

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2021] NZREADT 52

Reference No: READT 014/2021

**IN THE MATTER OF**

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

**BETWEEN**

**QH**  
Appellant

**AND**

**THE REAL ESTATE AGENTS AUTHORITY  
(CAC 2103)**  
First Respondent

**AND**

**KE and SE**  
Second Respondents

**AND**

**[Real Estate Agency]**  
Third Respondent

Hearing on the papers

Tribunal:

D J Plunkett (Chair)  
G Denley (Member)  
C Sandelin (Member)

Representation:

The appellant:  
Counsel for the first respondent:  
Counsel for the second and third  
respondents:

Self-represented  
S Bishop, M Shaw  
K Burkhart, N Dhaliwal

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**DECISION**  
**Dated 14 October 2021**

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## INTRODUCTION

[1] QH, the appellant, bought two old churches sitting on contiguous sections in rural [area] with a view to converting them into residential dwellings. He spent a considerable sum commencing the conversion process. However, their zoning as part rural did not permit dwellings. He says that, in purchasing the churches, he was misled by the advertising material of the real estate agents, KE and SE, the second respondents. The agency was [Real Estate Agency] the third respondent.

[2] QH made a complaint to the Real Estate Agents Authority (the Authority), the first respondent. A Complaints Assessment Committee (CAC 2103) decided on 8 June 2021 that the listing of the properties included false and misleading information. However, KE and SE had not misled QH as he would have been aware of the true state of the property when the sale became unconditional. Accordingly, the Committee decided to take no further action. QH appeals against that decision.

## BACKGROUND

[3] On 14 September 2020, the [vendors] granted a sole agency to KE and SE of [Real Estate Agency] in [town], for the sale of two old churches on two titles side-by-side. The titles recorded their "Part Rural" zoning. They are in a rural neighbourhood.

[4] The churches were marketed on the [Real Estate Agency] website. There was a photo of the two churches with the following text:

Under offer!!

This property is Under Offer

Wow have you ever had the dream of renovating a church?

This is the opportunity to make those dreams a reality now. These former Methodist churches have long standing history in the area.

The original [redacted] church Built in [redacted] has a floor area of approximately 86 sqm Weatherboard cladding with a timber floor on piles and a corrugated iron roof. This was converted to a hall with kitchen and toilet many years ago and remains a Heritage Building.

In the 1950s a new church was built with a floor area of approximately 84 sqm of concrete construction on piles with a concrete ring foundation and concrete tile roof. Front and rear entrances with a separate storage room.

Two titles are selling as one offering.

[5] Under a “Property Details” box, there was an item “Rooms”, with “1” next to a bedroom icon. There was also a bath icon without an accompanying numeral. Under “Property Type”, it said “Residential”.

[6] The property was also advertised on Facebook. There was a photograph, but little information. The following question was posed, with its answer:

Have you ever dreamt of renovating a church? Well here's Two!!

[7] An advertisement was also placed in the local newspaper. There were photographs. Readers were asked whether they had ever had the dream of renovating a church. The older church was said to have been converted into a hall “with kitchen and toilet” and remained a heritage building. The newer of the churches had “a separate storage room”.

[8] QH was already aware of the churches. He lived in the vicinity. He saw the Facebook advertisement and was interested in converting them into residences, so he approached KE and SE. He told SE of his conversion plan. QH said he was the director of a concrete placing company.

[9] Starting on 1 October 2020, QH visited the churches more than once.

[10] On 1 October 2020, QH signed a “Purchaser Acknowledgements” form. Under “Disclosure of known defects”, it was stated (*verbatim*):

OLD CHURCH AND WILL NEED TO DO OWN DUE DILIGENCE ON USEAGE

[11] KE and SE say that all prospective purchasers, including QH, were expressly advised to do their own due diligence by contacting the local council.

[12] An offer was made by QH on 2 October 2020.

[13] QH visited the churches again on 7 October 2020.

[14] The offer by QH was accepted by the [vendors] on 8 or 13 October 2020 (both dates are given in the evidence before the Tribunal).

[15] On 13 October 2020, QH signed the Agreement for Sale and Purchase, with a subject to finance condition. He crossed out the requirement for a LIM report. An additional condition was handwritten in the appendix to the agreement and was initialled by QH:

purchaser acknowledges they have been advised to do their own due diligence on the property with regards to future use + conversions. The purchaser

acknowledges they are not relying on any verbal conversations had with the agent in regards to the same matter.

[16] The finance condition was satisfied on 23 October 2020. The sale was finally confirmed and the agreement became unconditional on 28 October 2020 once QH had arranged insurance.

[17] On the same day, KE and SE edited the Facebook advertisement. It incorporated a "SOLD" notice. It stated there was one bedroom and one bathroom.

[18] QH was enthusiastic about the conversion project. He had even started to incur costs before the agreement was unconditional.

[19] Having incurred considerable cost, QH later discovered from the council that the part rural zoning did not permit a residence. The size of the land area was too small for this. A zoning change could be sought, but this would be time consuming and expensive. The consent of neighbours might be required, but QH says one neighbour had indicated opposition.

[20] From about 4 November 2020, QH started making verbal complaints to SE and then to the staff of [Real Estate Agency]. He had a meeting on 16 November 2020 with SE and EQ, [Real Estate Agency]'s regional manager and company licensee. QH stated that KE and SE had misrepresented the property.

[21] EQ sent an email to QH on 20 November 2020 recording their discussion at the meeting. He said the two old churches were not marketed as anything other than two churches. The newspaper advertisement made no mention of the property having a dwelling. The system on the [Real Estate Agency] website required a bedroom symbol in order to upload it, but the advertising text made no reference to a bedroom. Furthermore, upon viewing the churches, he would have seen that it had no bedrooms. QH was advised to make a complaint to the Authority if he was unhappy about how the matter had been handled.

## **THE COMPLAINT**

[22] On 17 November 2020, QH made a complaint against KE and SE to the Authority. He alleged that the advertising on Facebook showed the property was residential, with one bedroom and one bathroom. After purchase, he approached the council and was told he could not live on the property. It was rural land, not residential. Due to the false advertisement, he was looking at spending a large sum of money (\$5,000 to \$50,000) to change the land use and consent might not be granted.

[23] QH subsequently provided further information to the Committee. He said that prior to the sale becoming unconditional, he had gone to the council and handed over [Real Estate Agency]'s website advertisement. He enquired whether he could add more rooms and was told that, as the property was residential, it would be easy. The staff member did not check the council's computer system. This was a query about internal alterations. QH said he did his due diligence using that advertisement. It was only after purchase that the council said he could not. The website advertisement disclosed the churches, but nowhere did it state that the property was not residential.

[24] QH provided to the Committee information about the Facebook and website listing changes made after the sale. He said they had been edited.

#### *Response of the agents*

[25] At the request of the Authority, an explanation was provided on 11 February 2021 by EQ. He stated that the print and social media advertising did not include misleading information that the churches could be lived in. The Facebook advertisement and local newspaper advertisements did not refer to the churches being residential, nor to a bedroom. After the sale went unconditional on 28 October 2020, a SOLD Facebook advertisement generated by their computer system was populated with a bedroom icon by mistake.

[26] However, there was a listing on the [Real Estate Agency] website which did refer to the property type as residential. This was because when KE and SE entered the listing into the "REX" computer system, they were required to choose a property type and decided that residential was the best description, there being no church or "other" category. The residential category though required at least one bedroom. The marketing blurb on the website made it clear that it was two churches being sold, not a residential dwelling.

[27] According to EQ, QH was advised to conduct his own due diligence. Both the Purchaser Acknowledgements form and the sale agreement signed by him said the same.

[28] In a narrative from KE and SE attached to EQ's letter, it was stated that QH had recently relocated two old houses onto a 20-acre lot and gone through the consent process to subdivide the block into two 10-acre blocks. He had also converted a lifestyle block into a free-range chicken farm, going through the consent process.

[29] EQ wrote again to the Authority on 16 February 2021, with information about how he supervised KE and SE. There was a supervision plan and training agreement with each of them. They were considered experienced, competent and respected.

[30] EQ also sent to the Authority information about the post-sale editing of the Facebook and website advertisements, including an email from the website designer.

*Decision of the Complaints Assessment Committee (CAC 2103)*

[31] On 8 June 2021, the Committee issued its determination.

[32] The Committee assessed the complaint in the context of r 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Professional Rules), whereby an agent must not mislead a client, nor provide false information nor withhold information.

[33] The Committee noted that QH had purchased the churches with the intention of converting them into places to live. He had looked at the property, but said he had not done any due diligence because he relied on the Facebook advertisement stating, "1 bedroom, 1 bathroom, residential". He had completed a lot of work, spending \$100,000. The council had advised him that no-one could live on a property under four hectares zoned rural land.

[34] In his original complaint, QH had not referred to the [Real Estate Agency] website, but later he said he did not rely on the Facebook or local newspaper advertisements. It was the [Real Estate Agency] advertisement which he had relied on. The Committee accepted that the [Real Estate Agency] website listing, which included the term "Residential", contained false information and was misleading.

[35] The Committee further found that the Facebook and print advertisements did not make reference to the property having one bedroom or one bathroom or being zoned residential.

[36] While the Committee accepted the explanation that the company managing the website could not create a residential listing for an ex-church without including one "room" (bedroom), it would have expected the property to have been loaded as rural property, not residential. The agents were therefore unprofessional.

[37] The Committee went on to consider whether, given one of the advertising channels was misleading, there was any further information or there were intervening

channels that meant QH was aware of the true condition of the property and ceased to be misled at the time the agreement became unconditional.

[38] It concluded that QH could not reasonably rely on the pre-sale [Real Estate Agency] advertisement as a basis for being misled. The information provided to him corrected any misleading or false information and showed he could not be said to have been misled:

1. QH was advised verbally to conduct his own due diligence;
2. The Purchaser Acknowledgments and Sale and Purchase Agreement highlighted for QH the need to carry out due diligence on the zoning;
3. QH was fully aware he was purchasing two churches not zoned residential;
4. QH said he had undertaken due diligence and did visit the council, but the steps he took did not clarify what he could or could not do with the property;
5. QH crossed out the need for a LIM report. It would have revealed the rural zoning. He had indicated regret at not obtaining the report;
6. The Sale and Purchase Agreement recorded that the property was "Part rural";
7. QH was represented by a lawyer; and
8. QH viewed the property before making an offer. He would have seen the churches did not contain a bedroom or bathroom.

[39] The Committee found that QH was likely to have been aware of the true state of the property when the sale became unconditional. Hence, the agents had not misled him and there was no breach of r 6.4 of the Professional Rules. The Committee accordingly decided to take no further action on the complaint.

[40] The Committee went on to consider whether the complaint raised issues about the supervision of KE and SE. Having decided to inquire into this, it found that there were supervision arrangements in place and they were sufficient. It found there was no breach of r 8.3 and decided to take no further action on this matter.

## **APPEAL**

[41] QH appealed to the Tribunal on 11 June 2021 against the decision of the Committee of 8 June 2021.

*QH's evidence and submissions*

[42] In his first submissions (received 30 July 2021), QH says he saw the advertisement in the newspaper on about 30 September 2020. He is dyslexic so his wife read the advertisement to him. On the website he found that the property was residential, with "1" against a picture of a bed and "1" against a picture of a bath. He therefore knew he was purchasing two old churches on residential land.

[43] QH says he then did due diligence visiting the local council, the heritage body and valuers. When he visited the council, he showed "the lady at the front desk" a print-out of the website advertisement and explained his intentions. He was told that it was perfectly fine as the property was residential. He later found out that the council's information, based on the advertisement, was incorrect.

[44] In order to get the funds from the bank for the purchase, he needed a valuation. The valuers confirmed they had sourced their information from the [Real Estate Agency] website. They gave a valuation by comparison with the sale of dwellings on small lifestyle blocks.

[45] It was only after spending in excess of \$100,000 in purchasing kitchens, solar panels, fixtures and the like, and working on the property for four weeks, that he found out from the council that the property was not zoned residential and people could not live there. He informed the insurer and it cancelled the insurance. When the insurance was cancelled, the bank informed him he could not have a mortgage on a building that was not insured.

[46] QH adds that he has now noticed multiple errors in the advertisement (for example, the age of the oldest church) and that the advertisement was edited multiple times after the purchase. It looked like an attempt to cover up errors made previously.

[47] QH and his wife own businesses and they know the rules regarding false advertisements. When you make a mistake, you own it and do not run away and hide. They had suffered immense stress. It had caused mental stress and financial hardship from the costs involved, since they could not rent out the dwellings. If he had known the property was not residential, he would not have purchased it.

[48] In support, QH produces a number of documents, including some not before the Committee. This includes the first page of a valuation report dated 21 October 2020. The property type is identified as "A Single Dwelling" and the property is described as "two churches situated on a small lifestyle block".



[49] Further submissions (13 August 2021) were provided by QH in reply to those of the respondents. He says he did 90 per cent of what any normal person would do on due diligence, the exception being he did not get a LIM report as his lawyer informed him there would be little information on the file. The bank told him he had done enough due diligence, otherwise he would not have received a mortgage.

[50] QH says he is not seeking his costs of \$100,000 back, only the rent lost.

[51] According to QH, everyone has been misled, himself, the bank, the valuer, the heritage trust and the tenant he had signed up.

[52] QH accepts he saw the Facebook advertisement, but clicking on the listing took him to the [Real Estate Agency] website listing. He also saw the newspaper advertisement. While he cannot read or write, he noted the website address at the foot of the newspaper advertisement and typed it into the computer. His wife read out all the information and printed it.

[53] QH says that at no time did he enter the churches. From the exterior, he saw a frosted window and thought this was a bathroom (it is a toilet and basin). He also saw a curtained window and thought this was a bedroom.

[54] QH denied telling KE and SE he had subdivided a property into lifestyle blocks and nor did he tell them he had converted a lifestyle block into a chicken farm, as alleged. He had not done any of this. What he had previously done was obtain consent to move two homes onto bare blocks of land.

[55] It is contended by QH that KE should have selected rural as the property type on the [Real Estate Agency] website. This would have allowed for the bedroom and bathroom icons to be left out. These icons should have caused her to question the property type chosen.

[56] There are further submissions from QH (received on 1 September 2021). He says he did not research the zoning of the land as the [Real Estate Agency] website stated it was residential.

[57] According to QH, there has been a cover-up by KE and SE. The Facebook advertisement was edited multiple times after the sale, including on the day of the complaint.

[58] The Purchaser Acknowledgments form stated he would need to do his own due diligence on usage, but this was for the use of the buildings (the churches), not the land.

The Sale and Purchase Agreement mentioned due diligence, but this was for the use of the buildings and not the land.

[59] The Committee formed the view that KE and SE were unprofessional, as they should have loaded the property as rural. QH says this is fraud, as funds were obtained from him to purchase something that was not what it said.

[60] QH points out that he is now in the position where the bank wants its money back and he risks losing the family home.

#### *Submissions of the Authority*

[61] There are submissions (27 August 2021) from counsel for the Authority on behalf of the Committee. The Authority supports the summary of the substantive issues by counsel for the second and third respondents.

[62] The Authority understands QH to be contending that the Committee erred in deciding that he was not, in fact, misled by KE and SE. He concludes his submissions by stating that he would not have purchased the property if it was not residential.

[63] It is submitted by counsel that the Committee's decision to take no further action should be upheld. The Facebook and print advertisements could not have misled QH, and the post-sale Facebook advertisement was not operative before the sale went unconditional.

[64] The Committee's focus was on the [Real Estate Agency] website pre-sale advertisement. It considered KE and SE's account as to why this occurred and concluded that it was unprofessional to load the property as residential, not rural.

[65] The Authority disagrees with the contention made to the Tribunal on behalf of the other respondents that the entirety of the [Real Estate Agency] listing cannot be misleading because the content of the blurb corrects and overrides the categorisation of the property as residential and the inclusion of the bedroom and bathroom icons.

[66] The blurb does not directly and unambiguously specify that the property was actually rural. It is too much to ask of consumers to second-guess the details of a property listing by reference to other material. The stated zoning of the property was residential. A reader was entitled to take that information at face value.

[67] However, the Committee was entitled to find that the cumulative effect of the events, prior to the sale going unconditional, was that QH could not have been misled. It makes little sense to consider the [Real Estate Agency] advertisement in isolation from

KE and SE's conduct as a whole and QH's engagement in the sale process. The effect of the advertisement was comparatively transitory.

[68] In *Edwards v Bridge*, the High Court upheld the decision of a Committee which, while finding advertising to be initially misleading and a breach of r 6.4, awarded no relief due to a lack of causation.<sup>1</sup> It was found that the purchaser had ceased to be misled prior to the agreement becoming unconditional, as he had learned of the true state of the property from an intervening building report.<sup>2</sup> In the case before the Tribunal, QH visited the property and must have been acutely aware of its status prior to the sale becoming unconditional.

[69] The Committee was entitled to accept the narrative put forward by KE and SE, which was supported by signed material. Whereas QH's account, especially on the issue of due diligence, changed from when he first made his complaint and when the Committee considered it. QH has not provided any corroborating material as to his interaction with the council. It is unlikely that it would advise him solely on the basis of the agency's listing. Even if it did, that would not amount to due diligence. His shifting account is implausible.

[70] Overall, it is submitted that the Committee was correct to focus on whether QH was actually misled by the [Real Estate Agency] advertisement at the time of the property sale. Any issues created by that advertisement were dispelled through the offer process.

[71] There is a further memorandum (7 September 2021) from the Authority's counsel. Counsel notes that in the later submissions of QH, he provides more detail of what he says happened, including of his interactions with KE and SE. The Authority reiterates its concern that the narrative of events from him appears to be ever changing.

[72] Another memorandum (30 September 2021) was received from the Authority's counsel, referring to the Tribunal's recent decision in *Feng v Real Estate Agents Authority*.<sup>3</sup> Relevantly the Tribunal upheld a Committee's finding that an advertisement misled the purchaser, and hence r 6.4 was breached and there was unsatisfactory conduct. This was despite the agents having subsequently sent to the purchaser correcting material.

[73] It is submitted by counsel that, in respect of the sale of the churches, the impact of KE and SE' subsequent representations and of QH's own apparent understanding of the property mean that the [Real Estate Agency] advertisement was deprived of its

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<sup>1</sup> *Edwards v Bridge* [2019] NZHC 2286.

<sup>2</sup> At [21] & [67].

<sup>3</sup> *Feng v Real Estate Agents Authority* [2021] NZREADT 15.

misleading effect. The Tribunal in *Feng* accepted that in some instances, separate statements could be considered so intertwined that an initial misrepresentation may no longer be available as a basis for complaint.<sup>4</sup>

*Submissions of KE and SE and [Real Estate Agency]*

[74] There are submissions (13 August 2021) from counsel for KE and SE and [Real Estate Agency]. The substantive issues on appeal are:

1. Whether the Committee was correct to find that the advertising on the agency's website was misleading, but that the pre-sale advertising on Facebook and in the newspaper was not misleading and did not include false information; and
2. Whether the Committee was correct to conclude that QH was not in fact misled by the advertising, so there was no breach of r 6.4 of the Professional Rules.

[75] According to KE and SE's evidence given to the Committee, the council had told QH he would need to use the consent process to apply for a change of land use to convert the churches to residential buildings. He told them, "He knows exactly how [the council] operates". When QH started complaining on 4 November 2020, it was initially directed at the council, but he then became increasingly aggressive towards the agents.

[76] It is contended that the Committee's decision to take no further action should be upheld. The advertising on the [Real Estate Agency] website was not misleading, although elements of it when viewed in isolation might have the potential to mislead. The references to "residential" and an icon for a bedroom might have been misleading, but the other information provided ensured that no party would be misled. The references were incorrect, but they have to be viewed in the context of the entire listing and the marketing campaign.

[77] In addition, QH was not in fact misled by any of the online or print listings and he always knew that the property was not residential. This was based on his own inspections and his discussions with the agents that a resource consent would be required.

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<sup>4</sup> At [31]–[32].

[78] It is accepted that r 6.4 of the Professional Rules may be breached even without an intention to mislead. The highest and strictest standards in terms of the legislation and regulations will be applied.

[79] In an earlier case, marketing which was casual and sloppy had been found to be unsatisfactory.<sup>5</sup> In another case, it was deemed to be unsatisfactory where agents concealed the true situation of a property, such as where it had been advertised as having five other rooms when it had resource consent for only three bedrooms.<sup>6</sup>

[80] However, conduct is not unsatisfactory where agents take appropriate measures to ensure purchasers understand the requirement to achieve the concept marketed. Where an advertisement referred to a property as residential, although it was a retirement village, reasonable purchasers were not misled because their attention was drawn to the need for a change of use and the marketing material stated that interested parties had to rely on their own judgement and due diligence.<sup>7</sup>

[81] In another decision, the Tribunal overturned a Committee's finding of unsatisfactory conduct in respect of website and newspaper advertisements. It was found that the advertisements might suggest the potential for subdivision, but that would not lead to a conclusion that the agent was conveying information that the property was "readily subdivisible". There was no evidence that subdivision was impossible, although it would have been difficult to obtain consent.<sup>8</sup>

[82] QH claims he was misled by the listing on the agency's website. That listing comprises a photo of the churches, a blurb and a Property Details box. The box was generated by the agency's software, based on listing information entered by the agents. They must choose from four property types: Land, Rural, Residential or Commercial. The category chosen will determine what icons are generated.

[83] KE chose "Residential" as there was no "Other" category for buildings such as churches. The Committee said it would have expected the property to be categorised as rural and that listing it as residential was unprofessional. The agents agree that rural is more accurate. The error does not reflect her professional abilities or competence. It was her subjective and honest view. She associated rural with farming. Her understanding was that the inaccuracy would be clarified by the information in the blurb.

[84] It is submitted that the icons and word residential, read in conjunction with the blurb, would not lead a reader to reasonably conclude that the churches were a

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<sup>5</sup> *Bridge v Real Estate Agents Authority (CAC 409)* [2018] NZREADT 61 at [30].

<sup>6</sup> *H v Real Estate Agents Authority (CAC 20004)* [2014] NZREADT 58.

<sup>7</sup> *Anderson v Real Estate Agents Authority (CAC 20003)* [2014] NZREADT 15.

<sup>8</sup> *Wang v Real Estate Agents Authority (CAC 303)* [2016] NZREADT 45.

residential property. It was wrong to find that the error rendered the listing as misleading, although it did not in fact mislead QH.

[85] QH could not have relied on the Facebook advertisement showing one bedroom and one bathroom as this was post-sale. The fact box was generated by [Real Estate Agency]'s software.

[86] It is noted that QH initially said he did not do any due diligence, but he now says he was told by "the lady at the front desk" of the council that his plan was perfectly fine. He now also says that a valuation described the property as a "dwelling" and "lifestyle block", based on the agency's website listing. It is unlikely that the council or the valuer would have provided such advice based solely on the agency's listing. Even if this advice was provided by the council and the valuer, it would not be reasonable for QH to rely on it as proper due diligence. Furthermore, a complete copy of the valuation report has not been produced, so it is not known if the report makes any other reference to the need for resource consent. If the whole report is admitted as evidence, KE and SE and [Real Estate Agency] request an opportunity to make submissions.

[87] The Committee decided there were no supervision issues. QH has not taken issue with this aspect of the decision.

[88] The Committee's decision should be upheld in its entirety.

[89] Following this complaint, KE and SE will be on guard against such errors.

[90] There are additional submissions (8 October 2021) from Ms Burkhart and Ms Dhaliwal responding to the submission of the Tribunal's decision in *Feng* by the Authority.

[91] It is noted that in *Feng* the Tribunal considered misleading conduct could be cured by subsequent statements, so that the initial representation was no longer available as a basis for complaint.<sup>9</sup> This distinguishes *Feng* from QH's case. Any misrepresentation was cured by subsequent corrective statements:

- (1) The icons of a bed and bath had the ability to mislead but were clarified by the text in the blurb.
- (2) At his first visit to the property, QH told the agents he planned to convert the churches into houses. The agents told him that he would have to follow the usual consent processes.

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<sup>9</sup> *Feng v Real Estate Agents Authority*, above n 3, at [31]–[32].

- (3) The nature of the property was obvious to QH from his visits. He was not in fact misled.
- (4) Unlike in *Feng*, the website listing was not a persuasive influence on QH's decision to purchase. He had seen the Facebook and newspaper listings which contained no errors.

## JURISDICTION AND PRINCIPLES

[92] This is an appeal pursuant to s 111 of the Real Estate Agents Act 2008 (the Act).

[93] The appeal is by way of a rehearing.<sup>10</sup> It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.<sup>11</sup> After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.<sup>12</sup> If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.<sup>13</sup>

[94] A hearing may be in person or on the papers.<sup>14</sup> A hearing in person may be conducted by telephone or audiovisual link.

[95] This appeal is against the determination of the Committee under s 89(2)(c) to take no further action. It is a "general appeal". The Tribunal is required to make its own assessment of the merits in order to decide whether the Committee's determination is wrong.<sup>15</sup> An appellant has the responsibility of showing on the balance of probabilities that their version of the events is true and hence the Committee is wrong.

### *Directions regarding the hearing*

[96] On 2 July 2021, the Tribunal directed that the appeal be heard by audiovisual link and set out a timetable for submissions.

[97] On 12 August 2021, the Tribunal hearing issued a Minute (No. 2) stating that it would determine QH's application to adduce fresh evidence at the hearing. He was directed to produce a full copy of the valuation report.

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<sup>10</sup> Real Estate Agents Act 2008, s 111(3).

<sup>11</sup> *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] & [83].

<sup>12</sup> At s 111(4).

<sup>13</sup> At s 111(5).

<sup>14</sup> At ss 107, 107A.

<sup>15</sup> *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] & [16] and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112].

[98] On 3 September 2021, the Tribunal issued a Minute (No. 3) directing the appeal to be determined on the papers.

[99] On 7 September 2021, the Tribunal issued a Minute (No. 4) confirming that the appeal be heard on the papers. It repeated that the application to file new evidence would be determined in the course of considering the appeal.

## DISCUSSION

[100] There is a preliminary issue as to whether QH can adduce various items of evidence not provided to the Committee.

### *Whether further evidence can be produced by QH*

[101] As noted above, this appeal is a rehearing of the case as presented to the Committee. A party is not entitled as of right to produce a new version of the events or new evidence. The Tribunal can, however, give leave to adduce new evidence if it is just to do so. Broadly, this requires satisfying the Tribunal that the evidence could not with reasonable diligence have been provided to the Committee and that it could be important.<sup>16</sup>

[102] In their memorandum (dated 10 August 2021), counsel for the Authority note that a number of documents adduced by QH were not before the Committee. Most are either irrelevant or can ground submissions. However, the Authority objects to the admissibility of the valuation. It is submitted that QH should make an application to rely on it.

[103] QH duly made an application to introduce the new documents (received 11 August 2021). He says he was told at the start of the complaints process that he only needed to provide the bare basics. He had since become aware that there were more documents supporting some of his points.

[104] Counsel for the agents and the agency, in their memorandum (dated 11 August 2021) advise that their clients will abide by the Tribunal's decision in relation to the admissibility of further evidence. They would want an opportunity to respond to it, if it is admitted.

[105] In his submission received on 1 September 2021, QH responded to the objection to the introduction of further evidence, notably the first page of the valuation report. He says that at the start of the process, he was told to provide the bare minimum of evidence

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<sup>16</sup> *Nottingham*, above n 8; *Eichelbaum v Real Estate Agents Authority* (CAC 303) [2016] NZREADT 3 at [47]–[52]; *Moseley v Real Estate Agents Authority* (CAC 1907) [2021] NZREADT 19 at [59].



to prove that the advertising was false. He now knows that he needs to provide more. However, he cannot provide the full report, because the report itself states that it cannot be relied on by third parties without written consent. He abides by the law and anyone wanting to use the report would have to follow the correct process. He is not legally entitled to issue the report. According to QH, all the information in the report was obtained from the [Real Estate Agency] website advertisement. He contends that nothing further would be shown by disclosing the whole report.

[106] On 3 September 2021, QH forwarded to the Tribunal an email from a senior clergyman of the [vendors] of the same date. The clergyman believes the listing of the churches by the agents was misleading.

[107] This prompted another memorandum from the Authority (6 September 2021). It is noted by the Authority that QH is applying to adduce further evidence and in his latest submission has attached even more new evidence. It is generally irrelevant. Despite the Tribunal's direction to provide a full copy of the valuation report, he has not done so. QH's reliance on the disclaimers in the report is plainly insufficient. As a matter of natural justice, if he wants to rely on the report, he must disclose it in its entirety. His assurance that there is nothing else in the report cannot be taken at face value.

[108] There is also another memorandum from the agents and the agency (6 September 2021). QH has not adequately explained why the new evidence could not have been put before the Committee or that it will have an important influence on the outcome. Much is irrelevant. As for the valuation report, it cannot be considered unless it is provided in its entirety.

[109] QH replied on 7 September 2021 to say it is important to add the further evidence, such as the email from the clergyman, as it shows that others who consulted the agents were also misled.

[110] The Tribunal finds that much of the new evidence is either irrelevant or, while conceivably relevant, is not material to the Tribunal's assessment. Bar the two items discussed below, none of it will be considered by the Tribunal. The other documents are not important.

[111] The first item conceivably material is an extract from a valuation report (21 October 2020). The Tribunal has been given the first page and what may be the second or fourth page. The first page states that the property type is "A Single Dwelling" and that it comprises two churches on a small lifestyle block. The other page records the disclaimers referred to by QH.

[112] The report pre-dates the Committee's assessment and could have been provided to it. QH's explanation for not doing so, that he was advised by an unknown person to provide the bare minimum to the Authority/Committee, is inadequate.

[113] In any event, even if QH had a good reason not to disclose it to the Committee, it cannot be relied on. In the first place, he has refused to disclose the entire document. Only two pages have been disclosed, contrary to the Tribunal's direction. The reliance on the disclaimer is not a good reason. QH does not need the valuer's permission to provide it to the Committee or the Tribunal, but he could have asked him if he thought he should do so. He does not appear to have done so.

[114] The Tribunal therefore does not know the contents of the undisclosed part. It is not known whether the report has attached to it the certificates of title showing the part rural zoning, or any other information as to the zoning. Nor has QH provided any letter from the valuer confirming that information (as to zoning) was sourced from the advertisement. QH's evidence that a professional valuer producing a formal report intended to be relied on by a bank, sourced such information from an agent's website, is inherently unlikely.

[115] Then there is the email from the clergyman. This is recently dated and therefore could not have been provided to the Committee. It is certainly relevant. Without formally determining whether it is admissible, we have considered it. We find that it is not material. It tells us nothing new. The Committee accepted that the [Real Estate Agency] advertisement contained false and misleading information. So do we.

*Did the [Real Estate Agency] advertisement mislead QH?*

[116] The Committee accepted that the [Real Estate Agency] website advertisement contained false information and was misleading. This was because it stated that the property type was "Residential" when it was in fact "Part Rural". The zoning does not permit a residence without an appropriate application to the council for consent to change the land use. The wrong property type was compounded by the use of icons for a bedroom and a bathroom.

[117] The explanation from KE and SE was that the internal website options forced this classification as there was no "Other" type that might be suitable for two churches. The icons arose automatically from the choice of residential as the property type. The Committee accepted the explanation, though found choosing that type to be unprofessional as the agents should have chosen "Rural". We agree with the Committee that the choice made to list the property as residential was unprofessional. Despite the

explanation, it is surprising that churches in a rural area would be thought to be residential.

[118] The Committee found the information as to the property type to be false and the advertisement to be misleading. It is argued by counsel for KE and SE and [Real Estate Agency] that the website advertisement as a whole was not misleading because of the accompanying 'blurb'. It is said that the advertisement must be read as a whole. We agree with the Authority that the blurb does not dispel the clear description of the zoning as residential. A reader was entitled to take that information at face value.

[119] As for the advertisement in the newspaper and the pre-sale advertisement on Facebook, we agree with the Committee that they did not contain false information and were not misleading. QH's evidence about changes to the Facebook advertisement are post-sale and irrelevant. There is no cover-up. KE and SE have always acknowledged that their pre-sale website advertisement and the post-sale Facebook advertisement contained inaccurate information.

[120] Having accepted the explanation of KE and SE as to the mistake made, their conduct could not be misconduct in terms of the Act.<sup>17</sup> It could though amount to unsatisfactory conduct:<sup>18</sup>

72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or
- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.

[121] The Committee assessed the conduct in terms of subsection (b), whether it contravened rr 6.4 and 8.3 of the Professional Rules. We agree that if there is no contravention of the rules, then no other subsection is contravened.

[122] Rule 6.4 states:

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<sup>17</sup> At s 73.

<sup>18</sup> At s 72.

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.

[123] The question is whether, at the time the contract went unconditional (on 28 October 2020), QH was misled by the [Real Estate Agency] advertisement. Was the misleading nature of the advertisement still operative then?

[124] First, we note that QH was notified by other documents that both pieces of land were zoned part rural. It is written on the Agreement for Sale and Purchase. QH suffers from a literacy impediment, but this does not excuse him from ensuring he understands legal or important documents signed. Nor is he saying this. If in fact he could not read the agreement, he should have asked his wife or lawyer to do that for him. The land zoning is also written on each certificate of title. He and/or his lawyer would have seen that.

[125] Of course, part rural might mean part something else. But QH is not saying that he thought the zoning allowed residential development because the advertisement reinforced any mistaken view he had of “part” rural in the zoning description. He denies knowing of the true zoning because, he says, he was misled by the advertisement.

[126] It is unlikely QH did not know of the true zoning. This is not just because it is clear from the formal documents. It would have been obvious to him from his inspection of the property and observation of the neighbourhood. It is a rural area surrounded by paddocks and possibly lifestyle blocks, not houses. At the very least, this should have put him on notice to check the zoning information obtained from the advertisement.

[127] Then there are the numerous occasions QH was notified of the need to undertake due diligence.

[128] The evidence of KE and SE that they verbally told QH to do his own due diligence is not disputed. This advice was reinforced by the formal documents he signed. The Purchaser Acknowledgments signed by QH on 1 October 2020 stated that there was an old church and prospective purchasers should do (*verbatim*) “own due diligence on useage”. The Agreement for Sale and Purchase (13 October 2020) contained a handwritten condition, initialled by him, stating that he had been advised to do his own due diligence with regard to “future use + conversions”.

[129] We will put to one side QH’s change in narrative as to whether or not he undertook due diligence and accept his current position that he did. He explains that he did not though enquire into the land zoning because he knew from the advertisement that it was residential.

[130] The written notifications concerning due diligence are not so narrowly drafted. They speak of due diligence on usage, not specifically building usage. A reasonable person would not interpret the clauses in the narrow way QH says he did.

[131] While denying due diligence on land zoning or usage (because of the website advertisement), QH nonetheless says he attended at the council and a woman at the front desk, to whom he showed the advertisement, said residential conversion of the churches was fine.

[132] It is not clear precisely what the person said. It may have been nothing more than, if it is residential, then you can convert it (though presumably building consent and consent to modify a heritage building were required). QH says the context was permission for internal alterations. The person did not look up the council's records. Whatever was said to him, a reasonable person would not rely on such a casual encounter as due diligence in relation to land use and would not treat the apparent response as reliable advice from the council which could be acted on.

[133] We do not need to resolve the conflict in evidence between QH and KE and SE as to what he told them about his previous experience with property developments and council consent processes.

[134] The Tribunal finds that the effect of the erroneous information in the website advertisement was transitory. By the time the purchase was unconditional, if not at the time the agreement was signed, QH knew the true land use. He was not misled by the advertisement into confirming the agreement.

[135] It follows that QH's situation is different from that of the purchaser in the recent *Feng* decision of the Tribunal.<sup>19</sup> The conclusion of the Tribunal there was that the misleading nature of the advertisement was not cured by the later corrective statements.<sup>20</sup> It was accepted in *Feng* that other statements could effectively retract any earlier misrepresentation, which would no longer be available as the basis of a complaint.<sup>21</sup> This is what occurred here.

#### *Were KE and SE properly supervised?*

[136] The Committee then went on to consider whether the circumstances raised an issue concerning the supervision and management of KE and SE. The relevant professional rule is r 8.3:

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<sup>19</sup> *Feng v Real Estate Agents Authority*, above n 3.

<sup>20</sup> At [34].

<sup>21</sup> At [31]–[32].

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

[137] No party is contesting the Committee's conclusion that there was no breach of r 8.3 and that no further action would be taken on that matter.

### *Conclusion*

[138] QH has not shown that the Committee was wrong to find that he was likely to have been aware of the true state of the zoning at the time that the agreement became unconditional and therefore that KE and SE had not misled him by the wrong information in the advertisement. It has not been established that r 6.4 was breached. Nor does the evidence establish that the agency did not properly supervise and manage KE and SE. There is no other evidence of unsatisfactory conduct.

[139] It has not been shown by QH that the Committee's determination to take no further action on his complaint was wrong.

### **OUTCOME**

[140] The appeal is dismissed. The Tribunal confirms the determination of the Committee.

[141] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, which sets out the right of appeal to the High Court.

### **PUBLICATION**

[142] The Committee made an order on 8 June 2021 directing publication of the decision without identifying the complainant, the licensee or the property.

[143] In light of the outcome of this appeal and having regard to the interests of the parties and of the public, it is proper to order publication of the decision of the Tribunal without identifying any party (apart from the Authority) or the property.

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G Denley  
Member

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C Sandelin  
Member