BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 34

READT 002/2020

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	TERESA and BRIAN HAMMOND Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 520) First Respondent
AND	SONIA TAFILIPEPE Second Respondent

Hearing:	23 July 2020, at Christchurch
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Appearances:	Mrs Hammond, on behalf of the appellants Mr R W Belcher, on behalf of the Authority Mr W A L Todd, on behalf of Ms Tafilipepe
Date of Decision:	11 August 2020

DECISION OF THE TRIBUNAL

Introduction

[1] On 10 December 2019, Complaints Assessment Committee 520 ("the Committee") issued a decision that it would take no further action on a complaint made by Mr and Mrs Hammond[1] against Ms Tafilipepe ("the Committee's decision").[2] The appellants have appealed against that decision.

Background

[2] Ms Tafilipepe is a licensed agent. In January 2017 she entered into a listing agreement to market a property in Bromley, Christchurch, for sale ("the property"). It had sustained damage in the Christchurch earthquakes, but EQC-approved repair work had been carried out. The property did not sell at the time.

[3] In October 2018, the vendor went back to EQC, as repairs had not been completed correctly, and further damage had been sustained following aftershocks. On or about 5 October 2018, the vendor received a letter from Mr David Jones, an EQC Settlement Specialist, certifying as to further repair work to be undertaken ("the David Jones letter"). The specified work included the following:

> … we noted some cracks in the cement sheet joins on the exterior cladding down the pathway leading to the front door and under the window to the lounge. It appears as though the sheet joins were not meshed as previously allowed for, so I will also include an allowance for this to be repaired. This would involve meshing the sheet joins/cracks, then plastering and painting corner to corner. I'll match the previous scope of works repair measurements and costs to ensure all cracks/sheet can be addressed.

Mr Jones also said:

> As discussed, please forward me your bank details so I can proceed with payment. Any queries or issues, please let me know.

[4] Ms Tafilipepe listed the property again on 18 January 2019.

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1 In this decision Mr and Mrs Hammond will be referred to as "the appellants", unless it is necessary to refer to them individually.

2 Complaint C30922, Decision to take no further action, 10 December 2019.

[5] The appellants had owned a property in Christchurch. It, too, had sustained earthquake damage. They had received a settlement payment in respect of the damage, and sold their own property "as is where is" rather than have it repaired.

[6] The appellants viewed the property on 17 and 18 February 2019. On 18 February Mrs Hammond made an offer to buy it, conditional on her obtaining finance, a satisfactory LIM, her and the vendor's solicitors' approval, arranging satisfactory insurance, a satisfactory building report, and the assignment of the benefit of any outstanding claims for earthquake damage. The offer was accepted by the vendor, and the deposit of $41,000 was paid to Ms Tafilipepe's agency. Settlement was to occur on 29 March.

Building reports

[7] The appellants obtained a report on the property from Property Check (N.Z.) Limited, dated 20 February 2019 ("the Property Check report"), which was emailed to them on 25 February. This stated under the heading "Conclusions":

> The exterior walls are clad with direct fixed fibre cement sheeting. This type of construction is now not permitted in today's construction methods without a drained and ventilated cavity due to the inherent weathertightness risks. There are a number of defects identified to the dwelling which may be allowing moisture ingress at present or in the future. It is unknown at this time if any moisture damage has occurred and if so, to what extent. Repairs may include timber and cladding replacement. The defects include cracking at the sheet joins and also at windows and doors, gaps at penetrations and also broken sections of sheeting. It is recommended to engage the services of a cladding specialist to identify the costs for repair and also carry out further investigation to check for any moisture presence within the timber framing.

[8] The appellants obtained a further report on the property from Synergy Property Inspections, dated 28 February 2019 ("the Synergy report"). This focussed on non-invasive testing for moisture with a scanner, which the appellants preferred over invasive testing. Ms Tafilipepe was present at the property when the Synergy inspector carried out his inspection, as was Mr Hammond. During the inspection, Ms Tafilipepe sent an email to Mrs Hammond advising her of three "hair line cracks and they will be fixed".

[9] The Synergy report stated in its "Overview of Inspection" that:

> As requested we took multiple moisture meter readings throughout the interior. The instrument used is a non-invasive Trotec T660 using the capacitance method to determine the likelihood of the presence of moisture.
>
> Readings were taken on internal walls with attention to internal and external corners and wall and joinery junctions. The readings are typical and within acceptable levels for plaster board lined Radiata Pine framed walls in NZ conditions, including in the area of partially displaced wall cladding.
>
> Higher readings were at the skirted bottom plates as to be expected.
>
> Examination of the lower roof cavity showed some light mould growth over wall insulation adjacent to the shower and reduced loft of ceiling insulation resulting in a lower thermal efficiency.
>
> Overall we found the areas of inspection to be in an average to above average condition taking into consideration the age and use of the dwelling.
>
> No mildew, mould growth or any obvious evidence indicative of water ingress to internal linings was detected.
>
> In our professional opinion the exterior wall cladding provides a watertight envelope.

Finance

[10] At the time that the appellants sold their property, they were advised by their existing mortgage provider, SBS, that they would be able to transfer their existing mortgage over to a new property. However, they also required loan finance to make some improvements to it. Ms Tafilipepe introduced them to a mortgage broker to assist with obtaining finance.

[11] On 22 February, Mrs Hammond advised Ms Tafilipepe that their bank (SBS) "is concerned about leaky home issues and weathertightness". She added "We will be ok won't we. The house didn't look to be hiding anything". Mrs Hammond emailed a copy of the Property Check report to her SBS banker, and her solicitor, on 26 February.

[12] On 27 February, there was an exchange of emails between Ms Tafilipepe and Mrs Hammond:

> 3.19 pm, Ms Tafilipepe to Mrs Hammond: I just spoke to [the mortgage broker] and he is going to ring you but what he is saying that if you are happy tomorrow with the outcome of the report and get the insurance sorted etc, then you are best just to purchase the house now and once you are in the house then go back to him with a detailed list and pricing for the updates to the house as they are improving the value of the home and you have a lot of equity in the home it will

be easier to do it that way, then it takes the stress off you for now and you can move in on that date 29 March.

3.29 pm, Mrs Hammond to Ms Tafilipepe: So he doesn't think we will get a mortgage.

3.37 pm, Ms Tafilipepe to Mrs Hammond: Hi How much are you talking to do these things, maybe not the gate at this point? Like what is the difference between your house sale and payout compared to $410 for [the property].

3.46 pm, Mrs Hammond to Ms Tafilipepe: Is there going to be a problem with the banks.

4.23 pm, Mrs Hammond to Ms Tafilipepe: I don't know what to do now. I don't. The mortgage broker is ringing the lawyer. Please tell me, is the house no good.

4.56 pm, Ms Tafilipepe to Mrs Hammond: Hi with mortgages a few things factor in, it's just you going on the mortgage so only one person, it goes on weekly income even though you can't afford the repayments.
The house is good as far as I believe but [tomorrow] the guy will be able to confirm if any issues or not.
They also look at mainly changing mortgages over for house only not extra expenses to do the house up.
If you can just buy the house now would be good once all the checks have been done then go for more money later for repairs then that's a better process to do it that way for you guys with your situation.
Is there money you still need to borrow just to get the house?

8.14 pm, Mrs Hammond to Ms Tafilipepe: That mortgage consultant said there would be no problem transferring the mortgage. … Just a big mess and there is no heating, we were going to invest in a good pellet fire, …

8.36 pm, Ms Tafilipepe to Mrs Hammond: Hi before you sold your house did you talk with your bank about transferring the mortgage over? …

8.40 pm, Mrs Hammond to Ms Tafilipepe: [The SBS banker] said there would be no problem changing it over if it stayed just with me. But she changed her mind when it was the cladding issue. …

…

8.47 pm, Ms Tafilipepe to Mrs Hammond: Did she say you could do that? You could transfer the mortgage and use some of the money for repairs?

9.40 pm, Mrs Hammond to Ms Tafilipepe: Yes but then she said get another place that doesn't have the cladding, we are trying to look out for you and don't want you buying a dodgy house that you will have to spend lots of money on. The mortgage guy said I will get you finance, it's not your worry, but after talking with SBS he said there is no point looking at any other bank and you won't get insurance on it with anyone either at this stage till you are in the clear but now he is saying it's about the whole picture, wages, job, everything. I don't know what he said to our lawyer. Is he trying to help. I don't know. …

[13] The exchanges between Mrs Hammond and Ms Tafilipepe continued on 28 February:

> 4.31 pm, Mrs Hammond to Ms Tafilipepe: Hi Sonia. Could you please send us the paperwork that says who is going to repair the repairs necessary so we can send them to our lawyer. I sent the scope of works and quote for the painting but don't know if there is anything else I am supposed to have sent. Thank you for all your help. As Brian said, we should have got you to sell out house.
>
> 5.00 pm, Ms Tafilipepe to Mrs Hammond: Hi I sent it via text. When you get the report from guy forward it to me, I am sorting other builder out.
>
> 5.56 pm, Mrs Hammond to Ms Tafilipepe: Hi Sonia. We don't know how to get to the text. Or how to forward it on. Can we have it through email? We only have the basics. Have no phone internet.
>
> 6.00 pm, Ms Tafilipepe to Mrs Hammond: What's your lawyers email.

Insurance

[14] Ms Tafilipepe introduced the appellants to an insurance broker to assist with obtaining insurance cover. They asked Ms Tafilipepe to assist them with obtaining necessary information from the vendor and filling in the requisite forms, as they did not have a scanner or printer. Mrs Hammond emailed a copy of the Property Check report to the insurance broker on 26 February.

[15] On 1 March, Mrs Hammond sent Ms Tafilipepe a copy of the Synergy report. She then emailed Ms Tafilipepe:

> I sent the [insurance broker] the report anyway. Do I need to [send] the crap one? I don't know if I have or not. [probably] have?

Ms Tafilipepe replied:

> No just good one

[16] On 4 March, at 10.32 am, Mr Arthur advised Mrs Hammond and Ms Tafilipepe that insurance cover had been approved by Vero, on standard terms, and provided them with a Certificate of Insurance.

Confirmation of agreement for sale and purchase

[17] Ms Tafilipepe emailed Mrs Hammond's solicitor, Ms Grimshaw, on 1 March, attaching a copy of the David Jones letter:

> I have been helping [the appellants] with the purchase of this property.
>
> The Property Check building report was terrible and didn't reflect the property. They said they did moisture readings but the report didn't read like that as it was a statement on the moisture, they told me that if the findings are low they don't put it in the report and the findings were low. They talked about cracks in cladding there are 3 small hairline cracks which aren't deep and the letter provided shows that they will be fixed up, in the window the cracks in one place are painting cracks only. The top manhole in the bathroom I was able to open for the second inspection and the manhole in the garage doesn't open as it's a subfloor only for upstairs. She also said there was no spouting from the balcony but the second inspection guy showed there is and I have a photo.
>
> This letter shows that the cracks not fixed will be sorted and Vendor is onto that.
>
> Second inspector showed and will provide a report but the moisture levels throughout the whole house are low, lower than a modern townhouse he said.

[18] On 28 February and 1 March, there was an exchange of emails between Ms Grimshaw and a legal executive acting for the vendor, Ms Adams. On 28 February, Ms Grimshaw provided copies of the relevant pages of the Property Check report, and referred to the "multiple concerns around the cladding", that might be allowing moisture ingress. She required the vendor to "engage a qualified licensed building practitioner and cladding specialist to identify and attend to all defects in full", to be completed at least 3 working days prior to settlement, with proof of works via invoices and sign-offs.

[19] Ms Adams responded on 1 March advising that "swarms of inspectors" had visited the property the previous day, and that the vendor had been advised by one inspector that "any moisture present was within allowable levels". Ms Adams advised that the vendor had recently spent $2,500 on repainting and moss removal and was not prepared to do anything further to the property. She also advised that the vendor had provided all EQC information that she had to Ms Tafilipepe.

[20] Ms Grimshaw forwarded the response to Mrs Hammond on 1 March, asking that she discuss the vendor's "unwillingness to fix the cracks" with her banker and let Ms Grimshaw know whether she was willing and able to proceed despite those issues.

[21] On 2 March, Ms Tafilipepe sent an email to Mr Jones, stating that the builders report had shown "a few cracks still not fixed". She asked Mr Jones if "someone is still coming back to fix these minor things". Mr Jones declined to discuss the matter

with her, without a deed of assignment or agreement from his customer. On 4 March, at 10.24 am, Ms Tafilipepe reported to Ms Grimshaw that the vendor would be contacting Mr Jones to "refix" the repairs, and was waiting on confirmation from him.

[22] The confirmation date for the conditions on Mrs Hammond's offer to buy the property were to expire on 4 March. At 12.48 pm, Ms Grimshaw wrote to Ms Adams, requesting a full sign-off for the EQC claim, confirmation that the vendor would ensure all repairs were completed prior to settlement (including repairs to cement joins in the exterior cladding), confirmation that the vendor would replace mouldy insulation in the roof cavity, and confirmation that the vendor would replace defective taps in the laundry and one bathroom. In light of the need to obtain responses on those matters, Ms Grimshaw also asked for an extension of two days before confirmation.

[23] Ms Adams responded at 2.32 pm that all information had been provided to Ms Tafilipepe, and that she had made a telephone call to the builder about the cracks in the cement sheet joins and was awaiting his reply. The vendor declined to effect any repairs to the insulation or taps, and declined to extend the period for confirmation.

[24] Ms Grimshaw emailed a copy of Ms Adams' response to Mrs Hammond at 2.38 pm, describing it as "not helpful". She asked what Mrs Hammond wanted her to do: whether she would confirm despite the remaining issues with the roof, taps, mould, and the missing EQC sign-off and whether she wanted to cancel the contract if the vendor did not agree to fix the cladding.

[25] At 4.07 pm, Ms Adams emailed Ms Grimshaw and Ms Tafilipepe, advising that:

> The cladding issue relates to EQC works. If our client is unable to get this attended to prior to settlement, our client will assign the residual benefits in the claims on settlement. Your client will be able to continue on with the process after settlement.
>
> …

[26] At 4.20 pm, Ms Tafilipepe emailed Ms Grimshaw, advising that:

> I just spoke with the buyers and they are getting advice from lots of different people and its confusing them. I said just to speak to you and to clarify if the cracks are covered under EQC and if the assignment of claims is handed over to them are they entitled to sort this out. The cracks are very small and the second builder told us they weren't deep for moisture damaging. The taps

> situation they saw this when they viewed the property and they aren't buying a new house. It was the vendor that stated that the whole unit needed to be replaced not a builder or anyone else. The mould on the ceiling has been treated and takes a while to come off.
>
> I have tried to contact the vendor myself but she isn't taking my calls.

[27] Following a further email from Ms Adams confirming that the vendor was not prepared to grant a further extension to confirm the contract, Ms Grimshaw advised Ms Adams:

> Our clients are disappointed that they cannot get further information from your client on the repairs nor confirmation that EQC will attend to the repairs to the cladding. However, they have instructed me to confirm this contract as unconditional with settlement for the 29th March 2019. This is on the basis that the residual rights in all claims will be assigned to her on settlement, as per the contract.

Post-confirmation

[28] On 5 March, Mrs Hammond emailed Ms Tafilipepe, advising that she was getting legal advice as Ms Tafilipepe had told her to send only the second (Synergy) report to the insurance broker. She said she hoped that Ms Tafilipepe had not "stitched me up with an uninsured house", and that if she had been sold an "as is where is partly-fixed home with no cover", at $40,000 above the government valuation, she would be devastated.

[29] Ms Tafilipepe responded that she had said to send the Synergy report because Mrs Hammond had already provided the Property Check report, and that the house was fully insured. She added that she was talking with the builder who did the work on the house to see when he could return and fix the cracks. Ms Tafilipepe also said that the mortgage broker had advised that he had "gone to the bank to see if you can get finance".

[30] There was a further exchange of emails between Mrs Hammond and Ms Tafilipepe on 7 July, in which Mrs Hammond said that Ms Tafilipepe had said to send only the "good" report. She also said that Ms Tafilipepe "wouldn't give me all the paperwork", which she could have obtained from EQC, and Ms Tafilipepe responded that the house was fully insured, and that as the insurance was with Vero, who were the previous insurers, they would have had all the documents from the vendor "as she

went along". Ms Tafilipepe added that nothing had been hidden, and "everything is above board".

[31] Ms Grimshaw sought confirmation from Ms Tafilipepe on 18 March that EQC would attend to the repairs as soon as possible, and whether EQC would provide a sign-off for the works. Ms Tafilipepe responded that:

> The EQC has provided a letter on what was to be done which was given to the contractor and contractor is going back to fix those missed.
>
> It is very minor stuff as the buyer has seen, 3 small hairline cracks and the stuff mentioned by the builder by the window sills is small as well, so I don't believe they will do a sign off as they didn't do this with the other recent work. It was the main work they completed and signed off.
>
> I will do a pre-inspection with the buyers to ensure that they are happy with what has been completed.

[32] Ms Grimshaw asked for written evidence of the work so that it could be added to the appellants' claims information, and Ms Tafilipepe said she would "see what I can do".

[33] On 25 March, Ms Adams advised Ms Tafilipepe:

> On Thursday 21 March, it was mutually agreed between the parties that the sale of the [property] will not proceed. The sale of [the property] has therefore "fallen through" and has been cancelled.

[34] The appellants forfeited the deposit of $41,000.

The appellants' complaint

[35] The appellants complained to the Authority about Ms Tafilipepe on 8 April 2019. Their key issues with her conduct, as stated in the Committee's decision, were that Ms Tafilipepe:[3]

> a) Badgered and pressurised the [appellants] to proceed with the purchase notwithstanding the unfavourable building report;
> b) Led them to believe the property was fully repaired when it wasn't and assured them [the] vendor was getting some cracks in the cladding sorted;
> c) Knew there was an issue with the hot water plumbing at the property which she did not disclose;

[3] Committee's decision, at paragraph 1.4.

d) Pushed them to obtain unsuitable finance;

e) Advised them to only disclose a second building report to their intended insurer;

f) Failed to disclose the property might be subject to potential weather tightness issues.

The Committee's decision

[36] The Committee recorded in its decision that it considered the complaint by reference to the following rules in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"): rr 6.2 (under which licensees must act in good faith and deal fairly with all parties engaged in a transaction), 6.3 (under which licensees must not engage in any conduct likely to bring the real estate industry into disrepute), 6.4 (under which licensees must not mislead customers or clients, nor provide false information, nor withhold information that should by law or in fairness be provided), 9.2 (under which licensees must not engage in any conduct that would put a prospective client, client, or customer under undue or unfair pressure), and 10.7 (which sets out licensees' duties regarding disclosure of hidden or underlying defects.

[37] With respect to the complaint that Ms Tafilipepe misrepresented the property in stating that all EQC repairs had been completed, the Committee found that as a result of the David Jones letter (referred to in paragraph [3], above), Ms Tafilipepe knew when she commenced marketing the property in early 2019 that not all EQC work had been completed, and that it was misleading, and a breach of r 6.4 of the Rules, to advertise the property as being fully repaired.

[38] However, the Committee exercised its discretion under s 80(2) of the Act not to make a finding of unsatisfactory conduct, and to take no further action on the complaint. This was on the grounds that there was no evidence from which it could conclude that the misrepresentation was deliberate, the David Jones email was disclosed to the appellants, the fact that the cracking at the sheet joints was yet to be repaired was known to the appellants when they instructed their solicitor to make the agreement for sale and purchase unconditional, and it was not possible for the

Committee to conclude that the appellants were materially affected by the misrepresentation.[4]

[39] In all other respects the Committee either found that the appellants' complaints were not proved, or decided that it would take no further action on them:

[a] It found it not proved that Ms Tafilipepe failed to act in good faith and deal with the appellants fairly, or that she put undue or unfair pressure on them to make the agreement for sale and purchase unconditional. It noted that the appellants' decision to confirm the agreement was made after they had received legal advice.[5]

[b] It found it proved on the evidence that Ms Tafilipepe had told the appellants that sheet join cracks would be repaired. However, it found that the vendor's representation to Ms Tafilipepe was not that the vendor would personally fix the cracks; rather, it was that they would be fixed under the EQC claim. In the circumstances, the Committee did not find it misleading for Ms Tafilipepe to say that the sheet join cracks would be repaired, and decided to take no further action on that complaint.[6]

[c] It noted that the appellants had not said what the hot water plumbing issue was. However, the Committee noted that the Property Check report disclosed defects with taps in the laundry and a bathroom, but also noted that there was nothing in the evidence which pointed to Ms Tafilipepe having knowledge of this and failing to disclose it. On the evidence, the Committee found that this complaint was not proved.[7]

[d] It found there was no evidence from which it could conclude or infer that the appellants were offered unfair or unsuitable finance, or placed under

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4 Committee's decision, at paragraphs 3.20–3.33, citing *Vosper v Real Estate Agents Authority* [2017] NZHC 53.
5 Committee's decision, at paragraphs 3.8–3.19.
6 Committee's decision, at paragraphs 3.34–3.50.
7 Committee's decision, at paragraphs 3.51–3.55.

unfair pressure to obtain unsuitable finance, such that this complaint was not proved.[8]

[e] The Committee noted that Ms Tafilipepe had admitted that she had told Mrs Hammond to send the insurance broker only the second (Synergy) report, but had said that it was because the broker already had the first (Property Check) report. The Committee also referred to an email from the broker to Mrs Hammond sent on 20 March 2019, advising that Vero had previously been supplied with the Property Check report, and an email from Mrs Hammond to the Authority's facilitator dated 1 May 2019, in which she said that "It looks like I did send the Property Check report." It found that put into the context of the broker already having the first report, no conduct issue arose from Ms Tafilipepe's telling Mrs Hammond to send only the second report. The Committee therefore determined to take no further action on that complaint.[9]

[f] It found that there was no evidence from which it could be concluded that there was a weathertightness problem with the property, and on the evidence available to the Committee, the complaint that Ms Tafilipepe failed to disclose a risk of weathertightness issues was not proved.[10]

The appellants' appeal

[40] Mrs Hammond summarised the grounds of the appeal in the Notice of Appeal as follows:

> I based my decision to buy the house assuming and trusting what [Ms Tafilipepe] was saying. I was reassured over and over. I wasn't given the true facts and was misinformed and trusted what we were told. Despite what the lawyer advised me, I relied on the repeat reassurance from numerous emails that the house was ok but wasn't, and the repairs would be fixed but were never going to be. We were lied to we felt about the whole situation and the condition of the house.

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8 Committee's decision, at paragraphs 3.56–3.61.
9 Committee's decision, at paragraphs 3.62–3.72.
10 Committee's decision, at paragraphs 3.73–3.81.

[41] As summarised by counsel for the Authority, Mr Belcher, the overarching issue for the Tribunal to determine is whether the Committee erred in its decision and, more specifically, whether it erred in its factual findings, whether it erred in failing to find a breach of any other Rules in its assessment of Ms Tafilipepe's conduct, and whether it erred in deciding to take no further action on the appellants' complaint.

Approach to the appeal

[42] The Committee recorded that its decision to take no further action on the appellants' complaint was made under s 89(2)(c) of the Act. An appeal against a Committee's decision under s 89(2)(c) proceeds as a "general" appeal: that is, the appellants are required to establish that the Committee was wrong to make that decision.

[43] The Committee's decision to take no further action against Ms Tafilipepe following its finding that her advertising the property as having all EQC work completed was a misrepresentation, in breach of r 6.4 of the Rules, was made pursuant to its discretion under s 80(2) of the Act. In an appeal against the exercise of a discretion, the appellants are required to establish that the Committee made an error of law, took into account irrelevant considerations or failed to take relevant considerations into account, or was plainly wrong.

Preliminary issue: application to submit further evidence

[44] Mrs Hammond applied for leave to submit further evidence in support of her appeal. This comprised an email chain on 1 March 2019 in which she asked Ms Tafilipepe if she needed to send the insurance broker the "crap" report, Ms Tafilipepe replied "No just good one", and Mrs Hammond responded "I thought that too",[11] and a letter of support from a licensee who had previously acted for her, dated 4 June 2020.

[45] Mrs Hammond submitted that she had had difficulty when providing emails to the Authority and realised later that although she had provided the email requesting

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[11] The email chain is set out at paragraph [15] of this decision.

advice from Ms Tafilipepe, she had not provided Ms Tafilipepe's response. She submitted that the Tribunal should have the whole picture.

[46] The Tribunal sought submissions on behalf of the Authority and Ms Tafilipepe. Mr Todd submitted on behalf of Ms Tafilipepe that the licensee's supporting letter is hearsay, and has no probative value. He submitted that the email chain should not be admitted, as Ms Tafilipepe accepts that she told Mrs Hammond to send the Synergy report to the insurance broker, against the background that she was aware that Mrs Hammond had already sent him the Property Check report.

[47] Mr Belcher advised that the Authority abides the Tribunal's decision on the application, but made submissions as to the approach to be adopted to the application.

[48] The Tribunal advised the parties at the hearing that the email chain between Mrs Hammond and Ms Tafilipepe would be admitted. First, it is clear from the email communications set out above that Mrs Hammond had difficulty with sending and receiving emails. Secondly, we accept that Ms Tafilipepe's email to Mrs Hammond "No just good one" was in response to Mrs Hammond's request for advice as to whether to send the broker the "crap" report. Ms Tafilipepe accepts that she told Mrs Hammond to send only the Synergy report. It assists the Tribunal to have the complete email chain regarding this request and response.

[49] The Tribunal also advised the parties that the support letter would not be admitted. It records what the author has been told by the appellants, and concludes that a "closer examination" of Ms Tafilipepe's conduct is warranted. It contains no evidence that is cogent or material to the issues the Tribunal is required to consider.

Was the Committee wrong to decide to take no further action on the complaint that Ms Tafilipepe misrepresented the property as having had all EQC repairs completed?

Submissions

[50] Mrs Hammond submitted that the property was falsely advertised as having had all EQC works completed. She submitted that the fact that they had not been completed was withheld from her, as she did not see the David Jones letter until she

received the Bundle of Documents for the appeal. She submitted that despite repeated requests, the appellants were never provided with the full EQC documentation, or sign-off documents.

[51] Mr Todd submitted that the evidence before the Committee was that at the time she advertised the property in January 2019, Ms Tafilipepe had seen a letter from Fletcher EQR (dated 4 November 2016) confirming that the approved scope of works had been completed at the property, and she stated that the vendor informed her that all earthquake repair work had been completed, but the vendor had not, at that point, given her the David Jones letter. He submitted that on the basis of the information available to her, Ms Tafilipepe advertised the property believing all EQC repair work had been completed. He further submitted that despite that belief, Ms Tafilipepe encouraged the appellants to obtain a builder's report.

[52] Mr Todd submitted that after the building inspections had been completed, the vendor provided Ms Tafilipepe with the David Jones letter. He submitted that Ms Tafilipepe immediately attempted to provide this to the appellants, and did provide it to their solicitor, Ms Grimshaw.

[53] Mr Todd submitted that Ms Tafilipepe acknowledged that her statement that all EQC work had been completed was misleading, but it was based on the advice and documentation provided to her at the time, and was inadvertently misleading. He submitted that as soon as Ms Tafilipepe realised that the statement was misleading, she took steps to have the repairs completed. He submitted that this was supported by the vendor's solicitor offering to assign the residual benefit of the claims.

[54] Mr Todd submitted that Ms Tafilipepe had responded appropriately after learning of the incorrect advertising, and the Committee was correct to decide to take no further action.

[55] Mr Belcher submitted that even if a misstatement is "innocent", or inadvertent, any incorrect information provided by a licensee to a customer or client will nevertheless constitute a breach of r 6.4, and may amount to unsatisfactory conduct.

The licensee's intent is a factor that may be relevant to whether the conduct amounts to unsatisfactory conduct or misconduct.

[56] Mr Belcher noted some inconsistency between Ms Tafilipepe's statement to the Authority that she was advised by the vendor that all EQC work had been completed and signed off, including matters raised in the David Jones letter, and her statements in her "Contract Report", dated 18 February 2019 in which she stated (under the heading "Discussions with Purchaser/s: House, EQC, anything else") that she had discussed that the construction of the property was "rockcoate" that had been fully re-done and painted as part of the 2016 scope of works; and that she had discussed that "work had been completed but the owner had reopened the case with EQC and was working on sorting the last things out".

[57] Mr Belcher submitted that the evidence tended to suggest that at some time after she listed the property, and before she discussed the property with the appellants, Ms Tafilipepe learned that the EQC case had been reopened, but believed that the external cladding had been repaired, then learned of the sheet join cracks from the Property Check report. He submitted that if the Tribunal were to make the same factual findings, then it could also find that the Committee was correct to decide to take no further action on this complaint.

Discussion

[58] The advertisement concerned stated:

> All EQC works have been completed and the property is ready to be occupied by the next lucky owner

[59] In her statement to the Authority, dated 28 May 2019, Ms Tafilipepe said that she met with the vendor in December 2018, listed the property in early January 2019, but did not actively take it to the market until 21 January 2019, as the vendor was receiving medical treatment. She went on to say:

> I had all the scopes of work and all the sign off paperwork and [the vendor] also showed me the letter from David Jones the settlement specialist from EQC. It clearly stated in this letter that there were still some things that needed attention and he had provided the letter as attached that he had made allowances for these things to be remedied. [The vendor] believed that everything from that extra letter had been completed.

[60] The Committee said in its decision:[12]

> The Committee takes from the evidence that [Ms Tafilipepe] was aware of the email from David Jones before she commenced marketing the property and also that [the appellants] were provided with this email as part of the disclosure information which [Ms Tafilipepe] says she provided to them.

[61] Mr Todd's submission that the vendor did not provide Ms Tafilipepe with the David Jones letter before the property was advertised is inconsistent with her evidence to the Committee (made within three months of the relevant events) that the vendor showed her the David Jones letter around the time the property was listed. At the hearing, Ms Tafilipepe advised (through Mr Todd), that she received the David Jones letter around 27 or 28 February 2019, and that she tried to email it to the appellants, and did email it to their solicitor.

[62] It is not clear to the Tribunal whether it was intended that the submission for Ms Tafilipepe was that she was not aware of the David Jones letter when she listed the property, and that this contributed to her mistakenly advertising it as having had all EQC repairs completed. If that was her submission, then it is rejected. The Committee clearly relied on Ms Tafilipepe's statement when deciding that she breached r 6.4 by advertising the property as having had all EQC repairs completed, and Ms Tafilipepe did not appeal against that finding. Further, it is more likely that Ms Tafilipepe's recollection of events, and in particular of what information she had when she listed the property, was correct in May 2019 than at the hearing more than a year later.

[63] We have concluded that the Committee was not wrong to conclude that Ms Tafilipepe breached r 6.4 in her advertising of the property. Further, the Committee correctly stated that a breach of a Rule constitutes unsatisfactory conduct. We turn to consider whether the Committee erred in the exercise of its discretion to take no further action in respect of that breach.

[64] The Committee referred to the judgment of his Honour Justice Heath in the High Court in *Vosper v Real Estate Agents Authority*.[13] The particular issues dealt with in the High Court were findings by a Complaints Assessment Committee, upheld by the

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12 Committee's decision, at paragraph 3.29.

13 *Vosper v Real Estate Agents Authority* [2017] NZHC 53, (2017) NZCPR 633.

Tribunal, that a licensee had continued to carry out real estate agency work after an agreement for sale and purchase had been signed, and had breached r 6.4 by misleading a customer as to his role, and that a licensee breached r 12.1 by failing to make an agency's dispute resolution procedures available to the customer when he made a complaint to the agency. The breach of r 12.1 had been accepted by the licensee.

[65] His Honour said of allegations of a breach of r 6.4:[14]

> Unlike in civil proceedings, there is no need to focus on whether a person has been misled. There is no requirement for the representee to have relied upon any misleading words or conduct. The focus of the inquiry is on the standard to which the licensee has performed statutory and other duties. In that context, the question must be whether what was done or said was *capable* of materially affecting a decision on the part of the representee in relation to the transaction; and with actual or presumed knowledge that the information was material. In my view, that approach has the benefit of synthesising the two elements in issue; representations by a person carrying the business of a real estate agent which are misleading in nature.
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> (Emphasis as in original)

[66] His Honour found that the Tribunal was wrong to uphold the Committee's finding. He found that there was no dispute that the licensee had acted honestly throughout, holding the genuine but mistaken view that he was no longer acting as a real estate agent after the agreement for sale and purchase was signed, and that there was nothing to suggest that his mis-statement was capable of having had any material adverse effect on the way in which the customer conducted himself in the transaction. Accordingly, the finding of unsatisfactory conduct for breach of r 6.4 was quashed.

[67] That left only the admitted breach of r 12.1, as to the failure to make the agency's dispute resolution procedure available to the customer. His Honour found that if the Committee had been in the position of dealing only with an admitted breach of r 12.1, and taking into account the licensee's long period in the industry with no disciplinary findings against him, and strong personal factors in his favour, the Committee would have exercised its discretion under s 80(2) of the Act to determine that no further action was necessary. His Honour said:[15]

> A balance needs to be struck between the competing goals of promoting a consistent and effective disciplinary process and avoidance of the stigma of a

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14 At [63].
15 At [74].

> finding of unsatisfactory conduct, where the conduct at issue is relatively minor and all other circumstances point to the absence of a need to mark the conduct in that way.

[68] In the present case, the Committee gave as its reasons for exercising its discretion to take no further action, rather than make a finding of unsatisfactory conduct, that there was no evidence that the misrepresentation was deliberate, the David Jones email had been provided to the appellants, the Committee could not conclude that the complainants were materially affected by the misrepresentation, and that the appellants knew that the sheet joins were yet to be repaired before they instructed their solicitor to make the agreement for sale and purchase unconditional.

[69] On the evidence before the Tribunal, we accept Mrs Hammond's submission that she first saw that letter when she received the Bundle of Documents, and was not aware of it before then.

[70] We are not persuaded that the Committee was wrong to conclude that Ms Tafilipepe's representation was not deliberate. We accept that she believed, on the basis of information given by the vendor, that all EQC repairs had been completed.

[71] However, concern about satisfactory completion of EQC repairs in Christchurch has been widely publicised, and would have been well known to Ms Tafilipepe. The fact that Ms Tafilipepe advertised the property as having "all EQC works … completed" indicates that she considered this to be a significant positive feature, that would attract buyers, as they would not have to be concerned with dealing with the EQC repair process. In the circumstances, it required the advertising to be accurate.

[72] Having seen the David Jones letter, Ms Tafilipepe should have sought confirmation that the additional work referred to by Mr Jones had in fact been completed, by way of some sort of sign-off, before using the completion of EQC work as a selling feature. It was not sufficient for her to pass on information given to her by the vendor without having taken steps to check that it was correct. In *Donkin v Real Estate Agents Authority (CAC 10057)*, the Tribunal said, in relation to an incorrect advertisement that a property was a "legal home and income":[16]

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16 See *Donkin v Real Estate Agents Authority (CAC 10057)* [2012] NZREADT 44, at [9].

> … an agent should make sure before a positive representation is made that they have at least taken some precautions to check the veracity of the representation.

[73] There is no evidence that Ms Tafilipepe took any such step before becoming aware, by way of the Property Check report, that the sheet join cracks had not been repaired.

[74] The circumstances of the present case are not analogous to those in *Vosper*, where the misrepresentation at issue (as to the licensee's role) was as to a matter that arose after an agreement for sale and purchase had been signed, such that the misrepresentation could not have materially affected the transaction.

[75] The misrepresentation in the present case was clearly intended to be a material factor in inducing prospective purchasers to view the property, and was, therefore, capable of materially affecting a decision on the part of anyone who read the advertisement.

[76] We have concluded that the Committee made an error of law in its application of *Vosper*. The conduct in issue, Ms Tafilipepe's failure to take steps to ensure that the statement that "all EQC work had been completed" was correct, was not "relatively minor", and there was a need to mark the failure by way of a finding of unsatisfactory conduct. Further, as noted in *Vosper*, it is irrelevant whether or not the representation materially affected the appellants' decision to buy the property: the question must be whether the representation was capable of doing so.

[77] We have concluded that the Committee erred in deciding to take no further action following its finding that Ms Tafilipepe breached r 6.4 by advertising the property as having all EQC work completed. Following our consideration of the material before the Committee, we have concluded that the proper outcome is that a finding is made that Ms Tafilipepe's conduct amounted to unsatisfactory conduct.

Was the Committee wrong to decide to take no further action on the complaint that Ms Tafilipepe misled the appellants by saying that the vendor would repair the sheet join cracks?

Submissions

[78] Mr Todd submitted that Ms Tafilipepe did not mislead the appellants in advising them that the necessary repairs would be completed. He submitted that the only repairs to which this statement applied were the repairs to three sheet join cracks (described in the David Jones letter). He submitted that these repairs were part of the corrective work required after the initial completion of repairs, and it was in the context of EQC (Mr Jones) having confirmed that they would be repaired that Ms Tafilipepe advised the appellants they would be repaired.

[79] Mr Belcher submitted that the available evidence (in particular, email communications) supported the Committee's finding that Ms Tafilipepe's representation was not that the vendor, personally, would have the cracks repaired, but rather that the cracks would be repaired as part of the EQC claim. He submitted that it is open to the Tribunal to uphold the Committee's decision to take no further action on this complaint.

Discussion

[80] We accept that Ms Tafilipepe represented to the appellants that the sheet join cracks would be repaired as part of the EQC claim. Similar representations were made by the vendor's legal adviser, that the residual benefit of the claim would be assigned to Mrs Hammond on settlement of the purchase.

[81] The appellants did not have the David Jones letter at the time Ms Tafilipepe made this representation. In particular, they had not seen his request to the vendor to provide bank details so that he could "proceed with payment", which raises the possibility that the vendor had received a cash payout (as the appellants had in respect of their previous property). This may have led the appellants to query whether the sheet join cracks were in fact one of the matters included within the residual benefit of the vendor's EQC claim, which was to be assigned on settlement.

[82] There was no evidence before the Committee on this point, and none before the Tribunal. In the absence of any evidence as to whether repairs to the sheet join cracks could in fact be undertaken under the EQC claim, we cannot conclude that the Committee was wrong to decide to take no further action on this element of the appellants' complaint.

Was the Committee wrong to find that the complaint that Ms Tafilipepe put pressure on the appellants to confirm the agreement for sale and purchase was not proved?

Submissions

[83] Mrs Hammond acknowledged that she was advised by her solicitor and SBS banker not to buy the house. She submitted that the only reason they proceeded was because of harassment from Ms Tafilipepe. She submitted that she was repeatedly reassured that the damage was minor, and all repairs would be done before she took possession. She submitted that she cancelled the contract because she did not receive confirmation that the sheet join cracks would be fixed, and she was concerned that the property was not weathertight and would require a full reclad.

[84] Mr Todd submitted that Ms Tafilipepe had a large involvement with the appellants throughout the transaction, and assisted them in all aspects, facilitating the introduction of a mortgage broker and an insurance broker, and assisting them by filling in the insurance forms for them. However, he submitted, this did not go further than providing the initial assistance, and guidance on the hurdles which were encountered. In particular, he submitted, Ms Tafilipepe was not part of the final decision as to whether the appellants would confirm the agreement for sale and purchase. That decision was made after they had consulted their solicitor, and Ms Tafilipepe was not part of that discussion.

[85] Mr Belcher submitted that the Committee had before it evidence of email communications as well as statements by Mrs Hammond and Ms Tafilipepe. He submitted that the emails demonstrate that there was a significant amount of communication, oral and by email, between Mrs Hammond and Ms Tafilipepe.

[86] Mr Belcher submitted that at several points in the communications, Ms Tafilipepe offered her assistance: arranging an insurance broker, arranging a mortgage broker, communicating with the authors of the building reports, and completing insurance forms, which assistance was universally accepted. He submitted that Ms Tafilipepe then engaged in communications with the mortgage broker and insurance broker, offered reassurance that EQC repairs would be completed, communicated with the appellants' solicitor, and tried to allay Mrs Hammond's concerns as to the state of the property.

[87] Mr Belcher also referred to Mrs Hammond's statements to Ms Tafilipepe that she was unwell, that "because of the last vendor we are a little bit worried", that waiting for the building report was "nerve-wracking", that she was concerned about the property, and that she needed help with the insurance application.

[88] He submitted that it is clear that Ms Tafilipepe had an intimate involvement in the purchase process, and a desire for the transaction to be completed. He submitted that the appellants' reliance on Ms Tafilipepe for assistance, and Mrs Hammond's comments about her health, the state of the property, and a previous bad experience tends to establish that they were out of their comfort zone, for which they required support and assistance. He submitted that the evidence does not go so far as to establish that Mrs Hammond was particularly vulnerable to pressure,[17] such that Ms Tafilipepe's conduct might be considered illegitimate, and there was no additional evidence provided on the point.

[89] Mr Belcher also submitted that the Committee considered the significant involvement of other professional advisers, in particular the appellants' solicitor and SBS banker, throughout the period. He submitted that any allegation of undue pressure or unfair dealing on the part of a licensee should be assessed against any independent advice received.

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[17] Mr Belcher referred to the Tribunal's decisions in *Du Fresne v Real Estate Agents Authority (CAC 409)* [2019] NZREADT 6, and *Molloy v Real Estate Agents Authority (CAC 521)* [2020] NZREADT 29.

Discussion

[90] The email communications set out earlier in this decision (which do not include all communications that were before the Committee) clearly indicate that the appellants sought Ms Tafilipepe's assistance, and were grateful for the assistance she provided. Besides her introductions to the insurance and mortgage brokers, this assistance involved her filling in the insurance application form (albeit, not entirely), discussions as to loan finance, reassurance that EQC repairs would be completed, and communication with the appellants' solicitor. We accept Mr Belcher's characterisation of the appellants' having been "out of their comfort zone, and for which they required support and assistance", and of Ms Tafilipepe's involvement as an "intimate involvement in the purchase process, and a desire for the transaction to be completed".

[91] We have carefully considered whether Ms Tafilipepe's assistance and desire for the transaction to be completed led her to go beyond what was legitimate, to what constituted undue pressure or a failure to deal fairly, and thus a breach of rr 9.2 and/or 6.2.

[92] In *Du Fresne v Real Estate Agents Authority (CAC 409)*, the Tribunal stated that it was not sufficient for the appellant to state that she was pressured; such a statement would have to be supported by "particularised and detailed evidence not only of the causes of the stress and the extent of the stress but also whether that stress would have been apparent to the licensee".[18] We accept Mr Belcher's submission that the Tribunal has not been provided with such evidence in the present case, and that Mrs Hammond took issue with a suggestion that she might suffer from any anxiety or mental health issues.

[93] In *Molloy v Real Estate Agents Authority (CAC 521)*, the Tribunal allowed an appeal against a Complaints Assessment Committee's finding that two licensees had engaged in unsatisfactory conduct by failing to protect a prospective purchaser's interest by failing to insert "appropriate clauses" into an agreement for sale and purchase, on the grounds that he was "vulnerable" on account of his age.

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18 *De Fresene v Real Estate Agents Authority (CAC 409)* at [8] and [10].

[94] The Tribunal cited a summary of "warning signs" for assessing whether one party is at a serious disadvantage vis-à-vis another, and this vulnerable. The summary concluded by saying that "the key factor is that the disadvantaged party must be, for whatever reason, unable to make proper judgments as to what is in his or her best interests".[19]

[95] In the present case, it is apparent from the email communications that Mrs Hammond (who was the purchaser) was not well, and that Ms Tafilipepe was aware of that fact. However, we are not persuaded that Ms Tafilipepe's involvement went beyond what was legitimate so as to become undue pressure or unfair dealing.

[96] In particular, we accept, as did the Committee, that the agreement for sale and purchase entered into by the appellants contained several conditions that were of benefit to them, including as to satisfactory building reports and obtaining finance. Further, they obtained two building reports, each of which identified matters of concern. The appellants acknowledged that they were advised by their solicitor and banker not to make the agreement unconditional but did so despite that advice.

[97] We are not persuaded that the Committee was wrong to find that the allegation that Ms Tafilipepe put undue pressure on them to proceed, or dealt with them unfairly, was not proved.

Was the Committee wrong to decide that the complaint that Ms Tafilipepe knew about, and did not disclose, plumbing issues at the property was not proved?

Submissions

[98] Mrs Hammond submitted that the Committee was wrong to decide that her complaint that Ms Tafilipepe knew about, but did not disclose to them, problems with the plumbing that required repair was not proved. She referred to the defects with the taps in the laundry and one of the bathrooms, identified in the Property Check report.

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[19] *Molloy v Real Estate Agents Authority (CAC 521)* at [63], citing James Every-Palmer "Unconscionable Bargains" in Andrew Butler (gen ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, 2009 717 at [23.2.1.]

[99] Mr Todd submitted that Ms Tafilipepe is not a builder, and relies on the building reports obtained. He referred to the Property Check report, which revealed matters which would, in the author's opinion, require repair and/or maintenance. The report recorded defects in the laundry and bathroom taps. He submitted that notwithstanding the reports, the appellants instructed their solicitor to confirm the agreement for sale and purchase.

[100] Mr Belcher submitted that the earliest documented mention of an issue with plumbing was in the Property Check report, and that there was no evidence to suggest Ms Tafilipepe knew about it before then. He submitted that if the Tribunal were to make that finding, then it could uphold the Committee's finding that the complaint was not proved.

Discussion

[101] We accept that there is no evidence to suggest that Ms Tafilipepe knew of the issue with the taps and did not disclose it to the appellants. The fact that the faulty taps were identified in the Property Check report does not establish that Ms Tafilipepe knew about the issue before then.

[102] We are not persuaded that the Committee was wrong to find that this complaint was not proved.

Was the Committee wrong to find that the complaint that Ms Tafilipepe pushed the appellants to obtain unsuitable finance was not proved?

Submissions

[103] Mrs Hammond confirmed at the hearing that she was able to complete settlement without finance, but required loan finance to undertake maintenance and to upgrade the property. She referred to an email from her SBS banker, which stated that the bank was not prepared to lend on the property because of the cladding.

[104] In a statement to an Authority Facilitator, Mrs Hammond said that the person Ms Tafilipepe introduced her to was a "non-bank lender", who "backed out" when he

could not secure a loan from a bank. She further submitted that her understanding was that Ms Tafilipepe's advice that they could move in to the property then seek finance for renovations was incorrect.

[105] Mr Todd submitted that Ms Tafilipepe had no role in the appellants' attempts to obtain finance beyond introducing them to the mortgage broker, and discussing the appellants' options with them. He further submitted that notwithstanding that the mortgage broker was not able to arrange satisfactory finance for the maintenance and upgrade of the property they wished to undertake, they instructed their solicitor to confirm the agreement for sale and purchase.

[106] Mr Belcher submitted that the email communications suggest that Mrs Hammond was not able to obtain funding from SBS, and Ms Tafilipepe arranged for them to see a mortgage broker. She then relayed messages from the broker, and discussed the issue of finance over several email communications on 27 February 2019. He submitted that there is no evidence to suggest that Mrs Hammond was offered unsuitable finance, in particular from a "non-bank lender".

[107] He submitted that despite several email communications between Ms Tafilipepe and Mrs Hammond regarding finance, it is open to the Tribunal to conclude that they do not disclose unfair pressure on the appellants to either obtain unsuitable finance, or to proceed to purchase without suitable finance, and to uphold the Committee's finding that the complaint was not proved.

Discussion

[108] We accept that there is no evidence that the appellants were in fact offered "unsuitable finance", from a "non-bank lender". Further, the evidence as to Ms Tafilipepe's involvement in their attempts to obtain finance for the work they wished to do on the property does not extend beyond introducing them to a mortgage broker, and relaying information from the broker.

[109] We are not persuaded that the Committee was wrong to conclude that this complaint was not proved.

Was the Committee wrong to decide to take no further action on the complaint that Ms Tafilipepe told Mrs Hammond to send only the "good" report to the insurance broker?

Submissions

[110] With respect to the Committee's decision to take no further action on her complaint that Ms Tafilipepe told her to send only the "good" building report to the insurance broker, Mrs Hammond submitted that Ms Tafilipepe had manipulated the sending of the "good" report in order that she would get insurance for the property. She submitted that Ms Tafilipepe was determined that they got insurance, so that they could not back out of the sale.

[111] Mr Todd submitted that the Committee was correct to decide to take no further action regarding Ms Tafilipepe's advice to Mrs Hammond to send the insurance broker only the second (Synergy) report to the insurance broker. He referred to Mrs Hammond's having previously sent the Property Check report to the insurance broker and Ms Tafilipepe, and submitted that there was nothing sinister in the fact that, knowing that the insurance broker already had the Property Check report, Ms Tafilipepe advised Mrs Hammond to send only the Synergy report. He further submitted that the insurance broker had confirmed that the property was insured.

[112] Mr Belcher submitted that if the Tribunal accepts Ms Tafilipepe's submission that her advice to Mrs Hammond to send only the "good" Synergy report to the insurance broker was predicated on her understanding that the "crap" Property Check report had already been provided to him, then there can be no suggestion that Ms Tafilipepe was manipulating anything, or encouraging the appellants to withhold relevant information. On that basis, he submitted, the Tribunal could uphold the Committee's determination to take no further action on the complaint.

Discussion

[113] The Committee considered that as the insurance broker already had a copy of the "crap" Property Check report (sent to him by Mrs Hammond) at the time Mrs Hammond asked Ms Tafilipepe if she should send it to him, no conduct issue arose.

[114] We would not exclude the possibility that a conduct issue may arise in such circumstances, as a licensee should not encourage the withholding of information. It is irrelevant whether, on the facts, the encouragement is misplaced if the recipient already has the information.

[115] However, in the present case, Ms Tafilipepe's evidence is that she responded to Mrs Hammond against the background of her understanding that Mrs Hammond had already sent the Property Check report to the insurance broker, so did not need to send it again, therefore, she only had to send the "good" Synergy report. We note that Mrs Hammond's request to Ms Tafilipepe includes the statement that she had "probably" sent it to him. On that evidence, we are not persuaded that the Committee was wrong to decide that it would take no further action on the complaint.

Was the Committee wrong to decide that the complaint that Ms Tafilipepe failed to disclose weathertightness issues at the property was not proved?

Submissions

[116] Mrs Hammond submitted that the Committee was wrong to find that Ms Tafilipepe disclosed the weathertightness issues. She submitted that Ms Tafilipepe's response when asked this question was "It's fine as far as I know", and the appellants had to wait for the building report which set out the issues. As noted above, she submitted that she first saw the David Jones letter when she received the Bundle of Documents for this appeal. She advised the Tribunal that she then asked her solicitor, Ms Grimshaw, and learned that she had received the letter.

[117] Mr Todd submitted that the evidence before the Committee was that Ms Tafilipepe discussed the cladding at the property with the appellants when they first viewed it on 17 February, 2019 and that when they viewed it on 18 February she told them that the style of the property meant that it was vulnerable to moisture ingress, and they should get a builder's report addressing moisture ingress issues.

[118] He further submitted that as the Property Check report had not discussed moisture levels (despite having referred to the risk arising from the nature of the cladding), Ms Tafilipepe then recommend they obtain a second report specifically

addressing the risk of moisture ingress. Mr Todd also referred to the Property Check and Synergy reports, neither of which disclosed any actual moisture ingress. On the basis of that evidence, he submitted that the Committee was correct to find the complaint not proved.

[119] Mr Belcher referred to Ms Tafilipepe's evidence of discussions with the appellants regarding the cladding, and her advice that they obtain building reports. He also referred to the findings in the Property Check report (detailing the risk posed by the construction using "direct fixed fibre cement sheeting") and in the Synergy report (which recorded typical and acceptable moisture readings), and to references to the cladding and damage in communications between the appellants' and vendor's legal advisers.

[120] Mr Belcher submitted that against that evidence, it is open to the Tribunal to uphold the Committee's decision to find the complaint not proved.

Discussion

[121] The Committee's decision to find this element of the appellants' complaint not proved was premised in large part on its finding that there was no evidence from which it could be concluded that there was a weathertightness problem with the property; that is, that the Property Check report identified the risk associated with a fixed fibre cement sheeting cladding but did not disclose any evidence of moisture damage, and the Synergy report stated that the cladding provided a weathertight envelope.

[122] However, the complaint was that Ms Tafilipepe failed to disclose the risk of weathertightness issues. The effect of r 10.7 of the Rules is that a licensee must disclose known defects in a property and, where it appears likely that a property may be subject to hidden or underlying defects (such as a risk that the property may have weathertightness issues) a licensee must inform prospective purchasers of that risk and recommend that they obtain a building inspection report. The licensee's obligations do not arise only out of the fact of a defect in the property, they arise where "it appears likely that a property may be subject to hidden or underlying defects." The Tribunal

has previously stated that where that is the case, a licensee must inform prospective purchasers, and recommend that they obtain a building inspection report.[20]

[123] In the present case, it would have been apparent to Ms Tafilipepe from the property's cladding that there might be a risk of weathertightness issues. Her evidence to the Committee was that at the first inspection with the appellants, she discussed the cladding with them, as did the vendor, and she recommended that they obtain building reports. She further says that there was further discussion at the appellants' second viewing, and when the Synergy inspection was taking place. As the Committee noted, the nature of the cladding, and its associated risk, was discussed in correspondence between the appellants' and the vendor's respective legal advisers.

[124] In the light of that evidence, we are not persuaded that the Committee was wrong to find that the appellants' allegation that Ms Tafilipepe failed to disclose the risk of weathertightness issues not proved.

[125] We must however, express concern at Ms Tafilipepe's repeated characterisation of the sheet join cracks as "minor" or "very minor". As Mr Todd submitted, she is not a builder. The cracks were considered to be of sufficient significance to be referred to in the David Jones letter, with an allowance provided for "meshing the sheet joins/cracks, then plastering and painting corner to corner". Mr Jones did not describe them as "minor". The cracks were also referred to in the Property Check report. That does not, however, affect our finding as to this element of the appellants' complaint, as we have accepted that Ms Tafilipepe did disclose the cracks, and the appellants obtained building reports, and legal advice, before making the agreement for sale and purchase unconditional.

Outcome

[126] The appeal is allowed insofar as it relates to the Committee's decision to take no further action in respect of Ms Tafilipepe's advertising the property as having "all EQC

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[20] See, for example, *Munley v Real Estate Agents Authority (CAC 402)* [2016] NZREADT 53, at [42] and [53], and *CAC v Crockett* [2017] NZREADT 15, at [121]

work completed". That decision is quashed. Pursuant to s 72 of the Act, we find Ms Tafilipepe guilty of unsatisfactory conduct.

[127] The Tribunal directs as follows regarding submissions as to penalty, following which the Tribunal will make a decision as to penalty on the papers:

[a] Submissions by or on behalf of the appellants: to be filed and served no later than ten working days after the date of this decision;

[b] Submissions on behalf of Ms Tafilipepe: to be filed and served no later than ten working days after the date of the appellants' submissions;

[c] Submissions on behalf of the Authority: to be filed and served no later than ten working days after the date of the submissions for Ms Tafilipepe.

[128] In all other respects, the appellants' appeal is dismissed.

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

_____
Hon P J Andrews
Chairperson

_____
Mr G Denley
Member

_____
Ms C Sandelin
Member