

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2022] NZREADT 1

Reference No: READT 008/2021

IN THE MATTER OF

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

BETWEEN

DU
Appellant

AND

**THE REAL ESTATE AGENTS AUTHORITY
(CAC 2104)**
First Respondent

AND

DC
Second Respondent

Hearing on the papers

Tribunal:

D J Plunkett (Chair)
C Sandelin (Member)
N O'Connor (Member)

Representation:

The appellant:	Self-represented
Counsel for the first respondent:	E Bergin
Counsel for the second respondent:	R Scott, V Waalkens

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 1 February 2022

INTRODUCTION

[1] DU (the appellant) was a prospective purchaser of two adjoining properties (the property) in a [Town]. DC (the licensee) is a licensed agent who listed the property on behalf of the vendor. The appellant discovered a subsidence issue at the property. He spent money on due diligence but was unsuccessful. He says he was persuaded to do so by the licensee who treated him unfairly. He further alleges the licensee conspired with the vendor to hide the subsidence issue from the purchasers.

[2] The appellant made a complaint to the Real Estate Agents Authority (the Authority). A Complaints Assessment Committee (CAC 2104) (the Committee) inquired into the complaint, but it decided to take no further action. It found no breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules).

[3] The appellant appeals to the Tribunal.

BACKGROUND

[4] On 12 October 2019, the vendor entered into an agency agreement to sell the property (both addresses) with the real estate agency engaging the licensee.

[5] On about 22 November 2019, the licensee approached the appellant and knowing he was searching for a property, said he would like to show him a new listing.

[6] The appellant viewed the property with the licensee on 26 November 2019.

[7] The appellant made an offer to purchase the property on about 27 November 2019 for \$1,080,000. It was conditional on due diligence. He was informed by the licensee that it was within a smidgen of the valuation and the vendor was happy with everything.

[8] On 2 December 2019, the licensee requested the appellant to obtain Land Information Memoranda (LIM) reports for the property so the sale could be unconditional before Christmas. The licensee said that the vendor was waiting to see if she was successful acquiring another house at auction on 4 December. The appellant immediately sought the reports.

[9] On the same day, the licensee sent an email to the vendor and the vendor's solicitor stating that he had "persuaded" the appellant to get LIM reports.¹

¹ Authority's bundle at 181, 285.

Appellant discovers subsidence

[10] Later the same day, the appellant and the licensee viewed the property again. The appellant noticed visible signs of subsidence. They went back on 4 December, with the appellant finding clear signs the house had slumped in one corner.

[11] On 5 December 2019, the appellant sent an email to the licensee formally withdrawing the offer “in light of the newly discovered land instability and house movement”.² He was still interested in making an offer and had a process to value the house and stabilise the hillside.

[12] On the same day, the licensee sent a text to the appellant stating that the vendor was successful buying another house.³

[13] The appellant sent a sketch of the property to a retired engineer in [City], who replied advising that the bank appeared to be unstable and required a specific wall.

[14] On 7 December 2019, the licensee sent an email to the vendor, her daughter and her solicitor.⁴ He said the appellant was concerned about the structural integrity of the house and retaining wall. The licensee could see there was an issue, but he was no expert. There would need to be an engineering report, which the appellant or vendor could obtain. If there was an issue, then he would need to disclose it to any buyer. It could not be hidden. The appellant had verbally offered \$925,000, estimating \$100,000 to deal with it. He had been asked to sign a cash, unconditional offer.

[15] On the same day, the licensee informed the appellant that the vendor was open to an unconditional offer at the price the appellant had indicated (\$925,000). The appellant told the licensee he needed a week for the LIM reports to arrive and to fly the engineer friend up to give further advice.

[16] The appellant and the engineer visited the property on 8 December 2019.

[17] The eventual purchasers of the property (the purchasers) visited the licensee at his office on 11 December 2019. They then contacted the vendor directly. The licensee sent an email to the purchasers on 12 December asking that all enquiries be addressed to him.

² Bundle at 290.

³ Bundle at 165.

⁴ Bundle at 291.

[18] The licensee sent an email to the vendor and her daughter on 12 December 2019 at 12:00 pm.⁵ He advised that the appellant would make an unconditional offer. While the appellant's expert had said there was an issue with subsidence, there was no report. As for the purchasers, the licensee had said to them there was a negotiation and it was complicated. In his email, the licensee said he had not informed the purchasers about the subsidence issue, which would need the vendor's permission. The licensee reminded the vendor that in their last conversation, she had said she wanted to sell the property to the appellant. He suggested she obtain her own building inspection report. He asked the vendor whether she wanted the purchasers to view the property.

[19] Later on 12 December 2019, the licensee sent an email to the purchasers responding to their email to the vendor seeking to view the property. The purchasers were asked to let him know, so the arrangements could be made. This appears to have prompted a text from the purchasers stating that the licensee had earlier said the property was not available to view and they should forget about any back up offer.⁶

[20] The vendor's daughter sent a text to the licensee on 12 December 2019 at 7:36 pm.⁷ She believed the purchasers were genuine buyers, so there might be a multi-offer.

[21] The licensee sent a text to the vendor's daughter, apparently on 12 December 2019 at an unknown time.⁸ It may be a response to the daughter's text at 7:36 pm, or it may have prompted her text. After stating that there were no signed offers at the time, he explained that a multi-offer process was the vendor's choice. There were risks of losing both, but that could be managed.

[22] The licensee sent an email to the vendor and her daughter on 13 December 2019 at 11:21 am.⁹ The appellant was going to present an offer. The licensee said he had asked him for evidence from the engineer, but the appellant said his engineer was not registered or insured. This might have implications for the credibility of his information. The purchasers wanted to view the property, but the licensee said he would take legal advice on what he had to disclose. His understanding was that the vendor wanted him to continue with the appellant.

⁵ Bundle at 293.

⁶ Bundle at 345.

⁷ Bundle at 350.

⁸ Bundle at 353.

⁹ Bundle at 296.

[23] The licensee sent another email to the purchasers on 13 December 2019 at 12:14 pm saying he was waiting to hear from the vendor.¹⁰ It was a complex situation which he could not divulge for privacy reasons. The vendor was working through another expression of interest. The communications between the licensee and the purchasers appear to have ended with this email on 13 December with the licensee saying he would make an appointment if he had the vendor's instructions.

[24] The vendor sent an email to the licensee on 13 December 2019 at 12:20 pm. She said she was waiting for the appellant's offer and his evidence in support.

[25] On about 13 December 2019, the appellant made an unconditional offer of \$925,000 on the property.¹¹ On 13 December, he wrote a letter to the licensee recording his finding of slumping and subsidence.¹² He advised that a retired engineer friend had been to the property and agreed there was suspected subsidence. The appellant set out his opinion as to the work required. He liked the home and its location and had the skills to address the issues raised.

[26] The licensee made a file note on 16 December 2019 of a discussion with the daughter.¹³ He recorded that the appellant had met on site with a retired, uninsured engineer. They (the licensee and vendor) needed to find the facts to see if there was an issue or not. The licensee was not sure if he was required to disclose the potential issue, so he was not taking any buyers through. He wanted to slow the process down until after the meeting with the solicitor. He would need the vendor's permission to disclose anything to a customer. A good start would be a building inspection report. They could ask the appellant to get a report from an insured, licensed engineer. The appellant's offer was \$175,000 below the valuation and \$245,000 below the asking price. The conversation had ended with a suggestion that the daughter would talk to the solicitor and let him know the result.

[27] The appellant increased his unconditional offer to \$950,000 on 18 December 2019. The licensee informed the vendor by email on the same day. He said he had inserted into the formal offer an 'as is where is' clause, so there would be no recourse. The licensee recorded that the appellant was happy to leave it on the table.

¹⁰ Bundle at 295.

¹¹ The copy provided to Tribunal is unsigned (Bundle at 381–399).

¹² Bundle at 376.

¹³ Bundle at 297.

Licensee asked to draft agreement for purchasers

[28] On 19 December 2019, the vendor's daughter went to the licensee's office with a document from the purchasers asking him to put together an agreement. In his email to the vendor that day, the licensee said that the daughter had told him that she had discussed the "potential for slippage" with the purchasers who had found it themselves and thought it could easily be fixed. He thought it important to keep the appellant's offer on the table.

[29] The licensee told the appellant by telephone on 19 December 2019 at an unknown time that the vendor had sold the property "behind [his] back".¹⁴ The appellant asked whether the purchasers had been told about the subsidence. The licensee replied that "apparently" they had.

[30] This led to a series of emails and texts between the appellant and the licensee on the same day.¹⁵ The appellant noted that the licensee had told him that the vendor did not want him to disclose the subsidence to the purchasers. All the appellant wanted was a fair deal and a fair shot at purchasing the property. The licensee said he had warned the vendor about liability.

[31] The licensee sent an email to the purchasers on 19 December 2019 at 10:27 am, attaching the agreement for sale and purchase.¹⁶ He stated that he did not know what representations had been made to them, so he had inserted an 'as is where is' clause. It was the licensee's understanding that the potential slippage had been discussed with them.

[32] The licensee then sent an email to the vendor and her solicitor on the same day at 10:40 am.¹⁷ He stated that the daughter had informed him that she had discussed the potential slippage with the purchasers who thought it could easily be fixed. The licensee thought it important to keep the appellant's offer on the table in case the purchasers' solicitor held things up.

[33] The licensee sent an email to the appellant on 19 December 2019 at 17:59 pm.¹⁸ He advised that the purchasers had been fully informed of the subsidence. The vendor had taken legal advice and been advised to disclose it. The licensee had also informed the purchasers in writing before they signed the agreement. That agreement had

¹⁴ Bundle at 225.

¹⁵ Bundle at 48–51, 374–375.

¹⁶ Bundle at 302.

¹⁷ Bundle at 301.

¹⁸ Bundle at 49.

significant terms inserted to reflect the issue. It was sent to both solicitors before signing. The purchasers went into the transaction with their eyes open. The contract was unconditional.

[34] The licensee sent an email to the appellant on 19 December 2019 at 6:10 pm.¹⁹ The vendor did the deal with the third party without his knowledge until that day. He was blindsided. He did not have the permission of the vendor to tell the appellant. When he found out, he asked for the appellant to be included in a multi-offer, but the vendor did not want to do that. The licensee recorded that the appellant had been asked to make his 'best offer' and \$950,000 was as far as he would go. As for the engineering issues, the licensee had insisted he would not be liable. He had separated himself from the issue.

[35] On 20 December 2019 at 12:22 pm, the licensee sent an email to the vendor, her daughter and the vendor's solicitor.²⁰ He recorded that he had not shown the purchasers the property, partly because of the possibility of slippage. He did not want to be forced into a situation of discussing a potential problem. He was not sure it was a defect he was required to disclose, since he did not have a report, only the comments of the appellant. Nor did the licensee have permission from the vendor to do so. In the absence of a report from an engineer, the vendor regarded it as hearsay only. The licensee said he had not disclosed it, as instructed. This was why he had suggested to her that she get legal advice.

[36] According to the licensee's email, the appellant felt that if there was another offer, he should have been given the opportunity to come back to the negotiating table. But he had earlier refused to offer \$975,000. The licensee stated that he had informed the appellant that the vendor had chosen not to enter a multi-offer process.

[37] The licensee recorded in his email to the vendor and others that the vendor's daughter had told him that the purchasers were fully aware of the subsidence concern and had regarded it as an easy fix. He had been instructed by the vendor not to disclose potential slippage with anyone, as she regarded it as hearsay and not backed up by a report. Accordingly, he had not disclosed it. He was not a party to that conversation, so he could not be held accountable.

¹⁹ Bundle at 309.

²⁰ Bundle at 315.

[38] On about 20 December 2019, an agreement for sale and purchase was entered into by the purchasers and vendor. The price was \$1,070,000. One of the conditions of sale stated:²¹

... The purchasers acknowledge that they viewed the property with the vendor without the knowledge, input or representation of the agent and are relying completely on their own investigations on the property in all respects. The purchasers agree to purchase the property on a “as is where is” basis...

THE COMPLAINT

[39] On about 27 January 2020, the appellant made a complaint to the Authority, alleging there was:

1. Planned and executed deceit by the vendor, her daughters, and the licensee regarding non-disclosure of the severity of subsidence to the purchasers. There were many comments from the licensee that he was worried about the vendor and his own liability for non-disclosure.
2. Planned deceit over a multi-offer situation, placing him at a disadvantage. This was because the other party was not aware of the severity of the subsidence.
3. Evidence the licensee lied about the existence of the other party’s offer, telling the appellant he did not know about it. He was suspected of drawing up the agreement.
4. An unfair process, costing the appellant thousands of dollars in lost expenses and effort.

[40] A director of the agency engaging the licensee wrote to the Authority on 16 March 2020, with the licensee’s explanation. The director pointed out that the eventual purchase price was considerably more than the appellant was prepared to pay.

[41] In the letter of 16 March, the licensee answered the appellant’s allegations (adopting the same numbering as above):

1. He denied deceit. The purchasers were made aware of the potential subsidence and accepted the property with its potential flaws. It was purchased with full disclosure of the potential issues. The agreement contains an “as is where is” clause.

²¹ Bundle at 468.

2. Nor was there any deceit regarding other offers. The vendor decided there would be no multiple offer situation. One of the purchasers was a family acquaintance of the vendor and he dealt directly with her. They were offering a lot more money, notwithstanding the possible issues. The appellant had specifically told him he would not go higher than \$950,000. The licensee said he suggested a multi-offer to give the appellant a chance to increase his offer, but the vendor did not want to upset or lose the purchasers. The licensee was instructed not to say anything to the appellant until the higher offer was unconditional.
3. The licensee did not lie about the other offer. It did not exist until 19 December and he did not know what was going on in the background until the daughter instructed him to draw up the offer.
4. The appellant was not the victim of an unfair process. He was encouraged to take legal advice and did so. He was issued with the Authority's Guidelines. He was encouraged to rely on his own enquiries and due diligence. He chose to apply for LIM reports and engage an engineer friend. These are simply part of the costs of researching a potential purchase. The purchasers paid 10 percent more than the appellant had stated he was prepared to pay.

[42] In addition, the licensee said that he told the appellant he was not an engineering expert and did not know if what was being pointed out was within required tolerances. He could see obvious signs of slippage in the pathways and the like. The licensee had advised the appellant to get expert advice.

[43] According to the licensee, this was a vexatious complaint from someone who was attempting to buy a property at a discount below fair value by pressuring the vendor with a potential issue with her property.

[44] On 27 July 2020, the Committee decided to inquire into the complaint.

[45] The Committee was provided with a letter (11 August 2020) from the licensee's former Personal Assistant (PA).²² She stated that the licensee had no idea that the deal was being struck between the purchasers and the vendor. The licensee had been working on the deal with the appellant until 19 December, expecting it to be signed by the vendor. He was waiting for her to take legal advice. The PA further confirmed that

²² Bundle at 324.

she was present at a meeting when the licensee asked the vendor if she would go for a multi-offer. She declined.

[46] The licensee obtained a letter (14 August 2020) from the vendor addressed to the Committee, which stated:²³

1. The licensee did not visit the property with the purchasers. Those arrangements and the negotiation were conducted in secret without the knowledge of the licensee until he was instructed to draw up the agreement on 19 December. Until then, he thought that she was waiting for legal advice to bring the appellant's offer to a conclusion.
2. She did not give the licensee authority to disclose the problem raised by the appellant. This was the main reason he did not want to take the purchasers through the property.
3. The purchasers were shown the areas of the property that had fallen away. They indicated they knew what they were dealing with. A price of \$100,000 less than the asking figure was agreed. They subsequently had contractors on site. She remained in contact with them and had no reason to think they had any concerns.
4. The licensee asked her about a multi-offer, but she declined.
5. She instructed the licensee not to tell the appellant anything about the other offer until it was signed, as she was concerned that she might lose it.

[47] On about 28 August 2020, the licensee advised the Committee:²⁴

1. A key question was whether the appellant's concerns constituted real defects, or had they been exaggerated by him. They were not confirmed by a suitably qualified expert. The levels of the building varied by only a small amount over a considerable distance. He said to the appellant he had no idea if they were within normal tolerances. There were no cracks in the blockwork. It was not proven that the property was subject to any major subsidence defect. The sunken pavers and pathways are normal for a property of this age. The appellant's apparent motive was to get a bargain.

²³ Bundle at 322.

²⁴ Bundle at 231–243.

2. When the daughter came into his office after the viewing by the purchasers and he was instructed to draw up the agreement, he asked her twice if the purchasers had been shown the area of concern and she confirmed that they had and that they knew all about the possible issues. The purchasers said it was an easy fix. The licensee told the daughter he would put a clause in the agreement showing the purchasers had been informed. When he sent the agreement to the purchasers, he inserted in the covering email that there were potential slippage issues. The licensee said he understood from the daughter that the offer was \$100,000 below the asking price to take account of any future work.
3. The question of disclosure was academic. There were no viewings except with the appellant.
4. The vendor told him not to disclose the potential defects while she took advice from her solicitor. This was why he put on hold all buyer interactions. It was why he refused to take the purchasers to the property. It was not an issue due to his decision not to interact with any additional buyers until it was clarified.

[48] On the same day, the Authority's investigator spoke to the agent who had introduced the purchasers. She said they were known to the vendor. Their visit to the property was arranged through the vendor's daughter. They then made an offer directly to the vendor. It was drawn up by the licensee. The licensee was paid his full commission and she was paid \$10,000.

[49] On 29 September 2020, the Authority's investigator rang one of the purchasers, but he declined to speak to her.

[50] The engineer wrote to the Authority on 9 November 2020. He confirmed he had inspected the property at the request of the appellant. The south wall was subsiding. He had advised the appellant to make allowance for the cost of stabilising the land.

[51] The appellant sent a commentary to the investigator on 10 November 2020, concerning the licensee's "dishonesty and lies" in his evidence to the Authority.

Decision of the Complaints Assessment Committee (CAC 2104)

[52] On 26 March 2021, the Committee decided to take no further action on the complaint.

Due diligence costs

[53] The Committee considered r 5.1 (exercise skill, care and diligence) and r 6.2 (act in good faith and deal fairly).

[54] The Committee recorded that the appellant said he had incurred council fees, legal fees and the expenses of an engineer, well in excess of \$5,000. He had also lost time and opportunity. The licensee said the appellant had chosen to apply for LIM reports and to engage his engineer friend.

[55] The Committee was satisfied that the licensee “told and encouraged” the appellant to get LIM reports as the vendor wanted the contract to be unconditional before Christmas.²⁵ The Committee further found the licensee had said that, if the offer did not go ahead, he would reimburse the appellant for the LIM reports.

[56] It found that while the licensee encouraged the appellant to get LIM reports, it was not established that the latter was pressured to do so. The Committee found no breach of the Rules, nor unsatisfactory conduct. At the time, the prospect of the vendor accepting the offer looked favourable. The vendor had bought another property. The licensee’s approach was practical, accommodating the vendor’s requirements, the due diligence period of 15 days, the time of the year and the interests of both parties in confirming an agreement before Christmas. There were no other interested parties.

[57] According to the Committee, it had not been established that the licensee’s request for an unconditional offer from the appellant was unreasonable.

[58] Nor was it established that encouraging the appellant to fly the engineer up was unreasonable. It was found that the licensee had said to the appellant that he could not promise that the property could be purchased at the figure of \$925,000, but he had suggested the appellant proceed with the engineer.

Communications with the appellant about the purchasers, including the multi-offer

[59] The Committee considered r 5.1, r 6.2 and r 6.4 (not mislead or provide false information).

[60] It was found by the Committee that the licensee had very limited dealings with the purchasers and it was not established that he provided false information to the appellant in relation to his dealings with the purchasers or their offer.

²⁵ Committee decision (27 July 2020) at [3.6].

[61] The appellant claimed that the licensee was fully aware of the purchasers' offer and assisted the vendor to obtain a sale without disclosure of the subsidence issue. He claimed that the licensee's handling of the purchasers' offer was unfair to him (the appellant) and deprived him of the chance to put in his best offer. He disbelieved the licensee's account that he was blindsided by the other offer and had been told by the vendor not to run a multi-offer.

[62] The Committee noted that the licensee said that the purchasers dealt directly with the vendor to inspect the property. He did not know what was going on in the background until the vendor's daughter requested him to draft an agreement for sale and purchase. He said he had been asked not to mention it to the appellant until the offer was unconditional. The licensee had suggested a multi-offer process, but the vendor did not want to lose the purchasers who were offering a lot more money.

[63] The Committee found that the dealings between the vendor and the purchasers occurred without reference to the licensee who was unaware an agreement had been reached until he was asked to formalise it on 19 December. The purchasers had earlier approached the licensee, but they had been discouraged by him because of the potential subsidence issue which was under discussion and undisclosed. The licensee told the vendor he did not want to show the property to the purchasers until more information was known about subsidence.

[64] The appellant considered that the licensee lied about the existence of the purchasers' agreement for sale and purchase, but the Committee found that until the afternoon of 19 December 2019, the licensee was unaware of the vendor's dealings with the purchasers and was waiting for a response on the appellant's revised offer. The licensee said in a text on 19 December, responding to the appellant's text at 1:29 pm about the lack of information from the vendor, that the vendor had not come back to him.²⁶ It was noted by the Committee that the licensee had already sent out the purchasers' agreement by then, but he had been waiting for confirmation it had been accepted. The licensee had been instructed not to tell the appellant until the offer was signed. Given the context, the licensee's text was not misleading.

[65] As for the multi-offer process, it was not possible to determine whether the licensee did suggest such a process when he became aware of the purchasers' offer. The vendor and licensee's PA said the licensee did ask the vendor. However, the licensee's correspondence with the vendor after the daughter's visit refers to keeping the appellant's offer on the table in the event that the purchasers' offer did not proceed. This

²⁶ Bundle at 166, 374.

suggested a multi-offer was no longer an option and less likely to have been raised with the vendor after the daughter's visit. The licensee was also inconsistent and said he raised it with the vendor's daughter, not the vendor.

[66] The text messages between the licensee and the vendor's daughter on 12 December 2019 discussed the purchasers' interest and potential for a multi-offer situation. At that point no offer had been signed and matters were left to see what would happen.

[67] The Committee was satisfied that the licensee was working to get the appellant's offer over the line and the vendor wanted this. However, this changed when the purchasers arrived on the scene. Despite initial efforts by the licensee to dissuade the purchasers, the vendor took over. The vendor was entitled to exclude the appellant from a multi-offer situation.

[68] It was not established that the licensee had misled the appellant or failed to treat him fairly. The vendor was entitled to choose another buyer over the appellant without entering into a multi-offer situation and the licensee was required to follow the vendor's instructions.

[69] The Committee went on to assess other communications between the licensee and the appellant, after the licensee was permitted by the vendor to tell the appellant about the purchasers. It was found that the licensee did not mislead him.

[70] The Committee found that it was not established that the licensee had failed to exercise skill, care or diligence, or failed to act in good faith or deal fairly with the parties, nor had it been established that he had misled the appellant or provided him with false information.

Disclosure of subsidence

[71] This involved consideration of r 6.4, r 10.7 (disclose known defects) and r 10.8 (licensee not to act if client directs withholding of information).

[72] The appellant said that on 2 December 2019 he discovered with the licensee that one wall of the house was subsiding towards a clay bank. They discovered further subsidence on 4 December 2019. He contends that the licensee failed to disclose this to the purchasers, acting in concert with the vendor to conceal the severity of the issue in order to secure a more favourable sale.

[73] According to the appellant, the licensee knew about such a problem in the area and acknowledged that subsidence at the property was obvious. On 13 December 2019, the licensee repeated this and said it required disclosure, but the vendor had instructed him not to disclose it.

[74] The Committee found that the appellant's concerns about subsidence were genuine and valid. He had a building background and there was a site visit from a retired engineer. It was satisfied that the licensee considered subsidence to be a potential issue and was concerned about how best to deal with it pending independent confirmation, so he avoided dealing with other parties in the interim.

[75] The Committee decided that the licensee was not required to disclose the potential subsidence issue until he was asked to prepare the agreement for the purchasers. He was not involved with the purchasers' viewing or negotiation. At this point, he obtained confirmation from the daughter that the purchasers were aware of the issue. An 'as is where is' clause was inserted into the agreement to address the potential issue with subsidence. The licensee's email to the purchasers of 19 December 2019 explained that the clause referred to slippage. The vendor had also said to the Committee that the purchasers had been shown the areas that had fallen away. Furthermore, the price was \$100,000 less than the asking price.

[76] It had not been established that the licensee had dealt with the purchasers prior to 19 December 2019, or that he had failed to disclose the potential subsidence issue. Nor had it been established that he had colluded with the vendor to avoid disclosure.

APPEAL

Submissions of the appellant

[77] The appellant provided preliminary submissions in his email to the Tribunal on 14 April 2021.

[78] In his submissions of 10 September 2021 to the Tribunal, the appellant contends there was insufficient information before the Committee. The vendor and her daughter had not been spoken to by the Authority's investigator. There was no statement from the purchasers.

[79] According to the appellant, the purchasers had a geotechnical report which confirms that the area was then unstable. They had since built a retaining wall of 4.8 metres.

[80] The appellant repeats much of what he told the Committee in his extensive submissions. We have reviewed all of it. It will be set out below only in summary.

[81] The appellant contends that the licensee was aware from other properties that subsidence was an issue in the area. While he denies knowing of any serious defect in the property, that was not his reaction at the time of the inspections with the appellant. The licensee said the subsidence was obvious and had to be disclosed. However, he had said in his email of 20 December 2019 that he had not disclosed it. The licensee had said opposite things to different people on 20 December 2019, as to whether the purchasers had been advised of the slippage issue.

[82] The appellant says he had been told by other agents that they are required to complete multi-offer forms when more than one offer comes in.

[83] The appellant questions whether the vendor's statement to the Authority (14 August 2020) was written by her and whether it is true. It is contradicted by the licensee's email to her (this appears to be a reference to the licensee's email of 20 December 2019).

[84] The appellant contends he is the victim of an unfair process. The licensee and vendor were so caught up in misleading the purchasers that they did not deal fairly with him. The licensee was saying opposite things to different parties. The appellant says that his losses had exceeded \$10,000, including his time in documenting the complaint to the Authority.

[85] One of the key findings the appellant says he is looking for is confirmation that the licensee told him that the vendor was refusing to let him disclose the slippage to others, but the licensee was required to do so.

[86] The appellant replied on 29 October 2021 to the licensee's submissions. He states that the evidence shows that the purchasers were not informed of the subsidence. The licensee has failed to provide a statement from the purchasers saying they were informed.

[87] According to the appellant, the lacklustre investigation means he is not aware of any complaints by the purchasers against the vendor. The Committee erred by not requesting a greater investigation. There is ample evidence proving that, at the time the agreement was drawn up, the licensee did not know that proper disclosure had been made. His own emails to the vendor state that he was told not to disclose the subsidence to the purchasers. The appellant therefore asks how the licensee could rely on the vendor to have told the purchasers.

[88] The appellant says he was told he had to make an unconditional offer. He was told to increase his offer without being informed of the other offer.

Submissions of the Authority

[89] In her submissions of 15 October 2021, Ms Bergin, counsel for the Authority, submits that the Tribunal should not strike out the appeal, as requested by the licensee. The parties have now filed submissions and the Tribunal is in a position to make a decision on the appeal. Considering the substance of the appeal is consistent with the consumer focus protection of the Real Estate Agents Act 2008 (the Act). It is noted that the threshold for striking out is set deliberately high.²⁷

[90] According to the appellant, the Committee erred by failing to contact the vendor to confirm the accuracy of her signed statement (14 August 2020). Counsel observes that the Committee had access to the licensee's emails, texts and file notes, as well as the appellant's recorded phone conversations with the licensee. The Committee could reasonably use this evidence to assess the accuracy of the vendor's statement.

[91] As for the appellant's contention that the Committee erred by failing to obtain independent statements from the vendor and her daughter, counsel notes that it had access to the emails and texts between the licensee and the vendor or her daughter. It was not required to obtain independent statements and could reasonably use the evidence before it to assess the complaint.

[92] Nor was the Committee required to obtain an independent statement from the purchasers, as submitted by the appellant. They had declined to get involved when contacted by the Authority's investigator. The Committee had the licensee's emails and texts with the purchasers.

[93] In answer to the appellant's contention that the Committee erred in accepting the licensee's evidence that the slippage issue was disclosed to the purchasers prior to their offer, Ms Bergin submits that the Committee could use the licensee's emails and texts to assess the accuracy of his evidence. There is no evidence that the purchasers were not informed of the possibility of subsidence. It is noted that the purchasers chose not to participate in the complaint process.

²⁷ *Nottingham v Real Estate Agents Authority* [2020] NZHC 1561 at [55].

Submissions of the licensee

[94] There are submissions (1 October 2021) from Ms Scott and Ms Waalkens on behalf of the licensee.

[95] The licensee applies for dismissal or the striking out of the appeal under s 109A of the Act. There are no reasonable grounds for the appeal and it is vexatious, frivolous and an abuse of process. The appellant does not identify any tenable ground of appeal. While lay litigants should be afforded some allowance, court rules and procedures still have to be followed. He is simply disgruntled. It has not been articulated where the Committee erred in its decision.

[96] The appellant's indirectly threatening emails began immediately after the sale. The vendor did not enter into any further discussions. The appellant made his complaint because he did not get his way. He has an 'axe to grind', having made the complaint to aggravate and discredit the licensee in a small community.

[97] It is submitted that it is important to make a distinction between complaints with foundation and those which use the Act's framework to air unfounded grievances. The impact of a complaint on an agent is not to be undermined. It is a serious process for the licensee to go through. The appellant's submissions are prolix and an abuse of process. The licensee should not be put to the task of having to respond to every point.

[98] If the Tribunal determines not to strike out the appeal, it ought to be dismissed or the Committee's decision to take no further action confirmed.

Due diligence costs

[99] It is submitted that the licensee acted in good faith and dealt fairly with the appellant during the due diligence process. Likewise, he exercised skill, care and diligence. It is commonplace to undertake due diligence on a property before making an offer. The appellant's offer was the only one at the time and the indications were that it might be accepted, so it was not unreasonable for due diligence to be recommended and undertaken. The licensee did advise the appellant to complete his due diligence the following week, but that is the very point of an unconditional offer. It must precede the offer.

Multi-offer process

[100] Counsel submit that a vendor is not required by the Act or the Rules to enter a multi-offer process, but is free to sell a property to any party. The licensee did ask both

the vendor's daughter and later the vendor on 19 December 2019 about such a process, but it was declined. The vendor was worried that if the appellant became part of the process, the agreement with the purchasers would fall over.

Disclosure of subsidence

[101] According to counsel, the licensee was not aware of subsidence at the property before the appellant raised it. He then became aware of a potential defect. It was never confirmed by an expert. The licensee in turn raised it with the vendor and suggested she get a report. The licensee, conscious of the property being in a small town, did not want incorrect information in the community without confirmation of the defect. He did not deal with any potential buyers following awareness of the potential defect. He even delayed the purchasers from viewing the property.

[102] The licensee was being prudent, balancing the requirement to disclose with the potential damage that incorrect disclosure could cause the vendor.

[103] The licensee was not aware of the deal being done with the purchasers until the day before. The vendor confirms that the viewing and negotiation were done without input from the licensee. The agreement itself reflects this. The licensee cannot be under an obligation to disclose a potential risk before knowing of the party. Rule 10.7 does not require a licensee to personally disclose a potential defect, as it is enough that the licensee ensures that the customer is informed. He did so by asking the daughter. He ensured the purchasers were informed in an email on 19 December 2019.

Bundle of documents

[104] The Tribunal received a paginated bundle of documents from the Authority.

JURISDICTION AND PRINCIPLES

[105] This is an appeal pursuant to s 111 of the Act.

[106] The appeal is by way of a rehearing.²⁸ It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.²⁹ After considering the appeal, the Tribunal may confirm, reverse, or modify the determination

²⁸ Real Estate Agents Act 2008, s 111(3).

²⁹ *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] & [83].

of the Committee.³⁰ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.³¹

[107] A hearing may be in person or on the papers.³² A hearing in person may be conducted by telephone or audiovisual link.

[108] 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.³³ An appellant has the onus of showing on the balance of probabilities that their version of the events is true and hence the Committee is wrong.³⁴

Directions from the Tribunal

[109] The Tribunal issued a Minute on 7 May 2021 directing a timetable for submissions regarding an application from the appellant to admit further evidence. A Ruling was issued on 23 August 2021. The Tribunal declined to admit two letters (written after the Committee’s decision) as further evidence. We have not considered these letters or the submissions and evidence filed in relation to the application to admit these letters.

[110] In a further Minute issued on 27 August 2021, the Tribunal directed that the appeal be determined on the papers and set a revised timetable for submissions.

DISCUSSION

[111] This is a preliminary issue, being the licensee’s application to strike out the appeal. As to this, the Tribunal agrees with the Authority that this is not an appropriate case to consider striking out. The complaint is not frivolous or vexatious and nor are the other grounds in s 109A(1) made out. The licensee’s communications with the appellant do raise an issue as to what was disclosed to the purchasers about the subsidence issue. We note also that the threshold for striking out is high.

[112] Turning to the substantive appeal, the appellant questions the adequacy of the Authority’s investigation, but we agree with the Authority that it had ample evidence, including the licensee’s numerous contemporary communications with the parties, his

³⁰ At s 111(4).

³¹ At s 111(5).

³² At ss 107, 107A.

³³ *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].

³⁴ *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22] and the higher court authorities cited therein at n 9.

file notes and the telephone recordings made by the appellant. There were also statements or letters from the vendor and the licensee's PA (obtained by the licensee), as well as from the engineer. There was no need for the Committee to obtain independent statements, noting that the purchasers had declined to assist the investigator.

[113] The relevant rules to be considered are:

5 Standards of professional competence

5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

...

6 Standards of professional conduct

...

6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

...

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

10 Client and customer care for sellers' agents

...

Disclosure of defects

10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either—

- (a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or
- (b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

10.8 A licensee must not continue to act for a client who directs that information of the type referred to in rule 10.7 be withheld.

[114] There are three areas of complaint to consider.

Due diligence costs

[115] The Committee considered rr 5.1 and 6.2, set out above. We also find r 6.4 to be potentially relevant.

[116] The appellant's complaint to the Authority was that the process was unfair which cost him thousands of dollars in lost expenses and effort.

[117] The evidence shows that from about 2 to 7 December 2019 the licensee encouraged the appellant to make enquiries and undertake due diligence, by seeking LIM reports and an inspection from an out-of-town engineer known to the appellant (given the identification of the subsidence issue).

[118] This was, self-evidently, sensible advice from the licensee. LIM reports are a standard source of information for a prospective buyer. Once the appellant had identified the subsidence issue, the engagement of an engineer was equally sensible. The appellant had first raised the issue with his engineer friend without reference to the licensee. That the licensee then encouraged him to arrange an inspection was appropriate advice from the licensee for a serious bidder.

[119] It will be recalled that the appellant was the only bidder known to the licensee at the early stage when the LIM reports were obtained and the engineer became involved. Furthermore, the vendor had already bought a property, so would have been under some pressure to sell. The licensee's encouragement to undertake due diligence in early December was reasonable. The vendor wanted the contract to be unconditional before Christmas. The purchasers did not appear on the scene until 11 December 2019, but by then the appellant had incurred the costs of the LIM reports and the engineer's expenses.

[120] There is no evidence of any undue pressure being put on the appellant by the licensee to incur due diligence costs and no reason to believe he could not have resisted any such pressure. The licensee's suggestion to the appellant on 7 December that he make an unconditional offer at the price indicated by the appellant (\$925,000) was reasonable.

[121] The Committee noted that the licensee offered to refund to the appellant the cost of LIM reports if his offer was unsuccessful. This is correct.³⁵ This offer is not material to our deliberations. Nor has any party asked us to consider it on this appeal.

³⁵ Bundle at 181.

[122] The Committee correctly found that the prospect of the vendor accepting the appellant's offer looked favourable and the licensee's approach encouraging due diligence was practical. There is no breach of rr 5.1, 6.2 or 6.4. There is no unsatisfactory conduct on the part of the licensee.

Communications with the appellant about the purchasers, including the multi-offer

[123] This involves rr 5.1, 6.2 and 6.4.

[124] The appellant contends that the licensee was fully aware of the purchasers' offer and assisted the vendor to obtain a sale without disclosure of the subsidence issue. It is alleged that the licensee's handling of the purchasers' offer was unfair to him (the appellant) and deprived him of the chance to put in his best offer. He disbelieves the licensee's account of being blindsided by that offer and being told by the vendor not to run a multi-offer process.

[125] We will consider the disclosure allegation separately.

[126] The evidence establishes, as the Committee found, that after the licensee declined to facilitate a visit, the purchasers dealt directly with the vendor. There is no evidence beyond the appellant's supposition that the licensee knew about the purchasers' inspection and offer, before the vendor's daughter asked him on 19 December to draw up the agreement.

[127] The licensee immediately told the appellant. He said the property had been sold behind his back. As the Committee found, the evidence shows this to be a genuine belief.

[128] As for the possibility of a multi-offer process, it is submitted on behalf of the licensee that he suggested such a process to both the vendor's daughter and later the vendor, but it was declined by the vendor.³⁶ She was worried that if the appellant became part of the process, the purchasers' offer might fall over.

[129] As we note above, the licensee's evidence is that he raised a multi-offer process with the daughter.³⁷ The licensee says the daughter declined it because she did not want to put the attractive new offer at risk. There is no reason to disbelieve the licensee's evidence it was raised with the daughter, as it had already been discussed in texts on 12 December. We further note that the licensee, in his evidence to the Authority, also

³⁶ Counsel's submissions (1 October 2021) at [67].

³⁷ Bundle at 157.

says he suggested a multi-offer to the vendor who gave him instructions not to say anything to the appellant until the higher offer was unconditional.³⁸

[130] The Committee found that it was not possible to find that the licensee had suggested a multi-process when he became aware of the purchasers' offer, though it was possible it had occurred. The Committee noted that the licensee in his communications with the vendor after the daughter's visit suggested keeping the appellant's offer on the table. We do not agree that this is inconsistent with the licensee raising a multi-offer which was declined. Whether or not the multi-offer process was declined, it would be prudent to keep the appellant's offer alive until the other offer was unconditional. It could be kept alive without a multi-offer process.

[131] The Committee further considered the licensee's evidence to be inconsistent concerning with whom he raised the multi-offer issue. According to the Committee, the licensee said he raised it with the daughter, but the vendor and the licensee's PA had said it was raised with the vendor. The Committee has overlooked the licensee's evidence stating he raised it also with the vendor, as we note immediately above.³⁹

[132] We find that the licensee's evidence that he raised the possibility of a multi-offer process with the vendor and her daughter on 19 December 2019, to be corroborated by the vendor and the licensee's PA.⁴⁰ It was rejected as the vendor was concerned about losing the purchasers' higher offer. That was a decision she was entitled to make. The appellant had no right to insist on engaging such a process. It will be recalled that it is the licensee's evidence that the appellant had decided against increasing his \$950,000 offer (though of course, the appellant did not know then of the other offer).

[133] In summary, we find that the licensee was not aware of the purchasers' offer until 19 December. The licensee raised the possibility of a multi-offer process, but it was rejected by the vendor. The appellant was not deprived by the licensee of any chance to put forward a better offer. If deprived by anyone, it was the vendor. As for the licensee's communications with the appellant after becoming aware of the purchasers' offer, we agree with the Committee that they were not misleading.

[134] The licensee's communications with the appellant reflected the licensee's knowledge at the time of the communications and were honest, fair and reasonable. There is no breach of any rule and no unsatisfactory conduct.

³⁸ Bundle at 153 (item 2).

³⁹ Bundle at 153 (item 2).

⁴⁰ Vendor's statement (14 August 2020) at 323 of the Bundle; PA's letter to Committee (11 August 2020) at 324 of the Bundle.

Disclosure of subsidence

[135] This involves rr 6.4, 10.7 and 10.8.

[136] The licensee downplays the subsidence problem in his evidence to the Authority and the Tribunal. He refers to it as a potential issue which was never confirmed by a report. However, the licensee's own conduct at the time, including declining to take the purchasers through the property, shows he regarded it as a real defect requiring disclosure. His communications with the appellant and the vendor and his handling of the agreement for sale and purchase with the purchasers also show he regarded it as real and disclosable.

[137] The appellant alleges that the purchasers were not told of the subsidence issue by the licensee and that he conspired with the vendor to hide the issue from them.

[138] The appellant is correct as to the licensee not disclosing to them the problem, as the licensee himself accepts.⁴¹ However, in the circumstances here, the failure of the licensee to inform the purchasers of the subsidence issue before the purchasers made their offer is not evidence of any unprofessional conduct.

[139] The purchasers had first approached the licensee, but the latter had declined to show them the property. This was not just because the licensee was in the process of negotiating a deal between the vendor and the appellant, but also because he did not want to disclose the subsidence issue to the purchasers. On 13 December, he offered them a viewing, if instructed to do so by the vendor. The communications between the licensee and the purchasers then ceased until 19 December. Whether or not the licensee should have disclosed it then is irrelevant, since the involvement of the purchasers was taken out of his hands. They then approached the vendor directly.

[140] Unbeknown to the licensee, the purchasers visited the property and made an offer. The licensee was then asked on 19 December to draw up the agreement. This was the first he knew of their pursuit of the property. He says he obtained confirmation from the daughter that the purchasers had been told of the subsidence issue. The vendor confirms the disclosure in her statement.

[141] The appellant contends that the licensee said opposite things to different people in his emails to the vendor and to the appellant on 20 December 2019.⁴² The licensee

⁴¹ Email licensee to vendor (20 December 2019) in fifth to last paragraph, at 315 of the Bundle.

⁴² Submissions (10 September 2021) at [15]. Email licensee to vendor (20 December 2019) at 315 of the Bundle. The email to the appellant is dated 19 December 2019 at 17:59 pm, at 049–050 of the Bundle.

told the vendor he had not disclosed subsidence to the purchasers. In his email to the appellant, he said he had informed the purchasers “in writing before they signed their agreement”.

[142] These statements are not contradictory. Both are true. The licensee did not inform the purchasers of the subsidence issue when he was in contact with them up to 13 December, but on sending the draft agreement to them on 19 December, he drew their attention to the ‘as is where is’ clause relating to slippage.⁴³

[143] The appellant further alleges that the vendor’s statement to the Authority (14 August 2020) contradicts the licensee’s email to the vendor.⁴⁴ The Tribunal assumes he is referring to the licensee’s email of 20 December 2019.⁴⁵

[144] The appellant does not identify the contradictory elements of the statement, but in his submissions he appears to be talking about disclosure of subsidence, so we will assume it is her statement that the licensee was never instructed not to disclose the defects.⁴⁶ This appears to contradict the licensee’s email to the vendor (20 December 2019) where he stated that the vendor instructed him not to disclose any potential slippage issue, as she regarded it as “hearsay and not fact” since it was not backed up by an engineer’s report.

[145] Superficially, this appears to be contradictory. What the appellant has overlooked is the observation by the vendor in her statement that she did not give the licensee authority to disclose to the purchasers what the appellant was saying was a problem.⁴⁷

[146] In the context of these communications, there is no material difference between the vendor’s ‘I did not authorise disclosure, but did not instruct non-disclosure’ and the licensee’s ‘I was instructed not to disclose’. The licensee believed he needed express authority or instructions to disclose the defect. He did not have such authority or instructions.

[147] The appellant steadfastly declines to accept that the purchasers were told by the vendor. He faces a grave difficulty. He presents no evidence from the purchasers confirming his version of the events. He complains about the Authority’s failure to obtain a statement from them, but the purchasers had declined to speak to the investigator.

⁴³ Bundle at 302.

⁴⁴ Submissions (10 September 2021) at [17].

⁴⁵ Bundle at 315.

⁴⁶ Vendor’s statement (14 August 2020) at [1] & [9], Bundle at 322–323.

⁴⁷ Statement (14 August 2020) at [1].

[148] The onus of proving that the licensee permitted the transaction to proceed without the purchasers knowing of the subsidence, lies with the appellant. He has not proved this. Indeed, the evidence proves otherwise. The licensee's evidence that the purchasers were told, albeit by the vendor, is corroborated by the vendor's statement to the Authority. That statement would have been drawn up by the licensee, but the vendor signed it. Furthermore, the licensee's contemporary communications with the vendor and the purchasers are consistent with the licensee's contention that the purchasers were made aware of the problem.

[149] We agree with the submission of counsel for the licensee that r 10.7 does not require personal disclosure of a defect to a customer. The agent must "ensure" that the customer is aware.⁴⁸

[150] Indeed, it is difficult to envisage how the purchasers could not have known. There is the 'as is where is' clause inserted into the agreement by the licensee as well as his email to the purchasers on 19 December referring to that clause and the "potential slippage".

[151] The evidence establishes that the purchasers were made well aware of the subsidence problem before advancing their offer (by the vendor) and again before signing the agreement (by the licensee). There is no evidence the purchasers were misled or that material information was withheld from them or that a known defect (subsidence) was not disclosed.

[152] There is no breach of any rule and no unsatisfactory conduct by the licensee in relation to disclosure of the subsidence defect to the purchasers.

OUTCOME

[153] The appeal is dismissed. The decision of the Committee to take no further action is confirmed.

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

PUBLICATION

[155] The Committee directed publication of its decision without the names or other identifying details of the parties, the witnesses or the property.

⁴⁸ Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, r 10.7(b).

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

D J Plunkett
Chair

C Sandelin
Member

N O'Connor
Member