BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2021] NZREADT 37

READT 034/2020

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	GREGORY ERNEST WATSON and KELLY WATSON Appellants
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1906) First Respondent
AND	JACEUELINE BERRY and BULSARA LTD (t/a Tall Poppy Real Estate) Second Respondents
Hearing:	29 June 2021, by AVL
Tribunal:	Hon P J Andrews, Chairperson Ms C Sandelin, Member Ms F Mathieson, Member
Appearances:	Mr Watson, Appellant Mr T Bain and Ms Z Wisniewski, on behalf of the Authority Ms Berry and Mr D Graves (Compliance Manager, on behalf of Bulsara Ltd), Second Respondents
Date of Decision:	20 July 2021

DECISION OF THE TRIBUNAL

Introduction

[1] Mr and Mrs Watson ("the appellants")[1] have appealed under s 111 of the Real Estate Agents Act 2008 ("the Act") against the decision of Complaints Assessment Committee 1906 ("the Committee"), dated 27 November 2020, to take no further action on their complaint against the second respondents, Ms Berry and Bulsara Ltd ("the Agency").

Background

[2] Ms Berry is a licensed salesperson engaged by the Agency. Pursuant to an agency agreement dated 9 December 2019, she was engaged by the owner of a property in Stratford ("the property") to market it for sale. The property comprised a two-bedroomed house ("the house") and a one-bedroomed "Versatile" unit ("the unit") which had been added by the vendor. Ms Berry had previously marketed and sold the property in October 2016 and May 2017.

[3] The following is a chronological summary of the relevant events. All relevant events occurred between 10 and 20 February 2020.

[4] On Thursday 13 February the appellants travelled to Stratford to view the property with Ms Berry. On the morning of Friday 14 February, the appellants met with Ms Berry and filled in an Expression of Interest ("EOI") form, which Ms Berry told them was an essential first step before making an offer. That afternoon an electrician attended at the property to prepare a quote for installing a separate electricity meter for the unit, and a building inspector from Betta Inspect It attended for a building inspection.

[5] On Sunday 16 February Ms Berry sent disclosure statements for the house and the unit to the appellants. She asked the appellants to record any defects or issues they had become aware of. She also advised that the vendor had asked whether the settlement date could be moved forward to 21 February.

---

[1] Except where it is appropriate to refer to Mr or Mrs Watson individually, we will refer to them as "the appellants".

[6] On the evening of Monday 17 February Ms Berry sent the appellants an Agreement for Sale and Purchase ("ASP"). On Tuesday 18 February the appellants advised Ms Berry that they had been advised to terminate their intent to purchase the property. They also advised that they would be making a complaint.

Complaint

[7] On 19 February Mr Watson made a formal complaint to the Agency about Ms Berry. Mr Graves responded on behalf of the Agency on 20 February. Mr Watson made a formal complaint to the Authority on 20 February, stating that:[2]

> 1. [Ms Berry] repeatedly agreed to provide [an ASP] to us before we engaged in spending money to visiting the property, scheduling a builder's inspection, and then over the course of four more days. She agreed we had a verbally accepted offer and that she guaranteed the vendor accepted and not back out.
>
> 2. [Ms Berry] withheld the vendor and salesperson disclosures statements until two days after we had left the area and were no longer able to check major concerns it contained. Such as the retaining wall not having council code of compliance and a concrete driveway built over sewer easement.
>
> 3. [Ms Berry] asked us to alter vendor and sales person statement that was originally signed in December of 2019, with new additional information and send it back to her.
>
> 4. [Ms Berry] asked us to drop two conditions of our offer that would have put us at risk to meet a deadline of the 21st, five days earlier than our previous agreed date of the 28th. This unfairly protect us in the event of LIM faults found.
>
> 5. [Ms Berry] changed the agreed deposit on the EOI from 10% to zero from our original agreed amount.

[8] The appellants subsequently confirmed with the Authority that their complaint was also that Mr Graves had not dealt adequately with their complaint.

The Committee's decision

Oral offer and acceptance[3]

[9] The Committee recorded that it had competing views of whether Ms Berry told the appellants that the vendor had "verbally" (that is, orally) accepted their offer of

---

2 Text as in original complaint.
3 Paragraphs 3.2 to 3.11 of the Committee's decision.

$360,000 on Thursday 13 February: Ms Berry said in her response to the complaint that she had not made that representation, but she told the Authority's investigator that she had told the appellants that the oral offer had been accepted, because she could not think of any other way in which to pass on the information to them. The vendor said he never received a written offer and would not have accepted a "verbal" offer.

[10] The Committee recorded that it would be surprised and disappointed if a licensee represented that an "accepted verbal offer" could be binding. It concluded "on balance" that Ms Berry had not represented that there was an accepted "verbal" offer for the property and that, therefore, she had not breached any provision of the Act or the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules").

Non-disclosure of issues[4]

[11] The Committee noted the appellants' concern that Ms Berry did not provide them with the disclosure statements until two days after the building inspection, that is, Sunday 16 February. It recorded that it was left with competing views as to whether Ms Berry "knew clearly" that there was to be a building inspection at 3.00 pm on Friday 14 February: the appellants' statement that the inspection was planned for 3.00 pm on 14 February and the vendor's statement that he was telephoned by Mr Berry about the inspection, and Ms Berry's statement to the Authority that the inspection was unexpected and a surprise to her.

[12] The Committee concluded that there could have been a genuine misunderstanding between the parties as to who would be attending at the property at 3.00 pm on 14 February. It considered that the appellants might not have advised Ms Berry in unambiguous terms that the inspection was to occur, and concluded that if she had been aware of it, it would have expected that she would have provided the appellants with the disclosure statements so that the builder could consider any issues noted as part of the inspection. It concluded that Ms Berry had not inappropriately withheld information that should have been provided to the appellants before the building inspection and had not breached any provision of the Act or Rules.

---

4 Paragraphs 3.12 to 3.25.

Request to alter the disclosure statement[5]

[13] The Committee recorded the appellants' complaint that Ms Berry asked them to alter the disclosure statement for the unit, to include the wiring issues identified by the electrician. It noted Ms Berry's statement that she did not make this request.

[14] The Committee observed that it was not clear to it why such a request would be made. It noted that at the time of the request the appellants were aware of the issue raised by an electrician, and the only possible reason for changing the disclosure statement would be if Ms Berry specifically knew of the electrical issue and had deliberately withheld it. It said that there was no suggestion that she had withheld information in that way and concluded that she had not requested that the appellants alter the disclosure statement and that she had not breached any provision of the Act or Rules.

Request to remove conditions from the Agreement for Sale and Purchase.[6]

[15] The Committee recorded the appellants' concern that Ms Berry had asked them to remove two conditions from the ASP, regarding a LIM and Council title check, such that they would be in a vulnerable position as they could not cancel the contract if there were any issues. The Committee noted Ms Berry's response that she provided the appellants with a draft ASP, they would then receive their own legal advice, and she played no part in the creation of any special clauses the appellants wished to have in the ASP. The Committee also referred to the email from Ms Berry to the appellants on 16 February (referred to in paragraph [5], above), in which Ms Berry told the appellants of the vendor's query whether the appellants could "be unconditional" on 21 February and said "I don't think you will be … Unless you forfeit the last two clauses".

[16] The Committee concluded that in this email Ms Berry was stating as a fact that in order to be unconditional by 21 February (five days away) certain conditions would not logistically be able to be met. It did not consider that Ms Berry's statement was a

---

5 Paragraphs 3.26 to 3.31.
6 Paragraphs 3.32 to 3.40.

recommendation that the conditions be removed. The Committee therefore concluded that Ms Berry had not requested that the appellants delete conditions in the ASP and had not breached any provision of the Act or Rules.

Deposit not included in the Agreement for Sale and Purchase[7]

[17] The Committee recorded that the appellants' concern was that the EOI provided for a deposit of 10 percent, and this was not included in the draft ASP Ms Berry sent them. The Committee recorded that when Ms Berry emailed them the ASP on 17 February, she also sent them a text message in which she said "Note: no deposit as your date to go unconditional and settle are the same day".

[18] The Committee observed that in a short settlement situation it would not be unusual for there to be no deposit. It noted that the appellants had instructed a lawyer before Ms Berry sent them the draft ASP, so that if this was considered a key issue, the ASP could have been amended to include a deposit, and that as long as there was a fully executed ASP, the lack of any deposit should not have put the appellants at risk of a competing purchaser being able to purchase the property. The Committee concluded that Ms Berry had not breached any provision of the Act or Rules by not including a deposit in the draft ASP.

Complaint against the Agency[8]

[19] The Committee recorded the appellants' complaint that Mr Graves (on behalf of the Agency) did not deal with them adequately.

[20] The Committee reviewed the email correspondence between the appellants and Mr Graves and concluded that while relatively brief, Mr Graves' responses addressed the issues and were not rude or aggressive. He had advised the appellants that they could raise their concerns with the Authority. It noted that "arguably" he could have responded to each of the issues raised by the appellants "in a bit more detail", but concluded that his response had not breached any provision of the Act or Rules.

---

7 Paragraphs 3.41 to 3.48.
8 Paragraphs 3.49 to 3.55.

The appellants' appeal

[21] The appellants appealed on the grounds that:

[a] they were given insufficient time to respond to the evidence before the Committee made its decision, as Mr Watson is visually impaired, being legally blind in one eye and having reduced vision in the other;

[b] the Committee comprised only two members when it should have had three, one of whom being a consumer representative;

[c] the Committee disregarded critical evidence; and

[d] the appellants sought to submit new evidence as to Ms Berry's knowledge of the building inspection.

[22] An appeal against a Committee's decision to take no further action is a "general" appeal, and the Tribunal is required to make its own assessment of the merits of the case in order to decide whether the Committee's decision was wrong. The appellants bear the onus of satisfying the Tribunal that the Committee's decision was wrong.[9]

[23] In a Ruling issued on 13 April 2021 the Tribunal gave leave for the appellants to submit evidence regarding the arrangements made for the building inspection.[10] The Tribunal's grounds for granting leave included that it was satisfied that Mr Watson would have found it difficult to peruse the material sent to him for comment within the short period given to do so.

Was the Committee improperly constituted?

[24] The appellants submitted that the Committee was improperly constituted, because it comprised only two members. They submitted that the Act normally requires there to be three members: a member of the real estate industry, a lawyer, and

---

9 See *Austin, Nichols & Co v The Real Estate Authority* [2007] NZSC 103, [2008] 2 NZLR 141, at [4]-5]; and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898, at [112]

10 *Watson v The Real Estate Agents Authority* [2021] NZREADT 17.

a consumer representative. They submitted that in the present case there was no consumer representative (who was unable to attend due to personal reasons) and this left them at a disadvantage as the Committee was not able to come to a fair decision.

[25] Mr Bain submitted for the Authority that the Act does not require there to be three persons sitting on every matter, and the Committee was properly constituted in this case.

[26] Section 75 of the Act requires the Authority to appoint Complaints Assessment Committees. Section 75(2) provides that each Committee consists of three members and s 73(3) provides that one of the members of each Committee must be a member of the Authority, s 75(4) provides that two members of each Committee must be appointed from the panel maintained pursuant to s 76 of the Act, and s 75(5) provides that one of the members of each Committee (whether a member of the Authority or appointed from the panel) must be a lawyer of not less than seven years' legal experience.

[27] Section 76 provides that the Authority must maintain a panel of up to 20 persons who are suitable to serve as members of Complaints Assessment Committees. Pursuant to ss 76(2) and (3), when considering the suitability of persons for appointment to the panel, the Authority must not only have regard to their personal attributes but also their "knowledge and experience" of matters likely to come before the Authority. "Knowledge and experience" is defined as including (without limitation), knowledge and experience of law, the real estate industry, and consumer affairs.

[28] Section 77 provides that for the purpose of considering a matter before it, each Committee consists of:

> (a) The chairperson of the Committee or, if the chairperson is absent from duty for any reason, the deputy chairperson of the Committee; and
>
> (b) 1 other member, or if the chairperson or deputy chairperson so directs, 2 members.

[29] There is no requirement that there be three members of each Committee (the chairperson or deputy chairperson plus two others). The "default" position pursuant to s 77(a) is that there are two members (the chairperson or deputy chairperson plus one other). Furthermore, there is no requirement that each Committee should include a "consumer representative".

[30] This element of the appellants' appeal must fail.

Factual findings

[31] The essence of the appellants' appeal is that the Committee made incorrect factual findings on the evidence. Both the appellants and Ms Berry made statements to the Authority as to what occurred during the period between 10 and 20 February, which differed in many respects. Having heard from Mr Watson and Ms Berry at the appeal hearing, we have more information than was available to the Committee. Our findings are set out below.

[32] On Monday 10 February 2020 the appellants contacted Ms Berry about the property. At the time, they were living at Whangaparaoa, north of Auckland. They expressed their interest in viewing the property and asked Ms Berry if the vendor would be prepared to accept an offer of $350,000. This was so they would not have a wasted journey from Whangaparaoa to Stratford to view the property if their offer was not going to be acceptable. Ms Berry put this to the vendor, who responded that he wanted $360,000. Ms Berry told the appellants that the vendor would not accept an offer of $350,000. Ms Berry and the appellants exchanged emails that day, in which she sent them a rental appraisal and confirmed the sizes of the house and the unit.

[33] On Wednesday 12 February, the appellants telephoned Ms Berry again and asked her if the vendor would accept an offer of $360,000, with a settlement date of 28 February. Ms Berry contacted the vendor. The appellants said in their complaint that Ms Berry said that the vendor "would accept an offer of $360,000", and that he would agree to a settlement date of 28 February if the appellants would agree to the vendor and his mother renting the house from the appellants for two to three months.

Ms Berry told the Tribunal that the vendor "would consider an offer of $360,000" but could not remember if the word "acceptable" was used.

[34] The appellants travelled to Stratford on Thursday 13 February. They met with Ms Berry and viewed the property. While they were at the property Ms Berry arranged for an electrician to attend the next day to arrange a quote for separating the electricity meters for the house and the unit. The appellants asked a building inspection company Betta Inspect It (suggested to them by Ms Berry) to undertake an inspection the following day.

[35] At or immediately after the viewing the appellants told Ms Berry they wanted her to put an offer to the vendor, to purchase the property for $360,000. Ms Berry accepted at the appeal hearing that she put this offer to the vendor, and the vendor accepted it. This was done orally, not in writing. Ms Berry telephoned the appellants and told them the vendor had accepted their offer. They arranged to meet the following morning. The appellants understood that Ms Berry would have an Agreement for Sale and Purchase ("ASP") for them to sign.

[36] Ms Berry met with the appellants at the local library during the morning of Friday 14 February. They completed an EOI form, which Ms Berry said was an Agency requirement as a first step before completing an ASP. The sale price of $360,000 was inserted into the EOI form, with a provision for a deposit of 10 percent and a settlement date of 28 February. The appellants expressed concern at not having an ASP to sign. At the appeal hearing Ms Berry accepted that she said to the appellants that the vendors would not pull out of the agreement. She said there was no reason for them to do so, as the appellants' offer was the only one on the property and it was at the price the vendor wanted.

[37] Ms Berry assisted in arranging the Betta Inspect It inspection. She rang the vendor on Thursday evening (after the appellants' first viewing) and arranged access for the building inspector to attend the following day. Betta Inspect It confirmed to Mr Watson on 30 November 2020 that they emailed Ms Berry on 14 February about the inspection, and that she was spoken to at approximately 9.00 am on 14 February to confirm access for an inspection. Although the Betta Inspect It email referred to an

inspection at 3.00 pm on Saturday 15 February, rather than 3.00 pm on Friday 14 February, the error was corrected by telephone calls to Ms Berry and the appellants on the morning of 14 February. Ms Berry said at the appeal hearing that she was aware of the building inspection, she had spoken with the vendor to arrange access and received advice of the inspection, and did not know why she had said in her response to the complaint that she was "surprised" by the inspection.

[38] The appellants attended at the building inspection. Ms Berry was not able to attend it and arranged for a colleague to attend. Ms Berry arrived a little later, but did not have a signed ASP for the appellants to sign. The appellants expressed concern that the vendor could pull out, leaving them with the costs of inspection, and said that Ms Berry replied "don't worry, the vendor won't pull out".

[39] An electrician attended at the property at the same time to prepare a quote for separating the meters for the house and the unit. In the course of doing so, the electrician discovered that the power supply cable to the unit was insufficient for the installed fixtures in the unit.

[40] The appellants returned to Whangaparaoa on the evening of 14 February. On Sunday 16 February Ms Berry emailed disclosure statements for the house and the unit to the appellants. She asked them to read, sign and return the statements if they were happy with them. She referred to the "defects/issues" section of each statement (in a section headed "Salesperson disclosure" on page 5 of each document) and asked that they "state here if you have found any defects or issues". She added:

> The vendor would like you both to know that he has an offer on a section, and he has asked if you could or will be unconditional on Friday 21st February. As this was a one week extension?
>
> I don't think you would be as you still need a lawyer, LIM report and finance approved. Unless you forfeit the last two clauses".

[41] In his response to Ms Berry, Mr Watson referred to a disclosure as to retaining walls as to which the vendor had selected "no council compliance" and asked for more details on it. He also referred to a sewer easement and asked if a new cement driveway had been built over the easement, and how much that affected the value of the property.

[42] On Monday 17 February Ms Berry emailed the appellants, attaching "all the required documents by law to pass onto you for reading prior to signing a Sales and Purchase Agreement". She identified these as:

> Expression of Interest
> Complaints Eligibility AML
> Disclosures for the Main property
> Disclosures for the Versatile property
> Title explanation

[43] Ms Berry asked the appellants to sign and initial all the documents and scan and email them back to her. Mr Watson responded that the appellants had completed the EOI at the library, and thought she was just going to draft an ASP and forward it to him. Ms Berry responded that it was a requirement of the Agency's system that the documents be signed and initialled. Mr Watson asked Ms Berry again if she would provide an ASP "as we agreed last week".

[44] Ms Berry emailed the appellants a draft ASP during the evening on Monday 17 February. She asked for their lawyer's details, and said she would then re-send the document. She also asked them to "select or cross out clauses 21.1.1 to 21.1.7 that do not apply and initial". At about the same time she sent them a text message saying "no deposit as your date to go unconditional and settle are the same day". Mr Watson provided the lawyer's contact details, and queried Ms Berry's request regarding disclosure of faults they had found, and how they fitted into the ASP.

[45] At 10.13 am on Tuesday 18 February, Mr Watson advised Ms Berry that he had forwarded the documents to their lawyer. He noted that as they did not have a final ASP there would be a delay in the process, and he had been advised not to order a LIM until that had been completed. Ms Berry responded that the appellants should sign and return the documents when they were happy to do so.

[46] Ms Berry enquired how the appellants had got on with their lawyer by text message at 4.32 pm and 7.44 pm on 18 February. At 10.18 pm on 18 February the appellants advised Ms Berry by email that they had spent most of the day with their lawyers and had been advised to terminate their intention to purchase the property. They also advised that they would be filing a formal complaint.

Did the Committee err in finding that Ms Berry did not advise the appellants that the vendor had accepted their oral offer?

[47] We accept Mr Watson's submission that the appellants had not claimed in their complaint that they made an oral offer to the vendor, which was accepted, before they travelled down to Stratford. Their complaint was that they asked Ms Berry to put the offer to the vendor after they had viewed the property on 13 February. Ms Berry accepted at the hearing that she had put the offer to the vendor, it was accepted, she passed that on to the appellants, and the offer price was inserted into the EOI.

[48] We find that in focussing on the appellants' concern not to waste the journey from Whangaparaoa to Stratford, and on the discussions on 12 February, the Committee did not give consideration to the appellants' evidence as to the offer they asked Mr Berry to make to the vendor after viewing the property on 13 February, and the vendor's acceptance of the offer. It also failed to give consideration to Ms Berry's confirmation to the Committee's investigator that she had advised the appellants that their offer had been accepted.

[49] The Committee therefore erred in finding that Ms Berry did not represent that there was an accepted "verbal" offer for the property. We find that Ms Berry did represent to the appellants that the vendor had accepted their oral offer.

[50] In the light of that finding the Tribunal is required to consider whether in making that representation Ms Berry breached a provision of the Act or Rules.

[51] We find that when she made the representation Ms Berry understood and believed that the vendor had accepted the appellants' oral offer. As she told the Tribunal, that was why she was able to insert the purchase price of $360,000 into the EOI. Accordingly, we do not find that she made a misrepresentation, or misled the appellants. Further, we are not persuaded that in telling the appellants that the vendor "would not back out" Ms Berry was representing that there was a binding contract between the appellants and the vendor. Rather, as she said to the Tribunal, she was stating as a fact that the appellants had offered to pay a price that the vendor was willing to accept, and as there were no other prospective purchasers interested in the property, she was confident that the vendor would not back out.

[52] However, it is apparent that Ms Berry did not explain, or explain adequately, that until such time as there was a written offer and acceptance, there could not be a binding contract for the sale and purchase of the property. Rule 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules") requires a licensee to exercise skill, care, competence, and diligence when carrying out real estate agency work. A licensee exercising skill, care, competence, and diligence would be expected to make it clear to a prospective purchaser that an oral offer and acceptance did not create a binding contract for the sale of land. In failing to do so, Ms Berry failed to comply with r 5.1.

Did the Committee err in finding that Ms Berry did not inappropriately withhold information (the disclosure statements) that ought to have been provided to the appellants?

[53] The Committee based its decision that Ms Berry did not inappropriately withhold the disclosure statements from the appellants on its finding that she did not know of the building inspection on 14 February and was surprised when the building inspector arrived. It said it would have expected that if Ms Berry had known it was to occur, she would have provided the disclosure statements to the appellants so that any issues noted could have been considered during the inspection.

[54] In the light of Ms Berry's evidence to the Tribunal (recorded in paragraph [36], above) there is no proper foundation for the Committee's finding. It is now apparent that there was no misunderstanding as to who would be attending at the property: there was to be both an electrical inspection (for the purpose of providing an estimate of the cost of installing a separate meter in the unit) and a building inspection. As she knew about the building inspection, Ms Berry ought to have provided the appellants with the disclosure statements before that inspection took place. She did not provide them until two days later, on 16 February.

[55] Accordingly, we find that the Committee was wrong to find that Ms Berry did not know about the building inspection. We are therefore required to consider whether she was in breach of any of her obligations in not providing the disclosure statements to the appellants until 16 February.

[56] The disclosure statements were completed when the property was listed with Ms Berry in December 2019. They were, therefore, readily available to be provided to the appellants, at any time. In the Tribunal's view a licensee exercising skill, care, competence, and diligence would have provided the statements to the appellants as part of an information pack when she was exchanging emails with the appellants on 10 February or speaking on 12 February (so that they had the information when deciding whether to travel to Stratford to view the property), when they viewed the property on 13 February, or (at the latest) when they signed the EOI on 14 February.

[57] However, while it is not clear to the Tribunal why Ms Berry did not provide the disclosure statements until 16 February, we are not persuaded that she had any improper or ulterior motive for the delay. While we are satisfied that her failure to provide the disclosure statements at an earlier stage was a failure to exercise skill, care, competence, and diligence (in breach of her obligations under r 5.1 of the Rules) we are not persuaded that Ms Berry "inappropriately withheld" the disclosure statements from the appellants.

Did the Committee err in finding that Ms Berry did not ask the appellants to alter the disclosure statements?

[58] As recorded in paragraph [39], above, when Ms Berry emailed the disclosure statements for the house and the unit to the appellants on 16 February she asked them to read, sign and return the statements if they were happy with them. She referred to the "defects/issues" section of each statement (in a section headed "Salesperson disclosure" on page 5 of each statement) and asked that they "state here if you have found any defects or issues".

[59] The disclosure statements were prepared when the property was listed for sale in December 2019. Two statements were prepared, one for the house, the other for the unit. They are headed "Seller and Salesperson Disclosure (to potential purchasers)" and each document was signed by the vendors and Ms Berry. The purpose of the documents is stated as being "This form provides information for potential purchasers of the property at …". On page five of each document, under the heading "Salesperson disclosure" there is a box which has the instruction:

> If I become aware of any defects/issues that were not known about earlier nor disclosed by the vendor or that I have otherwise disclosed or have suspected, I will note them here or on a supplementary page attached.

[60] The disclosure statements recorded disclosures by the vendor and Ms Berry. They are important documents, prepared in order to give information to prospective purchasers. They are not documents on which prospective purchasers are expected to provide information, and Ms Berry did not say what her purpose was in asking the appellants to add the information, and she said in her response to the complaint that the disclosure statement:

> … whether it be honest, correct or otherwise is their statement to make and we do not do anything with it – apart from providing it to potential buyers with a clear warning that it is the vendors work and may or may not be accurate. Similarly the Salesperson's section is the opinion of that person and not the vendor

[61] Ms Berry's request to the appellants to "state here if you have found any defects or issues" was a request to the appellants to add information to the disclosure statements that was not already there. It is therefore difficult to understand the Committee's finding that Ms Berry did not "request the [appellants] to alter the disclosure statement".

[62] However, we are not persuaded that the Committee was wrong to find that in asking the appellants to add any defects and issues that had been identified to them to the disclosure statements Ms Berry did not breach any of her obligations under the Act and Rules. Ms Berry was clearly concerned to ensure that defects and issues at the property were identified and recorded. It would have been better if she had asked the appellants to set out any defects and issues that had been identified to them, then added the information to the disclosure statements herself, so that they were available to any subsequent prospective purchasers. While she did not do that, we are not satisfied that Ms Berry's request that the appellants add the defects and issues to the list constituted a breach of any of her obligations.

Did the Committee err in finding that Ms Berry did not ask the appellants to remove two conditions to the Agreement for Sale and Purchase?

[63] As recorded in paragraph [39], above, when Ms Berry emailed the disclosure statements to the appellants on 16 February, she advised them that the vendor had asked if they could be unconditional on 21 February. She added that she did not think they could, as "you still need a lawyer, LIM report and finance approved", then added "Unless you forfeit the last two clauses". As recorded in paragraph [43], above, when she emailed the appellants a draft ASP on 17 February Ms Berry asked them to "select or cross out clauses 21.1.1 to 21.1.7 that do not apply and initial".

[64] Clause 21 was inserted into the draft ASP as "Appendix B: Further terms of Sale (Special Clauses and Warranties)" and was headed "Purchaser's Special Conditions". Clause 21.1 contained seven conditions to the agreement (as to solicitor's approval of title, and the purchaser obtaining finance, arranging insurance, obtaining a satisfactory building inspection report, satisfactory council records/property file, a satisfactory toxicology report, and a satisfactory insulation report for the property), and provided for a common period of time for satisfaction of each condition (not specified in the draft ASP). Clause 21.2 further made the agreement conditional on receiving a satisfactory LIM report within a certain period (not specified in the ASP).

[65] We observe that the Committee also referred to cl 22 of the ASP (headed "Better Offer"), which provided that if before the agreement became unconditional the vendor accepted another offer which he considered to be preferable, the vendor could give notice to the appellants to confirm the agreement as unconditional, within a period of three working days, or the agreement would be terminated. However, that does not appear to have been of concern to the appellants. Their concern, as noted in their complaint, was that Ms Berry had asked them to drop conditions as to the LIM and title in order to meet the proposed settlement date.

[66] We are not persuaded that the Committee erred in finding that in her email on 16 February Ms Berry was stating as a fact that in order to meet the vendor's request for an unconditional agreement by 21 February (five days away) certain conditions could not logistically be met, unless those conditions were removed from the

agreement. We agree with the Committee that Ms Berry's email cannot be read as a recommendation, or advice, that the relevant conditions be removed.

[67] We also note Ms Watson's submission on appeal that Ms Berry was not acting in good faith "to imply we *could consider* forfeiting of the LIM and finance conditions to meet a new deadline".[11] Ms Berry was simply stating that there would not be time for satisfaction of the conditions, if they remained in the agreement with an unconditional date of 21 February. We do not accept that Ms Berry's reference to the possibility of forfeiting was in any way a failure to act in good faith.

Did the Committee err in finding that Ms Berry did not breach any of her obligations under the Act or rules in not including a provision for a deposit to be paid in the draft Agreement for Sale and Purchase?

[68] The Committee's decision that Ms Berry had not breached any of her obligations was based on its view that it would not be unusual for there to be no deposit payable in a short settlement situation, the appellants had instructed a lawyer by the time Ms Berry sent the draft ASP to them, and the ASP could have been amended to include a deposit if it was considered a key issue, and as long as there was a fully executed unconditional ASP the lack of a deposit should not have put the appellants at risk of a competing purchaser being able to purchase the property.

[69] We are not persuaded that the Committee was wrong to take this view. The purpose of a deposit is to confirm the prospective purchaser's serious intention to purchase the property, pending satisfaction of any conditions in the agreement for sale and purchase. At the time the EOI was completed on 14 February (with a provision for a 10 per cent deposit), the proposed settlement date was 28 February. When Ms Berry sent the draft ASP to the appellants on 17 February the settlement date and the "unconditional" date were the same: 21 February. We agree that with the "unconditional" and settlement dates being the same, there was no need for a deposit.

[70] Further, whether settlement was going to occur on 28 February or 21 February, it was reasonable to omit the requirement for a deposit, as the deposit would have required a ten-day clearance period.

---

[11] Emphasis as in the appellants' submissions.

Should Ms Berry be found guilty of unsatisfactory conduct?

[71] We have found that Ms Berry failed to exercise due skill, care, competence, and diligence, in breach of r 5.1, by failing to make clear to the appellants that notwithstanding the vendor's oral acceptance to buy the property, they did not at that stage have a binding agreement for sale and purchase, and by failing to provide them with the disclosure documents before the building inspection occurred.

[72] We do not accept the appellants' submission that Ms Berry had any improper or ulterior motive or intent to mislead them, or intentionally manipulated events, to the point where the appellants were forced to withdraw their offer. There was no reason for her to do so. She had a buyer willing to pay the vendor's price, and a vendor who wanted to sell, and she had no other prospective purchasers expressing interest in the property.

[73] In paragraph [32], above, we recorded that the appellants asked Ms Berry on Wednesday 12 February to ask the vendor if he would accept a purchase price of $360,000, with settlement occurring on 28 February, just 16 days later. On receiving advice that the price and settlement were acceptable to the vendor, the appellants viewed the property on 13 February. Given the very short time period between viewing and anticipated settlement, another salesperson in another agency might have prepared a written ASP (subject to appropriate conditions) when asked to put an offer to the vendor after the appellants' viewing on 13 February. However, the Agency's procedures required an EOI to be completed first.

[74] Ms Berry told the Tribunal at the hearing that she had only recently joined the Agency at the time of this transaction, and it was her first transaction through the Agency, following the Agency's processes. She told the appellants after they withdrew from the purchase of the property that "with Tall Poppy procedures it does make it difficult to grasp", but "Tall Poppy procedures [were] the reason why I joined this company for transparency".

[75] Having heard Ms Berry's evidence, we have concluded that her errors arose from her lack of experience with the Agency processes, and possibly a lack of training as to

the processes and supervision through her first transaction. As the Committee did not undertake any inquiry into the Agency's supervision, we are not able to make any finding in that respect.

[76] In the present case a building inspection was arranged, and took place, and the appellants were able to take the inspector's report into account when making their decision whether to proceed with the ASP. The appellants made the decision not to proceed after having received both the building inspector's report and the electrical report, and after consulting their solicitors. They had no difficulty in withdrawing from the sale, as they had not entered into a written contract.

[77] In his judgment in *Vosper v Real Estate Agents Authority*,[12] his Honour Justice Heath considered whether a finding of unsatisfactory conduct should be made against a licensee who had been found guilty of what a Complaints Assessment Committee had described as a "relatively minor" breach of r 12.1 (which requires agents to develop and maintain procedures for dealing with complaints and dispute resolution procedures). His Honour said:[13]

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

[78] In this case, we are satisfied that Ms Berry's errors were relatively minor and may have resulted from a lack of understanding of the Agency's processes and supervision rather than a lack of regard for her obligations. The evidence does not support the appellants' submission that Ms Berry intentionally manipulated events, and intentionally provided false statements to the Authority.

[79] We have concluded that Ms Berry's errors do not lead to a need to mark them by way of a disciplinary finding. Accordingly, we have concluded that the Committee did not err in deciding not to take no further action on the appellants' complaints.

---

12 *Vosper v Real Estate Agents Authority* [2017] NZHC 453.
13 At [74].

[80] Accordingly, the appellants' appeal against the Committee's decision to take no further action on the appellants' complaint against Ms Berry is dismissed.

Did the Committee err in determining to take no further action on the appellants' complaint against Mr Graves?

[81] At the appeal hearing the Tribunal referred the parties to the judgment of his Honour Justice Cooper in *House v Real Estate Agents Authority (CAC 2003)*, in which his Honour held that work done by a licensee (in that case, an agency's customer relations manager) in response to a complaint after a transaction was completed did not come within the definition of "real estate agency work" in the Act.[14]

[82] The effect of that judgment is that a licensee responding to a complaint on behalf of an agency after a transaction has ended (and who has had no involvement with the matter when the transaction was ongoing) could not be found guilty of unsatisfactory conduct under s 72 of the Act (which deals only with real estate agency work), and could only be found guilty of misconduct under s 73(a) of the Act (disgraceful conduct): that is, if the Tribunal were satisfied that a charge had been proved that the licensee's conduct "would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful".

[83] We agree with the Committee's characterisation of Mr Graves' response as "brief", and its comment that he could have responded to each of the issues raised by the appellants in more detail, but we do not consider that the response was one that would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful. We are not persuaded that the Committee was wrong to determine to take no further action on this element of the appellants' complaint.

[84] The appellants' appeal against the Committee's decision to take no further action on the appellants' complaint against Mr Graves is also dismissed.

---

14 *House v Real Estate Agents Authority (CAC 2003)* [2013] NZHC 1619, at [51] to [53].

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

_____
Hon P J Andrews
Chairperson

_____
Ms C Sandelin
Member

_____
Ms F Mathieson
Member