BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 37

READT 034/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	CHARLES and LANA EADE Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1903) First Respondent
AND	TRENT QUINTON and BAYLEYS REAL ESTATE LIMITED Second Respondents
Hearing:	3 and 7 August 2020 at Auckland
Tribunal:	Hon P J Andrews, Chairperson Mr G Denley, Member Ms C Sandelin, Member
Appearances:	Mr Eade, Appellant Ms E Woolley, on behalf of the Authority Ms J Keating, on behalf of Mr Quinton and Bayleys Real Estate Limited
Date of Decision:	25 August 2020

DECISION OF THE TRIBUNAL

Introduction

[1] Mr and Mrs Eade[1] have appealed pursuant to s 111 of the Real Estate Agents Act 2008 ("the Act") against the decision of Complaints Assessment Committee 1903, dated 20 August 2019, in which the Committee decided to take no further action on their complaint against Mr Quinton and on its "own motion" inquiry into Bayleys Real Estate Limited ("the Agency").[2]

Background

[2] On 12 May 2015, the appellants entered into an agreement to purchase an apartment "off the plans" in an apartment building in Auckland, known as "Hereford Residences" ("Hereford"), being developed by the Tawera Group ("the developer").[3] They settled the purchase in July 2017.

[3] Mr Quinton is a licensed salesperson, engaged at the Agency. The Agency was engaged by the developer to market Hereford and was the selling agent for the appellants' purchase. As a sale off the plans, Mr Quinton marketed the development to the appellants by way of architects' plans, a brochure produced by the developer, and (as the development was within an existing building) a display suite. Prospective purchasers were also shown a scale model of the development.

[4] In August 2018, the appellants complained to the Authority that Mr Quinton had made representations in the course of marketing Hereford, as to a 24/7 concierge, live-in manager, swimming pool, gym, theatre, and security. They alleged that contrary to the representations, there was no concierge or live-in manager, the swimming pool was on land leased from another entity rather than owned by the Hereford body corporate, the "gym" and "theatre" were empty rooms for which equipment and furniture had to

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1 Mr and Mrs Eade will be referred to as "the appellants", except where it is appropriate to refer to one or other of them individually.

2 Complaint No C27106: Quinton and Bayleys Real Estate Limited: Decision to take no further action.

3 All units in the development were initially owned by an entity called "8 Hereford Limited". For convenience, the Tawera Group and 8 Hereford Limited will be referred to in this decision as "the developer".

be purchased or leased by the body corporate, and the body corporate had had to fight to obtain swipe card access.

[5] The Committee decided to inquire into the complaint. Pursuant to s 78(b) of the Act, it decided to inquire into the conduct of the Agency.

[6] In their responses to the complaint, submitted by their solicitors, Mr Quinton and the Agency agreed that the marketing brochure contained statements that Hereford would have a concierge and a live-in manager, but also referred to disclaimers in the advertising material and the appellants' agreement for sale and purchase, and stated that decisions on these matters (and others) had been made by the developer and/or the body corporate, without the knowledge of, or input from, Mr Quinton or the Agency.

[7] They further stated that there had been no representation as to the ownership of the swimming pool, the gym and theatre room were shown on the plans for Hereford and there had been no representation that equipment and furniture would be provided by the developer, and there had been no representation that security would be different from what was in place.

The Committee's decision

[8] The Committee considered the appellants' complaint by reference to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), in particular rr 5.1 (a licensee must exercise skill, care, competence, and diligence), 6.2 (a licensee must act in good faith and deal fairly with all parties engaged in a transaction), 6.3 (a licensee must not engage in any conduct likely to bring the real estate industry into disrepute), 6.4 (a licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client), and 9.8 (a licensee must not take advantage of a prospective client's, or client's, or customer's inability to understand real estate documents).

[9] The Committee's decision to take no further action was made under s 89(2)(c) of the Act. It summarised its reasons for doing so in paragraph 3.1 of its decision.

After noting that Mr Quinton and the Agency were not acting for the appellants, but for the developer, the Committee said:

> …
>
> b) The legal and other detail of [Hereford] had not been settled at the date the [appellants] entered into the agreement for sale and purchase (ASP). The [appellants] should have been aware of this. As at the date of the ASP they did not know precisely what they would be purchasing. Shortly prior to the date of settlement, however, the pertinent certificate of title, including easements and covenants had been issued.
>
> c) The development of which [Hereford] was a part was a mixed residential and commercial development. Not all parts of the building would comprise apartments and associated common areas.
>
> d) By handing out the developer's marketing material [Mr Quinton] and the Agency were not verifying its accuracy by doing so.
>
> e) [Mr Quinton] and the Agency could not be expected to know the legal and planning minutiae of [Hereford]. This was for reasons of size and complexity, and the unfolding nature of the development, requiring the ongoing involvement of architects, builders, lawyers and Auckland Council officers, amongst many others. Furthermore, it was not possible for [Mr Quinton] and the Agency to predict the decisions that the body corporate would make, once established. As a result, [Mr Quinton] and the Agency were no better informed than the [appellants] with regard to progress and changes concerning the specific matters they have complained about.
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> f) There was no legal or professional responsibility on the part of [Mr Quinton] and the Agency to keep the [appellants] abreast of progress with the [Hereford] developments from date of ASP to settlement.
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> g) The [appellants] do not identify any parts of the ASP as having been breached in respect of the matters they complain about. The [appellants'] focus is on the written and verbal representations made before they entered into the ASP.
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> h) The [appellants] were legally represented from and including the time they entered into the ASP.
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> i) It was ultimately the responsibility of the [appellants] to protect their own interests.
>
> j) It was open to the [appellants] to make inquiries and seek clarification and confirmations at any time during the period of more than two years from the date of [the] ASP to date of settlement.
>
> k) The [appellants] did not approach [Mr Quinton] about the various issues of concern until several months after settlement.

The appeal

[10] The appellants summarised the grounds of the appeal in their Notice of Appeal as follows:

> The decision does not take consideration of the standards set in the Act.
> Key evidence from the [appellants] was not considered.
> Factually incorrect information appears in the decision reasoning.
> The investigation process was unsatisfactory.
> The Agency was seriously deficient but was not examined by the [Committee].
> The decision does not follow Tribunal precedent.

[11] An appeal against a Complaints Assessment Committee's decision to take no further action under s 89(2)(c) of the Act is a "general" appeal. That is, the appellants must satisfy the Tribunal that the Committee's decision was wrong.

Evidence received on appeal

[12] Pursuant to a ruling issued on 19 February 2020, leave was given to the appellants to submit on appeal a timeline of events relating to the appellants' purchase of their apartment in Hereford, and of a copy of the Minutes of a meeting of the Hereford body corporate, held on 18 May 2017. Leave was also given for Mr Quinton and Mr Bayley (Group Licensee, Compliance Manager, and Director of the Agency) to be cross-examined on their statements to the Committee.[4]

[13] Pursuant to a ruling issued on 18 June 2020, leave was given for a statement of Mr Quinton to be submitted on appeal.[5] This statement had been provided by the Agency's solicitors to the Authority on 5 February 2019, but inadvertently not provided to the Committee or the appellants prior to the Committee's consideration of the complaint.

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4 *Eade v Real Estate Agents Authority (CAC 1903)* [2020] NZREADT 5.
5 *Eade v Real Estate Agents Authority (CAC 1903)* [2020] NZREADT 26.

Relevant evidence

Advertising material

[14] The developer's brochure for Hereford included the following statements:

> **Apartments**
> Live-in building manager & concierge
> Security
> **Amenities**
> Hereford Residences facilities include an infinity pool gymnasium and recreational deck. All of which have been carefully conceived for elegant living. Stroll through impeccably maintained Zen gardens.
> Escape for a while in the in-house library or theatre room. Entertain with ease and style in beautiful residential facilities that are yours to enjoy.
> **Complimentary services**
> Package deliveries / Maintenance of common areas
> **Additional services**
> Cleaning service / Flower delivery / Porter services / Catering / Personal chef / In house massage / Child minding / Dog Walking / Car valet services
> (Charges may apply. Services are subject to change and are offered at the discretion of the building manager.)

[15] The brochure also included the following statement:

> The specifications, illustrations, perspectives, and information set out in this brochure are indicative only, subject to change and do not form part of any sales agreement.

[16] The brochure's contact list for Hereford set out the names and contact details for three "Project Directors", then listed Mr Quinton, with his Agency contact details, as "Sales Director". A testimonial on the developer's website described Mr Quinton as an "invaluable asset to the [developer's] team", and as having become "part of the [developer's] family".

[17] Mr Quinton marketed Hereford as from 2014. Press statements concerning Hereford issued by the Agency and Mr Quinton during 2014 included the following statements:

> Hereford Residences will be the first apartment block in New Zealand to have its own concierge. That concierge will be far more than just a doorman – it is envisaged they will be the personal organisers for residents in the block – organising everything from restaurant bookings and show tickets through to dry cleaning pick ups and even car valeting.

> The former headquarters of corporate heavyweight Telecom is to be converted into a luxury apartment block – complete with its own international-style concierge doorman, a library, theatre, gymnasium, and a heated infinity pool overlooking Auckland's Waitemata Harbour.
>
> Bayleys apartment specialist Trent Quinton said the Hereford Residences concierge service set it apart from other apartment developments and was a first in New Zealand.

Agreement for sale and purchase

[18] The agreement for sale and purchase entered into by the appellants on 12 May 2015 contained six schedules of floor plans and carparking plans, outline specifications, general terms of sale, amendments to the general terms of sale, further terms of sale, and a purchaser guarantee. A pre-contract disclosure statement and draft initial body corporate budget were included with the agreement.

[19] The agreement contained several clauses which allowed the developer to make changes to the property. The agreement also contained the following "disclaimers"

> (In Schedule 2 "Outline Specifications)
>
> While the developer will use its reasonable endeavours to ensure that each unit is built in accordance with the plans and specifications contained in the marketing material, the developer reserves the right to change or vary this information at any time.
>
> (In Schedule 5 "Further Terms of Sale", under the headings "General" "Financial Accommodation")
>
> 22.14 The Purchaser further undertakes and warrants that:
>
> …
>
> (d) it has not relied on any representation, written or oral, made by or on behalf of the Vendor or its agent, which is not set out in this Agreement and this Agreement represents the entire agreement between the parties.

Transaction report

[20] Mr Quinton completed his transaction report regarding the sale of the appellants' apartment on June 2015. As relevant to this proceeding, we record the following entries:

> Statements made/discussions and your answers about the construction, piles, electrical, cladding, roofing, insulation, heating, sewage/water reticulation, drainage, pool/accessories fencing:
>
> "Full info supplied"

> Were any specific items discussed where you gave advice? Specify:
> "No"

Body corporate meeting of 18 May 2017

[21] As noted earlier, leave was given to the appellants to submit on appeal a copy of the Minutes of a body corporate meeting held on 18 May 2017. This meeting was attended by Mr M D Mahoney as "sole director of 8 Hereford Limited registered proprietor of all principal and accessory units" and Mr C Newman as representative of the body corporate manager, Auckland Body Corporate. Mr Mahoney chaired the meeting.

[22] The agenda items for the meeting included amendment of the body corporate rules, insurance, approval of an initial budget, financial statements, bank accounts, levies, pet approvals, "Louvretec cover" approvals, air conditioning unit approvals, and the body corporate entering into a management agreement with Auckland Body Corporate as the body corporate manager. The meeting also approved:

> 7.2 The body corporate enter into a building manager contractor services agreement with DJD Limited to provide onsite building management services to the body corporate in accordance with the terms of the building manager's agreement as presented to the meeting. The chairman of the body corporate be authorised to sign the agreement on behalf of the body corporate.

[23] The meeting further approved the body corporate reimbursing the developer $42,100 for the "purchase of furniture and décor for the theatre room, lobby and courtyard", and approved the body corporate entering into a lease for 48 months, at a monthly cost of $972.14, for equipment for the gym.

[24] This meeting was held approximately two months prior to settlement of the appellants' purchase of their apartment. The appellants were not made aware of the meeting until late 2017, some five months after settlement of their purchase.

Easement as to pool area

[25] On 29 March 2017, an easement and land covenant was registered, pursuant to which the developer, as owner of the land on which the pool was to be constructed, granted an easement over the land "for access for the purposes of the use of the

swimming pool and the associated swimming pool facilities located within the Covenant area".

Mr Quinton's evidence

[26] Mr Quinton accepted that he had advertised Hereford as having a 24/7 concierge service, and live-in building manager. He considered these to be signature features, enhancing the value of the property, and believed that they would be included in the completed development. He said that his mother had purchased an apartment, which he had subsequently purchased as an investment.

[27] With respect to the concierge, he said he believed that the developer wanted there to be a 24/7 concierge at Hereford, but he was not aware that infrastructure required for a concierge had not been incorporated during construction. He said that apartment owners were surveyed in February 2019 as to whether they wanted a concierge service, and the majority responded that they did not. This is recorded in a "memorandum of understanding" between the developer and the body corporate, dated 14 May 2019.

[28] Regarding a live-in building manager, he said that early in 2017, he was contacted by the building manager for another property, where the manager was leaving and wanted to sell his apartment. Mr Quinton realised that this raised issues, as the apartment would have to be sold as a going concern with the building manager's function. He passed this information on to the developer. Mr Quinton said that shortly before settlement of the Hereford apartments, he noticed that the area set aside for a building manager's residence had not been developed. He discussed this with the developer and was advised that it was "under discussion". He understood that the matter was still not decided at the time the appellants' purchase was settled.

[29] Mr Quinton accepted that the Minutes of the 18 May 2017 meeting are evidence that the body corporate (at the time, comprising only the developer, as owner of all units) agreed, before settlement of the sales of apartments, that there would be no live-in manager, that the developer would be reimbursed for theatre, lobby, and courtyard furniture, and that the body corporate would enter into a lease for gym equipment. He said he was not aware of the meeting until late 2017.

[30] He said that when units are being sold off the plans in a new development, it is usual for there to be a meeting of the body corporate before settlement, which deals with formalities and matters such as approvals for pets and spa pools, and it is not his practice as the selling agent to be involved in them. He said that Minutes are usually prepared by the developer's solicitors, and provided to prospective purchasers by the developer, not the salesperson.

[31] He said the 18 May 2017 meeting was unlike the usual pre-settlement body corporate meeting, and he was surprised at the matters that were agreed. He said that when he heard about the 18 May 2017 meeting he spoke to the solicitors for the developer, and was told that the Minutes had not yet been produced.

[32] Mr Quinton also said he believed that the pool would be built on land owned by the body corporate, and would be under the control of the body corporate. He said that he first learned that the pool would be on land not owned by the body corporate when the appellants raised the issue with him in October 2017.

[33] Mr Quinton said he did not represent to prospective purchasers that the spaces earmarked on the plans for the development as a gym and theatre would be provided by the developer as a fully functioning gym and theatre. He said he represented both the gym and theatre areas as spaces allocated for the particular purpose, and that it was always his understanding that they would be fitted out by the body corporate. He further said that while the developer's brochure referred to "Zen gardens", he always understood that to be a reference to the "courtyard" area on the plans for the development.

[34] Mr Quinton was questioned as to his contact with the developer, and his access to information. He said he had daily contact with the developer, orally, and by text and email, over the marketing period, and the developer had an "open door" policy. He said his communications with the developer were sales-based, and had nothing to do with construction issues. He said that on important matters, communication with prospective purchasers is from the developers, and in relation to Hereford, the developer told him they would provide information to prospective purchasers. He said

he was instructed not to contact prospective purchasers after they had entered into agreements for sale and purchase.

[35] Mr Quinton was also questioned about his advice to prospective purchasers regarding the possibility of changes occurring between representations in a developer's brochure and actual construction of a development. He responded that he knows that changes may happen and says so to prospective purchasers. In the present case, having been questioned specifically about the brochure's representation as to a 24/7 concierge service he responded that he did not say "there is a possibility there will be no concierge service", as he believed there would be one. He said it is not his practice to say "some things may not be there"; he says that developers "can make changes", and he generally provides examples of changes as to measurements. He further said that his focus is on the particular apartment, he is selling, and he does not specifically comment on how amenities may change.

[36] We accept the evidence given by Mr Quinton at the hearing that he was instructed that all communication with purchasers, following entry into an agreement for sale and purchase, was to be by the developer.

Mr Bayley's evidence

[37] Mr Bayley said that if the Agency had been advised of any change in the development, that information would have been passed on to prospective purchasers, but the Agency was not advised of any changes. He also said that for a development being sold off the plans, representations made by the agency's salespersons originate from the developer. He said the appellants' complaint was the first indication he had as to issues with the Hereford development. He expressed the view that the developers had "over-promised and under-delivered".

[38] Mr Bayley agreed that there are no written records of Mr Quinton's meetings, or discussions with the developer of the signature features of Hereford. He agreed that over the four years of marketing, there was no written evidence to corroborate the Agency's version as to how Hereford was presented to the appellants. He said that the

Agency presented Hereford in accordance with the brochure, and any written records would be as to units sold, under a conditional sale agreement, or still available.

[39] Mr Bayley was also questioned regarding Mr Quinton's transaction report. He was asked whether, in light of the signature features being subject to change, those representations should have been recorded in the transaction report. He responded that those representations were recorded, in the brochures and marketing material. He added that at the time of the transaction report for the appellants' purchase (2 June 2015) the Agency was not aware of any issues as to amenities in common areas being other than as represented in the marketing material. He also said that the transaction report would not have recorded "notional or potential" representations, such as "space for gym", or "theatre room", for the reason that the representation is very similar to photographs showing furniture in a "staged" apartment.

[40] Mr Bayley was asked whether the transaction report should have recorded advice that representations in the brochure were not necessarily what would be provided in the completed development. He responded that for a development of this size, the marketing material and agreement for sale and purchase clearly stipulated what was being made available, and it was clear in the agreement for sale and purchase that changes could be made. He said that in the appellants' case, if any particular question had been asked, or matter discussed, it would have been recorded in the transaction report.

[41] In answer to a question from the Tribunal, Mr Bayley accepted that a salesperson selling off the plans should probably make it clear to a prospective purchaser that there may be a difference between what is represented in marketing material and the completed property. He accepted that a transaction report may be relied on later, for confirmation as to advice given to prospective purchasers. He said there would be more detail recorded in the case of residential sales to individuals than in a multi-unit development, but accepted that multi-unit development sales are also to individuals. He said that he would review the transaction reports in this respect.

[42] Mr Bayley was also asked whether he would have expected the transaction report to have recorded advice given as to disclaimers contained in the marketing material.

He responded that he would not, as for a development of this type, the agreement for sale and purchase is a standard contract, prepared by solicitors. He added that there are no circumstances in which a salesperson would not advise prospective purchasers to seek legal advice.

Submissions

[43] Mr Eade submitted that there is no dispute that the developer failed to deliver the promised apartment complex and signature features, and there is no dispute that there were omissions and impairments to the represented features. He submitted that Mr Quinton breached r 6.4 of the Rules by failing to inform the appellants that changes were being made to signature features of the Hereford development. He submitted that Mr Quinton marketed their apartment purely off the brochure, without any question or investigation as to whether what was being promised would be delivered.

[44] He submitted that the representation that there would be a 24/7 concierge was a primary factor in the appellants' decision to buy an apartment in Hereford. He submitted that a concierge markedly changed the nature of the property, and added considerably to its value. He submitted that there was nothing in the brochure to the effect that whether or not there would in fact be a concierge would be the responsibility of the incoming body corporate. Nor, he submitted, did Mr Quinton give them any advice to that effect. He submitted that in the absence of an established concierge (and the necessary infrastructure), the Committee was wrong to find that it was for the incoming body corporate to decide whether there should be a concierge.

[45] He also submitted that the Committee was wrong to find that it was for the incoming body corporate to decide whether there would be a live-in building manager, when that decision had been made prior to settlement by a body corporate comprising only the developer, and concealed from incoming purchasers. He further submitted that the body corporate manager (Mr Newman) was an employee of the Agency, such that information held by him was information held by the Agency and Mr Quinton.

[46] Mr Eade further submitted that the Committee had not considered the evidence of the developer's brochure and the Agency's marketing material, supported by the

appellants' own evidence of how Mr Quinton presented Hereford to them. This was that the development would have a 24/7 concierge, it would have an on-site building manager, and it would have a gym, theatre room, Zen gardens, and enhanced security. He submitted that where the appellants and the Agency and Mr Quinton had differing positions, the Committee should have found that the written evidence of the brochure and marketing material should have tipped the balance of probabilities in favour of the appellants' complaint.

[47] Mr Eade submitted that Mr Quinton did not give any specific warning as to the possibility of changes being made. He submitted that they do not recall being shown any of the disclaimer clauses set out in the submissions for Mr Quinton and the Agency, and they were only given a general recommendation to "consult a lawyer", such as would be given to any purchaser, of any property. He submitted that it is for Mr Quinton to establish that he told the appellants of the disclaimers, which he described as "unusual and differing conditions". He submitted that Mr Quinton's assertion to that effect should be backed by evidence, and there is no such evidence here; for example, there is no reference of such a warning in the transaction report.

[48] Mr Eade further submitted that references to disclaimer clauses in the brochure and agreement for sale and purchase are not determinative, as there is no provision in the Act to the effect that the obligations of real estate licensees, as set out in the Act and Rules, can be contracted out of.

[49] Mr Eade submitted that Mr Quinton worked out of the developer's premises, was listed in the brochure the developer's "sales director", described as "part of the family", had had regular meetings with the developer and architects, and made the same marketing representations multiple times, but could not produce any written record of communication as to changes, or lack of them. He submitted that if there are emails or documents relating to signature features going ahead or not going ahead, they have not been presented. He submitted that the evidence before the Committee and the Tribunal establishes that the appellants are correct as to the representations made by Mr Quinton.

[50] Mr Eade referred to Mr Quinton's evidence that the developer had an open-door policy, and would answer any question he gave to them. He submitted that it would be remarkable if over a period of four years of marketing, and two years after the complaint, there was not a single piece of evidence of Mr Quinton asking the developer about the process. He submitted that Mr Quinton's evidence is limited to an assertion that he advised the appellants that "some things may change at some time". He submitted that it is for the Tribunal to decide if that is enough, but the appellants could not have confidence in the industry if that is acceptable.

[51] Mr Eade submitted that the present case is similar to that considered by the Tribunal in *Kek v Real Estate Agents Authority (CAC 409)*,[6] in which the Tribunal dismissed an appeal brought by a licensee who had made three particular representations when marketing a property without obtaining independent verification. He submitted that the representations made by Mr Quinton were of the same nature as those made by Ms Kek: that is, positive assertions intended as inducements to prospective purchasers, and Mr Quinton should have verified the accuracy of the representations he made concerning Hereford, and could not rely on saying that he was simply repeating information given to him by the developer.

[52] Ms Keating submitted that a sale of an apartment off the plans is different from other sales by licensees, as they cannot physically inspect what is being sold. A licensee can only make representations based on the package of information received from the vendor, and present that to the public. She submitted that the Agency accepts that what was marketed for Hereford is different from what was delivered in some respects, but submitted that neither the Agency nor Mr Quinton is responsible for those differences.

[53] Ms Keating submitted that during the period leading up to the appellants' entry into the agreement for sale and purchase in May 2015, Mr Quinton properly presented the appellants with the developer's marketing material, but at no time made representations beyond that material. She submitted that at that stage Mr Quinton had

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6 *Kek v Real Estate Agents Authority (CAC 409)* [2019] NZREADT 26.

not been advised of any changes to the advertised amenities, and understood that the development would proceed as marketed.

[54] She referred to Mr Eade's submission that the Agency and Mr Quinton had "mined" the brochure and agreement for sale and purchase for disclaimers, and submitted that Mr Quinton had properly pointed those out to the appellants, reiterated that changes could be made, and recommended that the appellants take legal advice before signing the agreement, which they did. She further submitted that it is clear that the brochure shows the concept for the development.

[55] Ms Keating agreed that a licensee should point out the disclaimers, and referred to Mr Quinton's evidence that he did so for each prospective purchaser. She accepted that he did not say that "some features may not eventuate", but submitted that it would be a step too far to require him to do so. She submitted that if a developer says it intends to develop certain amenities, the licensee should sell the property as such.

[56] Ms Keating submitted that during the period after the appellants signed the agreement for sale and purchase, the developer communicated with purchasers directly, having instructed Mr Quinton not to do so. She submitted that there was regular correspondence from the developer, and that this correspondence indicates that the developer intended to proceed with the concierge, pool and building manager.

[57] With respect to individual representations, Ms Keating referred to Mr Quinton's evidence that the developer had carried out research into the concierge concept several months after settlement, and presented it to the body corporate in February 2019, at which time the body corporate decided not to proceed. She submitted that the Agency marketed Hereford with a concierge service up until July 2017. She submitted that this established that Mr Quinton and the Agency believed that a concierge service would be provided.

[58] Ms Keating accepted that the decision not to have a live-in manager was made by the developer without consultation with incoming apartment purchasers. She referred to Mr Quinton's evidence that he was aware in early 2017 of difficulties concerning a live-in building manager at another development, and passed this on to

the developer, and that he raised the matter with the developer around the time of settlement, and told it was still under discussion. She submitted that while Mr Quinton now knows that a decision was made at the meeting on 18 May 2017, he did not know that at the time. She further submitted that it was only during the course of the appeal hearing that the significance of that meeting became evident to the Agency.

[59] Ms Keating agreed that prospective purchasers ought to have been consulted before the decision was made on 18 May 2017, but the developer did not consult them. She also agreed that the decision should have been disclosed in the developer's pre-settlement disclosure, but it was not. She referred to Mr Quinton's evidence that pre-settlement body corporate meetings are usual around the time of settlement, and will be disclosed to prospective purchasers. She submitted that there was no reason for Mr Quinton to query that a meeting would be held earlier, and that it appears that the developer intended to keep the meeting secret. She submitted that there were no red flags that alerted Mr Quinton to the fact that there had been a meeting.

[60] Regarding the pool, Ms Keating referred to Mr Quinton's evidence that it was not constructed as at the date of settlement. She referred to a developer's newsletter to prospective purchasers on 1 May 2017 as to the pool's location and construction. She submitted that this made no mention of ownership, and there was nothing in the newsletter that would have prompted Mr Quinton to query ownership of pool. She also referred to the easement lodged by the developer in March 2017, and submitted that the developer either intentionally omitted to advise prospective purchasers of it, or did not think it was significant. She submitted that there was nothing to raise a red flag with Mr Quinton.

[61] Regarding the gym and theatre, Ms Keating referred to Mr Quinton's evidence that he advised prospective purchasers that spaces were "earmarked for the gym and theatre", but did not make representation as to what each would contain. She submitted that his evidence was that fitting out would be a body corporate cost, and there would be an allowance for it in the body corporate budget, but he did not tell prospective purchasers there would be a functioning gym and theatre. He described the theatre as "a place to go to relax". The space was provided, the only question was as to who would pay for what was in the rooms.

[62] With respect to the Zen gardens, Ms Keating referred to Mr Quinton's evidence that the plans for Hereford showed a courtyard, and his understanding was that this was the space reserved for a Zen garden, and where the architect intended it to be. She also referred to the developer's newsletter of 1 May 2017, which referred to an "internationally renowned landscape artist" coming to Hereford. She submitted that there is nothing in the evidence that would have given reason for Mr Quinton to question the representation as to a Zen garden.

[63] Ms Keating submitted that *Kek* is distinguishable on its facts from the present case, and does not set a general precedent that licensees in any situation must verify the accuracy of information in marketing material. She submitted that in the present case, the representations in the marketing material were consistent with the developer's intentions, unable to be verified (as they related to amenities that were to be provided in the future), and not unusual for a proposed luxury apartment building.

[64] Ms Keating also referred to the Tribunal's decision in *McNicholl v Real Estate Agents Authority (CAC 416)*,[7] in which the Tribunal overturned a Complaints Assessment Committee's decision to take no further action, and found a licensee guilty of unsatisfactory conduct for having failed to identify the particular carpark allocated to an apartment being shown to prospective purchasers, and in not disclosing to them that there was an incompatibility between the advertised "smart wiring" for the apartment and the cabling in the building. She submitted that *McNicholl* is distinguishable from the present case on its facts, as the licensee could have shown the purchasers the allocated carpark, and he knew of the wiring issue.

[65] Ms Woolley submitted that Mr Quinton was required to verify information he was passing on, to disclose what was known, and ensure that prospective purchasers were aware of any disclaimers. She referred to Mr Quinton's evidence that he sat down with the vendor before the brochure was printed, to ensure he was aware of what was in the marketing material, and that it was accurate, and that he disclosed the disclaimers to the appellants. She submitted that the issue for determination is whether he complied with his obligations.

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7 *McNicholl v Real Estate Agents Authority (CAC 416)* [2019] NZREADT 19.

[66] Ms Woolley referred to Mr Eade's submission that there are no documents or records to verify Mr Quinton's evidence. She submitted that Mr Quinton's evidence on oath is evidence that the Tribunal can take into account, and there is no need for corroborating evidence. However, if there were such evidence, it would add weight to the oral evidence. She submitted that Mr Eades' assertions might equally fall into the "uncorroborated" category.

[67] Ms Woolley submitted that in this case, licensees' duties are not as clear during the period after an agreement for sale and purchase is signed, and any case will rely on its particular facts. In the present case, the marketing material contained disclaimers: that things could change. She submitted that if Mr Quinton had learned that a promised feature was not going to be delivered, then he was required to disclose that to the appellants. She submitted that the expectation is that licensees will disclose anything they know of, or learn about, and that they should make inquiries if it is reasonably obvious that there will be a change. She referred to Mr Quinton's evidence that he did not learn that any features were to be changed until after settlement.

[68] She submitted that public confidence is a real issue in the present case, which involves a sale off the plans, and heightens the importance of disclosure of all matters. However, she agreed with the submission for Mr Quinton and the Agency, that Mr Quinton could only disclose what he knew or could reasonably be expected to have inquired about. She submitted that the onus of disclosure is on the vendor (in this case, the developer), as the Unit Titles Act 2010 provides that the vendor must provide both pre-contract and pre-settlement disclosure statements to prospective purchasers.

[69] Ms Woolley endorsed Mr Quinton's evidence, and the submission on his behalf that it is usual for there to be a pre-settlement meeting of the body corporate, and for the Minutes of that meeting to be disclosed by the vendor to purchasers. She submitted that it would go too far to suggest that licensees should pro-actively make inquiries of the vendor as to any changes in the development. She submitted that changes that are material to the sale and purchase ought to be disclosed through the vendor's pre-settlement disclosure.

Discussion

[70] Rule 6.4 provides:

> A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

We accept Ms Woolley's submissions regarding compliance with r 6.4. We summarise below the principles set out in the Tribunal decisions referred to in counsel's submissions.

[71] Licensees must make every effort to know the product being sold, but are not required to anticipate problems where problems might not exist. Licensees have an active role in conveying information to a prospective purchaser, and if asked about particular aspects, must make proper enquiries.[8] Even if a misstatement is "innocent" or inadvertent, any incorrect information provided by a licensee will nevertheless constitute a breach of r 6.4, and may amount to unsatisfactory conduct or misconduct.

[72] Licensees cannot simply pass on information from a vendor, especially if it is about an important and complicated feature of the property, and before making a positive representation, licensees should take precautions to check its veracity, and should obtain verification of features, particularly if those features are unusual or distinctive.[9] Licensees cannot rely on having acted merely as a conduit from seller to purchaser in order to avoid responsibility for a misrepresentation, and in circumstances where licensees are conveying such information, they must make it clear that they are not the source of the information, that it comes from the vendor, and has not been verified.[10]

[73] None of the decisions referred to us involved a purchase off the plans: they involved sales of residential properties (*Donkin*, *Fitzgerald*, *Masefield*, *Kek*, and *McNicholl*), a lifestyle block (*McCarthy*), and a dairy farm (*Grindle)*. *McNicholl*

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8 See *Fitzgerald v Real Estate Agents Authority (CAC 20007)* [2014] NZREADT 43.

9 See *McCarthy v Real Estate Agents Authority (CAAC 20007)* [2014] NZREADT 94, *Masefield v Real Estate Agents Authority (CAC 301)* [2015] NZREADT 30, and *Donkin v Real Estate Agents Authority (CAC 10057)* [2012] NZREADT 44.

10 See *Masefield* (above, fn 9), and *Grindle v Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 85.

concerned an apartment building where some apartments had been purchased off the plans, but the apartment which was the subject of the complaint had been purchased after construction was completed.

[74] In most cases, the decisions were concerned with representations as to existing features or structures, which were capable of being verified:

[a] *Donkin*: the property was misrepresented as a "legal home and income", when it was not permitted as such;

[b] *Fitzgerald*: the property was advertised as having a "fully fenced yard" with "plenty of room for the children to play", when the fence was not on the boundary and when moved to the correct position removed a large part of the back yard;

[c] *Grindle*: the licensee passed on incorrect milk production figures provided by the vendor, when the correct information could have been obtained from Fonterra;

[d] *Masefield*: the issue was a licensee's disclosure of covenants protecting a "stunning view" from the property being sold;

[e] *Kek*: the misrepresentations were as to the type of timber treatment used, stud height, and the ability to install a swimming pool; and

[f] *McNicholl*: the misrepresentations were as to the allocated carpark, and "smart wiring".

[75] However, in *McCarthy*, a licensee told prospective purchasers of a lifestyle block at Waihi that a mining company owned neighbouring land, but that there was no intention to mine at or near to the land being sold. Some months after the purchase, the purchasers learned that a mining company had applied for resource consent to mine under the property. The Tribunal found that the licensee was unaware of the potential risk of mining in the area. The Tribunal found that the misrepresentation was innocent, but nonetheless constituted unsatisfactory conduct.

[76] The *McCarthy* decision demonstrates that the obligations under r 6.4 are not restricted to representations as to existing features or structures: as in *McCarthy*, they can apply to future intentions. Therefore, representations as to features intended to form part of a development off the plans are not to be treated differently from other representations. The same care must be taken by licensees, the same precautions must be observed, and the same principles apply as set out above.

[77] Mr Quinton remained under a duty to disclose what he knew or ought reasonably have been aware of, or might reasonably be expected to occur, between the agreement for sale and purchase and settlement.

[78] The provisions of ss 146 and 147 of the Unit Titles Act 2010, which require the vendor to make pre-contract and pre-settlement disclosure did not absolve Mr Quinton of that responsibility. Nor did the fact that he passed on information from the developer, or disclaimers in the marketing material or agreement for sale and purchase absolve him of his obligation not to mislead, not to provide false information, and not to withhold information that by law or in fairness he should have provided.

[79] In this case, the 24/7 concierge and live-in building manager, in particular, were signature features, and inducements to prospective purchasers. Mr Quinton was required to take steps to verify their accuracy before making positive representations as to the concierge and building manager. We accept Mr Quinton's evidence that he went through the brochure with the developer before marketing Hereford, and that he believed that those signature features would be delivered.

[80] The issue in this case turns on what Mr Quinton knew, or ought reasonably to have known, regarding changes made by the developer to the advertised features of Hereford. We do not accept Mr Eade's submission that we can infer Mr Quinton's knowledge from his identification in the brochure as "sales director" for Hereford, the testimonial as to his being "part of the [developer's] family", and his contact with the developer during the marketing period.

[81] Nor do we accept Mr Eade's submission that the body corporate manager was an employee of the Agency, and as such the body corporate manager's knowledge

could in some way be ascribed to the Agency and Mr Quinton. We accept the Agency's submissions that the body corporate manager is employed by a separate and independent entity.

[82] We accept Mr Quinton's evidence that he was given no reason to believe that the promised features would not be present in the completed building, or that he was made aware of any changes the developer made.

[83] There is no evidence that Mr Quinton was made aware of an intention by the developer not to proceed with a 24/7 concierge, or that necessary infrastructure for a concierge had not been included in the construction. His evidence that he continued to market the Hereford development as including a concierge service up until settlement of the transactions is to the opposite effect.

[84] We accept that Mr Quinton raised the question of the building manager's residence and was told it was still under discussion, he was not aware of the body corporate meeting on 18 May 2017, he was not provided with the Minutes of that meeting, and he was not made aware of the decision taken at that meeting to engage an off-site building manager until some months later. There is no evidence that Mr Quinton was aware of the meeting. He thought a body corporate meeting would be held, in the normal course, shortly before settlement of the transactions, but did not make any enquiries about it. We accept that this was because he considered it would have dealt only with the usual formalities.

[85] Further, there is no evidence that Mr Quinton was made aware of the easement and covenant that provided for access to the pool, but not ownership.

[86] While we consider that Mr Quinton should have been proactive, and kept himself more aware of matters affecting the transaction, in the circumstances where his role was limited by his instructions from the developer, we are not persuaded that his failure to do so constituted unsatisfactory conduct.

[87] With regard to the gym and theatre room, we accept that Mr Quinton represented the spaces indicated as "gym" and "theatre room" on the Hereford plans as being

spaces earmarked for the those purposes, and referred to the provisions in the body corporate budget (from which it is apparent that the fit out for these rooms was to be a body corporate responsibility), but did not represent that they would be provided as a fully fitted out and functioning gym and theatre respectively. While the brochure included photographs of exercise equipment, they could not be taken as representing anything other than a "staged" possible set up.

[88] Similarly, we accept Mr Quinton's evidence that the "courtyard" shown on the plans was the "Zen garden" referred to in the brochure.

[89] We also accept Mr Quinton's evidence that he pointed out the disclaimer clauses in the brochure to the appellants before they signed the agreement for sale and purchase, to the extent of reiterating the caution that "things could change" and advising them to take legal advice.

[90] However, while the evidence was that this is his normal practice, and that of the Agency, this case highlights the importance of licensees emphasising disclaimers. It is apparent that when a development is sold off the plans, there is always an inherent uncertainty, and possibility that changes may be made to the advertised concept. As appears to have been the case with Hereford, those changes can have a significant effect on the nature of the property being marketed.

[91] We therefore commend to the industry as best practice that licensees take particular care when marketing a property off the plans, that they start with the best information available as to the developer's plans and intentions, and that they keep notes of meetings with developers throughout the marketing and construction of the property, and keep themselves informed as to, and record, any changes being made, or under consideration, as the development progresses. Licensees will then be in a better position to market the property without misrepresenting or withholding information.

[92] We also commend to the industry as best practice that a transaction report should contain a reasonable amount of detail as to representations to, and discussions with, prospective purchasers. As Mr Bayley accepted, the transaction report is usually looked to for confirmation as to representations and discussions if any issue arises after

the transaction is completed. A detailed report is of considerable assistance when memories may not be fresh. In this respect, there should be no substantive difference between a transaction report for a sale off the plans and a report for the sale of any other type of property.

Decision

[93] While we have reached our decision for different reasons from the Committee's, we are not persuaded that it was wrong to decide to take no further action on the appellants' complaint. The appeal is therefore dismissed.

[94] 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.

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Hon P J Andrews
Chairperson

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Mr G Denley
Member

_____
Ms C Sandelin
Member