did not recommend specialist advice, or checking with the Council.

[20] The Committee considered that a prospective purchaser would reasonably infer that "room for a pool" in marketing material meant that it was viable to install a pool at the property. It found that Ms Kek failed to seek advice in respect of a potential pool installation, failed to qualify the marketing statement, and misled Mr and Mrs Morris as to the potential to install a pool. It found Ms Kek in breach of rr 5.1 and 6.4.

**The Committee's penalty decision**[5]

[21] The Committee assessed Ms Kek's conduct to be at a mid to high level of unsatisfactory conduct. It noted two previous findings of unsatisfactory conduct against her. It accepted that the circumstances of the previous complaints were factually different, but noted that in both cases her conduct was described as "self-serving". It considered that although more subtle in the present case, her conduct could also be seen as self-serving: where making the sale and earning a commission were important than meeting her obligations to the complainant purchasers. It also considered that Ms Kek had shown no remorse for her conduct.

[22] The Committee concluded that the previous penalty orders made against Ms Kek had not been a sufficient deterrent, and had not sufficiently achieved the purposes of

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4 At paragraphs 5.28 to 5.34.
5 Committee's penalty decision, at paragraphs 4.8–4.13.

the Act of promoting and protecting the interests of consumers, and promoting public confidence in relation to real estate agency work. It noted a submission made by Mr and Mrs Morris that Ms Kek be ordered to undertake further training. However, the Committee did not make such an order. This was on the basis that Ms Kek had previously been ordered to undertake further training on misleading and deceiving conduct and misrepresentation, which had not been effective in terms of her understanding of her ongoing misleading conduct and misrepresentation.

[23] Ms Kek was censured and ordered to pay a fine of $6,000. The Committee recorded that a fine at that level was required to deter Ms Kek from offending in a similar manner in the future.

**Appeal issues**

[24] Ms Keating submitted that the Committee was wrong to find that:

[a] it was unlikely that the vendor would have told Ms Kek that all of the timber was H5 treated;

[b] her interpretation of the plans for the property in respect of the stud height amounted to unsatisfactory conduct:

[c] her evidence that she told Mr and Mrs Morris they would need to get specialist advice and check with the Council about whether a pool could be built was not credible; and

[d] her conduct was self-serving and she had shown no remorse for her unsatisfactory conduct.

**The Committee's finding that Ms Kek breached rr 5.1 and 6.4 in representing that it was unlikely that the property was built with the H5 treated timber**

*Submissions*

[25] The focus of this appeal was on the Committee's finding that it was unlikely that the vendor would have told Ms Kek that all of the timber was H5 treated. Ms Keating

submitted that this was an adverse credibility finding, which infected the Committee's consideration of the complaint against Ms Kek. She submitted that there was no available evidence on which the Committee could conclude that it was "generally understood in the industry that H5 timber was only used for ground works and piling and was not a treatment used for house framing".[6] She submitted that the Ray White compliance manager had said that she realised "from her engineering background" that H5 treated timber is protected to a higher level for piling, yet that agency's marketing material had still included the reference to H5 treatment. She submitted that this had obviously escaped detection until a prospective purchaser obtained advice on the point.

[26] Ms Keating referred the Tribunal to Ms Kek's transaction report following the sale to Mr and Mrs Morris. She submitted that Ms Kek's entry "complete cavity system [with] H5 treated timber provided by vendor" in the section headed "Statements made/discussions and your answers about the construction, piles, electrical, cladding, roofing, insulation, heating, sewage/water reticulation, drainage, pool/accessories fencing", supported her evidence that the vendor had told her that H5 treated timber had been used.

[27] Ms Keating also submitted that the Committee had not obtained a statement from the vendor, so had no evidence on which it could find that Ms Kek had misconstrued what she was told by him. She submitted that the Committee was required to be satisfied on the balance of probabilities that there was evidence to show that Ms Kek included the timber treatment information without the vendor's instruction or by mistaken instruction, and that any uncertainty had to be resolved in favour of Ms Kek. Accordingly, she submitted, it was not open to the Committee to determine that Ms Kek was not advised and instructed by the vendors in respect of H5 timber treatment.

[28] Ms Keating further submitted that the Committee's credibility finding against Ms Kek influenced the determination against her. She submitted that even if Ms Kek ought to have verified the reference to H5 treated timber, and failed to do so, any finding of unsatisfactory conduct would have been minor.

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6 Committee's substantive decision, at 5.13.

[29] Mr Hodge submitted that the Committee properly relied on email communications from the vendor to Ms Kek regarding the advertising material which, he submitted, indicated that the vendor wanted to limit the references to H5 treated timber to the piles. He also submitted that the Committee referred to general information regarding the use of H5 treated timber for house piles. He submitted that it was open to the Committee, on the material before it, to make a finding against Mr Kek.

[30] Mr Hodge also submitted that in any event, the credibility finding against Ms Kek was not the sole basis for the Committee's finding of unsatisfactory conduct. He referred to the Committee's finding that even if the vendor had advised Ms Kek that the whole house, or all of the timber, was H5 treated, it was not reasonable for her to rely on that advice, and she was required to verify it independently of the vendor, or to caveat it as not being verified.

*Discussion*

[31] We are not persuaded that the Committee was wrong to find it "unlikely" that the vendor told Ms Kek, at the time she was preparing marketing material, that all of the timber used in construction of the house was H5 treated. Such a statement is inconsistent with the vendor's instruction that "solid piling foundation" was to be added after the reference to "H5 processed solid wood". This indicates an intention to limit the reference to the use of H5 treated timber.

[32] Ms Kek's statement "complete cavity system [with] H5 treated timber provided by vendor" in her transaction report does not support her submission. It does not state the extent of the use of H5 treated timber, and it does not give grounds to infer that all timber used in construction was H5 treated.

[33] Nor are we persuaded that the Committee was wrong to say that it was generally understood in the industry that H5 timber was only used for groundworks and piling, and was not a treatment used for house framing. We accept Ms Keating's submission that it appears that the error as to the use of H5 treated timber appears to have escaped detection by Ray White, which used the same marketing information used by the

Agency. However, the repetition of the error does not establish that the Committee was wrong to find that there was a general understanding that H5 treated timber was only used for groundworks and piling.

[34] The Committee's statement is supported by the description referred to by the Committee, by the New Zealand Timber Preservation Council. Secondly, the Committee is a specialist body, with particular experience in dealing with issues affecting the industry. The issues noted by the Committee as being identified with a leaky home profile are well-known in the industry. As the Committee stated, plaster cladding, flat roofs, and untreated timber are all associated with a leaky home profile. As a result, licensees have become aware, at least in general terms, of the various options for treating timber.

[35] The essence of the Committee's decision was that regardless of what she was told by the vendor, Ms Kek was obliged to obtain independent verification of information given by him and passed on to prospective purchasers. Ms Kek failed to obtain any independent verification, and failed to advise Mr and Mrs Morris that she had not verified the information.

[36] As the Committee said, the issue of timber treatment will be significant for a prospective purchaser of any property, particularly so where the property has features identified with leaky buildings. Ms Kek's advertising material contained a positive statement of fact, asserting that the property had been completed with H5 treated timber (described by the New Zealand Timber Preservation Council as being appropriate for a "severe decay hazard"). The Committee was correct to find that it was not reasonable for her to rely on advice given to her by the vendor. She was required to verify it independently of the vendor, or caveat it as not having been verified.

[37] We note Ms Kek's statement that the vendor told her, after Mr and Mrs Morris's complaint was received, that "everything" was H5 treated, and Ms Keating's submission that the Committee did not obtain a statement from the vendor. We cannot put significant weight on Ms Kek's statement as to what the vendor said at the time of the complaint, and it is inconsistent with his specific connection of "H5" and "piling"

at the time the marketing material was prepared. Further, as the Committee recorded, the vendor did not respond to approaches by the Authority's investigator by email and telephone.

[38] We are not persuaded that the Committee was wrong to find that Ms Kek was in breach of r 5.1 (by failing to exercise skill, care, competence, and diligence) and misled Mr and Mrs Morris, in breach of r 6.4, by misrepresenting that all timber used was H5 treated, when it was not.

**The Committee's finding that Ms Kek breached rr 5.1 and 6.4 by misrepresenting the stud height**

*Submissions*

[39] Ms Keating submitted that the vendor told Ms Kek that the stud height was 3.2 metres, and that the floor plans for the property showed it to be 3.3 metres. She submitted that it was reasonable for Ms Kek to rely on the plans and to market the property as having a 3.2 metre stud height.

[40] Ms Keating further submitted that Mr and Mrs Morris had no idea of the correct stud height (2.93 metres) for the entire time they lived in the property. She also submitted that the difference was "extremely minor", and not sufficient to lead to a finding of unsatisfactory conduct.

[41] Ms Keating also submitted that the Committee's adverse credibility finding against Ms Kek on the issue of H5 timber treatment had infected its consideration and finding against Ms Kek in relation to the stud height.

[42] Mr Hodge submitted that the Committee correctly found that Ms Kek misinterpreted the plans, and failed to take into account that the plans incorporated 0.30 metres of flor/ceiling joists, gib ceiling lining for the ground floor, flooring over the joists in the first floor, and carpet and underlay.

*Discussion*

[43] We do not accept Ms Keating's submission that the Committee's finding on the issue of what the vendor told Ms Kek about the use of H5 treated timber infected its consideration of this aspect of the complaint. The Committee found that the plans for the property were not inaccurate (as Ms Kek had contended), but Ms Kek had misinterpreted them and, as a result, incorrectly advised the stud height in her marketing material. This was not a credibility finding, so could not have been affected by any earlier credibility finding.

[44] Ms Kek's representation in the marketing material of "3.2 metre stud ceilings" was, again, a positive statement of fact. Prospective purchasers viewing the property would reasonably expect that the stud height was, indeed, 3.2 metres. We are not persuaded that the Committee was wrong to find that she failed to exercise skill, care, competence, and diligence by misrepresenting the stud height.

**The Committee's finding that Ms Kek breached rr 5.1 and 6.4 by representing that there was "room for a pool" and not advising Mr and Mrs Morris they would need to get specialist advice and check with the Council about whether a pool could be built**

[45] Ms Keating submitted that the Committee was wrong to criticise Ms Kek for not mentioning in her initial response to the investigation that she had recommended Mr and Mrs Morris obtain specialist advice, or check with the Auckland Council, as to whether a pool could be installed at the property, and rejecting the detailed response she gave later. She also submitted that the Committee's rejection of Ms Kek's evidence was infected by its earlier rejection of her evidence as to what she was told by the vendor about H5 timber treatment.

[46] Ms Keating submitted that the issue of a pool was not presented as being particularly significant in the request by the Authority's investigator for a response from Ms Kek, and was not listed by the investigator as an issue raised by Mr and Mrs Morris. She submitted that the issue of the pool was raised in a later response by Mr and Mrs Morris, to which Ms Kek responded in detail.

[47] Ms Keating further submitted that Ms Kek was entitled to rely on the vendor's statement that there was room for a pool, as the house had been positioned specifically to leave the option open to subsequent owners to install a pool. She submitted that this had never been stated as anything more than a potential.

[48] Mr Hodge submitted that a representation that there is "room for a pool" is more than a representation that "there is enough space for a pool", but is reasonably understood by a prospective purchaser to mean that "you can in fact put a pool here". He submitted that Ms Kek needed to take care to ensure (at least) that there were no major consenting obstacles, or to caveat the representation.

[49] Mr Hodge submitted that Ms Kek took no steps to check whether a swimming pool could be installed, or otherwise verify the vendor's statement to her. He submitted that if licensees wish to market a property as having a certain feature, in order to make it attractive to buyers and achieve a higher price, then they must do their due diligence and take all reasonable steps to ensure that what they are saying about the property is correct. He submitted that this is not placing an intolerable burden on a licensee.

*Discussion*

[50] In his complaint to the Authority, Mr Morris said (after setting out the complaints concerning the representations as to the use of H5 treated timber and the stud height) that "when my wife started to look for houses all of the agents she approached were given a list of what boxes should be ticked and to have a swimming pool was right at the top of that list … it was claimed there was room for a pool by Bayleys."

[51] The Authority's investigator sought a response from Ms Kek. The investigator set out what appeared to be the issues raised in the complaint against her as "whether [Ms Kek] misrepresented to [Mr and Mrs Morris], through marketing, that the property was clad in H5 timber treatment along with 3.2 metre stud ceiling when sold to them in 2014." This was not an accurate summary of the complaint, as it did not refer to the complaint concerning the representation that there was "room for a pool".

[52] However, Ms Kek had previously been provided with a copy of the complaint, and the response sought from her included the following:

> You need to provide a written response/explanation in relation to this complaint. this should be in the form of:
>
> 1. A general narrative describing your involvement in this matter
>
> 2. A chronological timeline of events
>
> 3. Please then address <u>each</u> of the above issues under a separate heading and provide your response to each issue.
>
> In addition please also respond to the specific questions raised by the Committee:
>
> *For [Ms Kek]*
>
> (a) Did you attempt to verify any of the information from your vendor (Mr Yap) re the timber treatment at the time of listing and selling the property?
>
> (b) If yes, what steps did you take and what information did you find?
>
> (c) Did you take any steps to verify the information re the timber that Mr Yap advised to you after you had spoken to [Mr Morris] (pre the Ray White auction)?
>
> (d) If yes, please detail.
>
> (e) If not, why did you not in the face of evidence to the contrary?
>
> (f) Where did you obtain the information you used in the advertising for the property re the stud height and potential for a pool?
>
> (g) What verification of that information did you have or make?

[53] We do not accept Ms Keating's submission that the issue as to Ms Kek's "room for a pool" representation was not presented as being particularly significant. It was raised in Mr Morris's complaint, and the investigator asked questions about it. In Ms Kek's response to the complaint, submitted by her solicitors, she responded to question (f) as follows:

> The available space on the property was clearly big enough to house a pool. The vendors planned the position of the house on the property specifically to leave the option open to subsequent owners for a pool.
>
> There are some access challenges with pool construction due to the position of the house, but these are obvious and, in Ms Kek's experience, are not prohibitive. Ms Kek stands by her assessment that this property has potential for a pool. Further investigations with a pool specialist as to what it would take to install a pool are the responsibility of the purchaser.

[54] Ms Kek's representations concerning a pool were not referred to anywhere else in the response.

[55] A further response from Ms Kek was included in her solicitors' response dated 31 August 2018, following their being provided with the Investigation Report. She denied that Mr Morris had advised that a swimming pool was one of his requirements, but said he had asked whether it was possible to build a swimming pool on the property. She said that she pointed out to him that there was potential space for a swimming pool to be built, but also specifically advised him that he needed to obtain expert advice and to check with the Auckland City Council about whether a pool could be built on the property.

[56] The Open Home registers, and Ms Kek's reports to the vendor, make no reference to such specific advice having been given as to installing a pool to Mr Morris (or to Mrs Morris, who made more visits to the property than he did).

[57] Ms Kek's transaction report on the sale makes no mention of any specific advice or recommendation given as to obtaining expert advice and checking with the Council about whether a pool could be built on the property. Had such advice been given, Ms Kek would have been required to record it in the report, either in the section where she was required to record "Statements made/discussions and your answers about the construction, piles, electrical, cladding, roofing, insulation, heating, sewage/water reticulation, drainage, pool/accessories fencing", or in the section "Were any specific items discussed where you gave advice? Specify". Ms Kek referred to H5 treated timber in the former section, and wrote "NIL" in the latter.

[58] Further, there was no suggestion that Ms Kek took any steps to verify that there was a sufficient "permeable" area of the property available for use for a swimming pool.

[59] For the above reasons, we are not persuaded that the Committee was wrong to reject Ms Kek's evidence, and to prefer the evidence of Mr and Mrs Morris, that they told her that a pool was important to them, and that Ms Kek did not advise them to seek specialist advice, or to consult with the Auckland Council. We have reached this conclusion without reference to the Committee's rejection of Ms Kek's evidence that the vendor told her that timber used to build the house was H5 treated.

[60] It follows that we are not persuaded that the Committee was wrong to find that Ms Kek failed to exercise skill, care, competence, and diligence, in breach of r 5.1, and misled Mr and Mrs Morris, in breach of r 6.4, as to the potential to install a pool at the property.

**Conclusion as to Ms Kek's substantive appeal**

[61] We are not persuaded that the Committee erred in finding Ms Kek guilty of unsatisfactory conduct, in respect of each of the three elements of the complaint.

[62] We add that we accept Mr Hodge's submission that if licensees wish to market a property as having a certain feature, in order to make it attractive to buyers and achieve a higher price, then they must do their due diligence and take all reasonable steps to ensure that what they are saying about the property is correct.

**Ms Kek's appeal against penalty**

*Submissions*

[63] Ms Keating submitted that Ms Kek had shown remorse, and co-operation, by accepting that she had included an inaccurate statement regarding H5 treated timber in the marketing material for the property. She submitted that there was no evidence for the Committee's finding that Ms Kek's conduct was "self-serving".

[64] Ms Keating further submitted that even if the Tribunal determined not to overturn the finding of unsatisfactory conduct against Ms Kek, the penalty against her should be reduced.

[65] Mr Hodge submitted that the fine of $6,000 ordered against Ms Kek was not excessive, and properly took into account the seriousness of her conduct. He submitted that the penalty was consistent with the penalty purposes of deterrence and public protection.

*Discussion*

[66] The Committee referred to two previous decisions on complaints against Ms Kek. The first of these (Complaint C03012) concerned conduct in April-June 2013, where she was the listing salesperson for a property to be sold at auction, and sold the property to a customer before the auction date. This was contrary to the pre-auction protocols of the agency at which she was engaged at the time (not Bayleys). A prospective purchaser had made a complaint to the Authority that his offer (through a different salesperson) was not considered. In a decision dated 30 January 2014, Complaints Assessment Committee 20010 ("CAC20010") found Ms Kek guilty of unsatisfactory conduct. In a decision dated 26 March 2014, Ms Kek was censured and fined $900. CAC20010 recorded that Ms Kek's engagement with the agency had been terminated on 28 June 2013.

[67] The second decision (Complaint 10557) concerned conduct occurring in September 2015. Ms Kek was the listing salesperson for a property that was passed in at auction. A prospective purchaser made a post-auction offer (through another salesperson) which was declined by the vendor. Ms Kek sold the property to a customer of hers, and failed to give the offeror an opportunity to make an improved offer, and did not advise him or the salesperson he was working with, that there was other interest in the property. In a decision dated 23 May 2016, Complaints Assessment Committee 409 ("CAC409") found Ms Kek guilty of unsatisfactory conduct. In a further decision dated 26 August 2016, Ms Kek was censured, ordered to pay a fine of $6,000, and ordered to undertake further training as to misleading and deceiving conduct and misrepresentation.

[68] It is clear that although Mr and Mrs Morris's complaint is the latest in time, the conduct it was concerned with pre-dated the conduct complained of in Complaint C10557. The Committee was therefore incorrect in treating Mr and Mrs Morris's complaint as if it concerned conduct which had occurred after Ms Kek had been found guilty of unsatisfactory conduct on two previous occasions, such that an uplift in the penalty was appropriate to deter her from further offending. It was also incorrect in reasoning that a previous order for further training had been ineffective in deterring her from further offending: Ms Kek's unsatisfactory conduct in relation to marketing

the property bought by Mr and Mrs Morris had already occurred before she was ordered to undertake the training.

[69] We are also concerned as to the Committee's references to the findings in Complaints C03012 and C10557 that Ms Kek's conduct was "self-serving" and its conclusion that her conduct in the present case was also "self-serving", albeit in a more subtle fashion. We accept that as a result of the conduct that led to Complaints C03012 and C10557 Ms Kek achieved the sale of each of the properties concerned, and the resultant commission, rather than another salesperson in the agency concerned. However, the present case cannot be seen in that light.

[70] It is appropriate that we undertake our own assessment of the seriousness of Ms Kek's conduct, and determine the appropriate penalty.

[71] In each of her representations as to H5 treated timber, the ground floor stud height, and the "room for a pool", Ms Kek made positive representations of fact. She did not obtain any independent verification of the representations as to the timber treatment, or potential for a pool, or advise prospective purchasers that the information was not verified. Her marketing as to the H5 timber treatment was incorrect, and her statement that there was "room for a pool" was misleading. We accept that Ms Kek looked at the plans to determine the stud height, but she did not read them correctly, so gave incorrect information.

[72] Ms Kek's misrepresentation as to the use of H5 treated timber is the most serious of her misrepresentations. On its own, we assess it as mid to upper level unsatisfactory conduct. The misrepresentations as to the stud height and "room for a pool" do not increase the level of seriousness to any great extent.

[73] We have noted earlier that the first disciplinary finding against Ms Kek (by CAC20010 in Complaint C03012) was issued shortly after Ms Kek listed the property, and the penalty decision on that finding was issued shortly after Mr and Mrs Morris signed their agreement for sale and purchase. The circumstances of the C03012 complaint were different from those we are considering, so that an uplift in penalty for the purposes of deterrence is not indicated. Nevertheless, we would have expected

that the fact that a complaint had been made, a disciplinary investigation undertaken, and finding of unsatisfactory conduct made, would have alerted Ms Kek to the need to be completely aware of, and comply with, her professional obligations.

[74] We have concluded that the appropriate order is that Ms Kek is censured, and ordered to pay a fine of $5,000. In the light of the training Ms Kek was ordered to undergo in the penalty decision on Complaint C10557 (in respect of later conduct), we will not order her to undergo further training.

## B. Mr Bayley's appeal

### The Committee's substantive decision[7]

[75] The Committee recorded Mr Bayley's statements that he was "technically the qualified supervisor" for the Agency, but had "delegated general day to day supervision to Ms Dovey", and relied on her to report any issues, complaints, complicated instructions, or inconsistencies". However, during the period of Mr and Mrs Morris's purchase of the property in 2014, and their complaint to the Agency in 2017, Ms Dovey held a salesperson's licence. As such, she was not qualified to supervise and manage Ms Kek under s 50(1) of the Act. Notwithstanding that, she was named as the manager of the Agency on the agreement for sale and purchase signed by Mr and Mrs Morris, and she handled the initial complaint from them.

[76] The Committee found that Mr Bayley was "not just 'technically' the qualified supervisor, he was the qualified supervisor at relevant times". In order for him to provide proper supervision and management, he needed to become familiar with the work being carried out by salespeople, have regular communication with salespeople, and provide sensible and timely advice on a day-to-day basis.

[77] The Committee referred to its finding that Ms Kek had failed to ask for advice from the Agency regarding verification of the timber treatment for the property, or as to the stud height. It considered that the inclusion of timber treatment and stud height in advertising, when it had not been detailed in the agency agreement, should have

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7 Paragraphs 5.43–5.48.

been a red flag to an alert supervisor to make further enquiries, and to discover the incorrect information. It concluded that had Mr Bayley been alert to identifying and remedying potential problems with the property and Ms Kek, as required by a qualified supervisor, it was likely that Ms Kek's mistakes would have been discovered and corrected.

[78] The Committee concluded that Mr Bayley's being available to salespeople, and able to provide advice, did not constitute proper supervision and management, and that he had delegated his responsibility for proper supervision and management in a manner that did not comply with the requirements of the Act, Mr Bayley was in breach of s 50 of the Act.

**The Committee's penalty decision**[8]

[79] The Committee noted the inconsistency of the thrust of Mr Bayley's submission that he provided active day to day supervision, and that Ms Dovey only provided oversight and assistance, and the Committee's finding that Mr Bayley had delegated day to day supervision and management to Ms Dovey (who was not qualified). The Committee repeated its finding that Ms Dovey was not assisting or providing oversight, she was acting as the supervisor.

[80] The Committee assessed Mr Bayley's "total absence of supervision" to be in the mid to high level of unsatisfactory conduct. Having taken into account his previously unblemished disciplinary history, Mr Bayley was censured and ordered to pay a fine of $4,000.

**Mr Bayley's appeal against the Committee's substantive decision**

*Submissions*

[81] Ms Keating submitted that the Committee was wrong to find that adequate supervision would likely have avoided Mr and Mrs Morris's complaint. She submitted that whether there has been sufficient activity to comply with the requirements of s 50

8 Paragraphs 4.15–4.17.

of the Act will be fact-specific. She submitted that it is not reasonable that a supervisor review all marketing material, particularly that prepared by an experienced salesperson like Ms Kek.

[82] Ms Keating submitted that the Committee was wrong to find that Mr Bayley "delegated" supervision responsibilities to Ms Dovey. She submitted that Ms Dovey assisted him with day to day supervision, but it was not a delegation of authority, and Mr Bayley was actively involved in supervising salespersons at the Agency. She submitted that Mr Bayley was aware of listings, and that any issues would be highlighted to him, either by Ms Kek or Ms Dovey. She submitted that Mr Bayley was in close contact with Ms Dovey, and was able to respond immediately if any issue had been raised with him. She further submitted that it is relevant that Ray White's advertising of the property included the same inaccurate information regarding H5 treated timber, and was only removed when a prospective purchaser advised them of the error.

[83] Mr Hodge submitted that it was not being suggested that a supervisor should sit on a salesperson's shoulder. However, he submitted, information in a property booklet, and marketing material, should be reviewed by a supervisor. He submitted that a competent supervisor would have stopped at references to "H5 treated timber", "3.2 metre stud height", and "room for a pool", and ask how the salesperson obtained the information. If the salesperson responded that it came from the vendor, a competent supervisor would ask what verification there was. He submitted that this was not putting an unreal expectation on a competent supervisor, nor was it a counsel of perfection. He submitted that marketing material is the shop window for the transaction, and the importance of the representations was such that a supervisor should have been involved in the present case.

[84] Mr Hodge submitted that Mr Bayley had delegated the bulk of his supervision responsibilities to Ms Dovey who, as the holder of a salesperson's licence, was not qualified to provide the supervision required by s 50. He further submitted that such supervision as Mr Bayley did provide was reactive (dealing with issues brought to his attention), but that was insufficient to comply with s 50. He submitted that this was especially so in respect of the express representation in marketing material as to timber

treatment, which was a representation that the Agency would not normally make. He submitted that this was such an "obvious pitfall", and "flashing red light", that reasonably competent supervision should have picked it up.

*Discussion*

[85] Section 50 of the Act provides:

> **50 Salespersons must be supervised**
>
> (1) A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager.
>
> (2) In this section **properly supervised and managed** means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure–
>
> (a) that the work is performed competently; and
>
> (b) that the work complies with the requirements of this Act.

[86] The provisions of s 50 are reflected in r 8.3 of the Rules:

> 8.3 An agent who is operating as a business must ensure that all salespersons employed or engaged by the agent are properly supervised and managed.

[87] As the Tribunal said in its decision in *Maserow v Real Estate Agents Authority (CAC 404)*:[9]

> Supervision must be actual, it must be tailored to the circumstances of the agent and the property sold, it must involve actual involvement by the branch manager with the agent(s), including a knowledge and understanding of the issues with each of the properties sold by the agency, if any. … The branch manager should be alert to identifying potential problems rather than waiting for a possibly inexperienced agent to identify them. At regular meetings of staff branch managers should ask questions to elicit matters which might be of concern such as issues with the boundary, lack of code compliance, and disclosure of known defects and issues with the LIM. All of these matters should be considered by the branch manager and agent when a property is listed for sale and in regular reviews relating to the sale process,

[88] Every case must be judged on its merits and the particular facts of the case. We accept that not every breach of the Act or Rules by a salesperson will inevitably lead to a finding of a failure of supervision.

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9 *Maserow v Real Estate Agents Authority (CAC 404)* [2016] NZREADT 19, at [25].

[89] As noted by his Honour Justice Toogood in *Wang v Real Estate Agents Authority* the statutory obligation of supervision cannot be delegated to a salesperson.[10] We reject Ms Keating's submissions that Mr Bayley did not "delegate" his supervision responsibilities to Ms Dovey. In a response to an inquiry from the Authority's investigator Mr Bayley's solicitors advised:

> Tony Bayley actively supervises the salespeople at the Remuera branch, including Ms Dovey. Ms Dovey is the Regional General Manager Eastern Bays and she and Mr Bayley ensure that all salespeople are adequately supervised on a day to day basis. Mr Bayley has delegated general day to day supervision to Ms Dovey who oversees all listings by way of weekly meetings, ensure that al licensees report issues promptly, reviews listings and agreements for sale and purchase, and ensures that licensees receive regular training. Ms Dovey is also available should any issues arise and encourages all salespeople to immediately report any concerns, even if minor. Ms Dovey reports to Mr Bayley on a daily basis. Mr Bayley, as the supervising agent, provides sufficient oversight, direction, and control to ensure that all salespeople are adequately supervised by:
>
> 1. Delegating day to day supervision to Ms Dovey who has 16 years' experience at Bayleys, is a leader and representative in the real estate industry, is one of Bayleys' highest performers, exceeds the industry's standards for a management position, and who has now gained her branch manager qualification (as of 19 September 2018);
>
> 2. Telephoning Ms Dovey on a daily basis to discuss new listings (particularly those that are not straightforward), any issues that have arisen with properties, any complaints, potential complaints, any problems that's salespeople have encountered, and training requirements etc;
>
> 3. Meeting with Ms Dovey on a weekly basis; and
>
> 4. Requiring Ms Dovey to immediately report any issues, complaints, complicated instructions, or inconsistencies.
>
> Mr Bayley, on behalf of Bayleys, takes an active role as Compliance Manager in ensuring that all licensees are adequately supervised, Mr Bayley is available to all salespeople and is able to provide them with advice. In particular, Bayleys provides sufficient direction and control through its processes, training, and staff appointments to ensure that all salespeople are properly supervised and managed.

[90] We accept Mr Hodge's submission that Mr Bayley's supervision was reactive, rather than proactive. He relied on being advised of potential issues by Ms Dovey or Ms Kek. The description of the supervision structure set out above does not indicate any personal oversight by Mr Bayley of Ms Kek, or any of her work.

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[10] *Wang v Real Estate Agents Authority* [2015] NZHC 1011, at [36].

[91] We referred earlier to the previous disciplinary decisions against Ms Kek. It appears that at the time she listed and marketed the property, Ms Kek would not have been engaged at the Agency for more than six months. The listing agreement was signed on 12 January 2014. CAC20010's decision on Complaint C03012 was issued on 30 January 2014. We note that the marketing material for the property was being finalised at around this time (evidenced by emails between Ms Kek and the vendor on 28 and 29 January 2014). The auction of the property was scheduled for 19 February 2014.

[92] Notwithstanding her previous experience in the industry, Ms Kek was at the time reasonably new to the Agency. A finding of unsatisfactory conduct was made against her around the time she was marketing the property. This should have alerted Ms Kek's supervisor to a need for more than reactive supervision (relying on her to raise an issue). Further, the marketing material included positive representations on matters not normally included by the Agency in marketing material (in particular, in relation to the used of treated timber and stud height). We are not persuaded that the Committee was wrong to find that the inclusion of the timber treatment and stud height in the advertising material when it was not detailed in the listing agreement should have been a red flag to an alert supervisor to make further enquiries and discover the incorrect information prior to marketing commencing.

[93] We are not persuaded that the Committee was wrong to find that Mr Bayley failed to provide proper supervision and management of Ms Kek, in breach of s 50 of the Act.

**Mr Bayley's appeal against penalty**

*Submissions*

[94] Ms Keating submitted that the Committee was wrong to assess Mr Bayley's conduct as being mid to high level unsatisfactory conduct, and the penalty imposed was too high. She submitted that in the circumstances, Mr Bayley's breach is at the low end of the scale. She further submitted that Mr Bayley does not have any history of disciplinary findings against him.

[95] Mr Hodge submitted that the penalty imposed by the Committee was consistent with its finding that there was a total absence of supervision by Mr Bayley.

*Discussion*

[96] We do not accept Ms Keating's submission that Mr Bayley's conduct should have been assessed as being at the low end of the scale of unsatisfactory conduct, and we are not persuaded that it was not open to the Committee's to assess it as "mid to high level". However, we have concluded that the Committee did not give sufficient recognition to Mr Bayley's previously unblemished disciplinary history. We have concluded that the order to pay a fine of $4,000 must be quashed and replaced by an order that he pay a fine of $3,000.

## C. The Agency's appeal

### The Committee's decisions

[97] The Committee recorded that the Agency was obliged under r 8.3 of the Rules to ensure that its licensees were properly supervised and managed. It found that the Agency had failed to ensure that all its salespeople were properly supervised and managed by a branch manager or agent, in breach of r 8.3. It also found that the Agency had misled Mr and Mrs Morris in respect of Ms Dovey's role as manager, in breach of r 6.4.[11]

[98] In its penalty decision, the Committee referred to two previous decisions concerning the Agency's supervisory processes. The first was CAC409's decision on Complaint C10057, involving Ms Kek. In that case, CAC409 found that the Agency's supervision was not adequate, or ineffective, in breach of r 8.3. It noted that Ms Dovey had the "title and status of a branch manager", but did not hold a branch manager's licence. It found that this was misleading, or potentially misleading to clients and customers. It was also found that a branch manager who did not hold a branch manager's licence was not able to provide proper supervision required by s 50 of the Act. The Agency was censured and ordered to pay a fine of $5,000.

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[11] Committee's substantive decision, at paragraphs 5.50–5.54.

[99] The second decision referred to was Complaint C17280. There, a salesperson made a positive and misleading misrepresentation as to the location of the boundary of a property being marketed. In a substantive decision issued on 12 July 2017, Complaints Assessment Committee 414 ("CAC414") found that the salesperson was "supervised" by a Regional General Manager, who as a licensed salesperson was not qualified to provide supervision under the Act. CAC414 stated that the Agency had to take responsibility for the marketing of properties listed with it, and take steps to ensure that marketing was not misleading. In a penalty decision dated 12 September 2017, the Agency was censured and ordered to pay a fine of $8,000. CAC 414 recorded that the penalty reflected the fact that this was not the first finding of unsatisfactory conduct against the Agency for supervision failings.

[100] In relation to penalty in the present case, the Committee acknowledged that the conduct complained of had occurred around March 2014, and that the Agency had taken positive steps to upskill its licensees since the decision in Complaint C10557 was issued in May 2016. However, it was concerned that at the time the Agency received Mr and Mrs Morris's complaint in July 2017, more than one year after that decision, Ms Dovey was still actively in the role of day to day supervisor. It noted that she did not obtain a branch manager qualification until 19 September 2018.

[101] The Committee noted the maximum available fine against an agency of $20,000. It considered it to be a serious matter that up until Ms Dovey completed the branch manager qualification, the Agency had continued to be in breach of its supervisory duties under s 50. Having referred to the penalty imposed in Complaint C17280, the Committee ordered censure and imposed a "mid-level fine of $10,000".[12]

*Submissions*

[102] The Agency's submissions focussed on the penalty orders made against the Agency. Ms Keating submitted that prior to the CAC409's decision in Complaint C10577, issued on 23 May 2016, Bayleys was not aware that experienced salespeople, such as Ms Dovey, could not supervise and manage staff. She submitted that this was the Agency's understanding at the time Ms Kek marketed the property, in 2014. She

[12] Committee's penalty decision, at paragraphs 4.19–4.24.

further submitted that following that decision, the Agency took rigorous steps to comply with the requirements of the Act, including requiring all salespersons in management positions to obtain branch manager qualifications.

[103] Ms Keating submitted that in pursuing that course, those salespersons had been required to repeat the entire training process, from salespersons' certificates onwards. She further submitted that without closing down offices, the Agency could not have done more to ensure adequate supervision while the requisite people obtained the branch manager qualification.

[104] Ms Keating submitted that the Committee failed to adequately take into account that the Agency had undertaken to improve its supervisory processes, and that previous penalty orders had been effective. She submitted that the Committee's determination was overly punitive, and not in keeping with the purposes of the Act. She submitted that the Agency should not have been penalised as a result of its having taken the time required to complete the full training.

[105] Mr Hodge acknowledged that the Agency had responded appropriately to the decision in Complaint C10557, by requiring further training for salespersons in management positions.

*Discussion*

[106] The Tribunal is concerned as to the submission that the Agency was not aware, before CAC409's decision in Complaint C10557 on 23 May 2016, that experienced salespersons could not manage staff. Pursuant to s 2(2) of the Act, s 50 has been in effect since 17 November 2009. We do not consider there to be any ambiguity in the provision that "a salesperson must, in carrying out real estate agency work, be properly supervised and managed by an agent or property manager".

[107] The Committee accepted that the Agency took steps after the decision in Complaint C10557 towards having any salespersons in management positions complete the training required for a branch manager's qualification. The Committee's concern in the present case was that while Ms Dovey was undertaking the training, she

remained actively in the role of day to day supervisor at the Agency's Remuera office, in breach of s 50. It regarded this as a serious continuing breach. We are not persuaded that the Committee was wrong to do so.

[108] However, we accept Ms Keating's submission that the fine of $10,000 was overly punitive. In making that order, the Committee referred to the penalty order against the Agency in Complaint C17280, of $8,000. The fine of $10,000 ordered in the present case represented an uplift of $2,000. Such an uplift may have been justified on the grounds of a need for a deterrent order on the grounds of repeated offending after adverse findings, where it is considered that an offender has disregarded the findings and has not been deterred by previous penalty orders.[13] Such reasoning cannot be applied here.

[109] We have concluded that the proper penalty order is for the Agency to be censured and ordered to pay a fine of $8,000; that is, the same as that ordered in Complaint C17280, which involved a similar failure of supervision in respect of representations made in marketing a property.

**Outcome**

[110] Ms Kek's appeal against the finding of unsatisfactory conduct is dismissed. Her appeal against penalty is allowed to the extent that the order to pay a fine of $6,000 is quashed and replaced by an order to pay a fine of $5,000.

[111] Mr Bayley's appeal against the finding of unsatisfactory conduct is dismissed. His appeal against penalty is allowed to the extent that the order to pay a fine of $4,000 is quashed and replaced by an order that he pay a fine of $3,000.

[112] The agency's appeal against the finding of unsatisfactory conduct is dismissed. Its appeal against penalty is allowed to the extent that the order that it pay a fine of $10,000 is quashed and replaced by an order that it pay a fine of $8,000.

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[13] See, for example (in the criminal law context), *Beckham v R* [2012] NZCA 290, at [84] and *Hewitt v R* [2018] NZCA 374, at [76]/

[113] All fines are to be paid within 20 working days of the date of this decision.

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

_____
Hon P J Andrews
Chairperson

_____
Ms C Sandelin
Member

_____
Mr N O'Connor
Member