BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2022] NZREADT 11

Reference No: READT 034/2021

IN THE MATTER OF	An appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	**BM** and **MF** Appellants
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 2101)** First Respondent
AND	**KN** and **TE** Second Respondents

Hearing on the papers

Tribunal:	D J Plunkett (Chair) N O'Connor (Member) F Mathieson (Member)

Representation:

Counsel for the appellants:	K Burkhart, N Dhaliwal
Counsel for the first respondent:	E Mok
The second respondents:	Self-represented

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 2 June 2022

INTRODUCTION

[1] The appellants are BM and MF (the licensees). They were engaged by the vendor to sell a lifestyle property of about 4 hectares. It had two dwellings, but there was an issue as to council consent for one. It was bought by KN and TE (the purchasers), being the second respondents in this appeal.

[2] The purchasers complained against the licensees to the Real Estate Agents Authority (the Authority), the first respondent. Complaints Assessment Committee 2101 (the Committee) found a breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) and therefore unsatisfactory conduct on the part of the licensees. The licensees appeal against the Committee's decision.

BACKGROUND

[3] The licensees were previously engaged by CU (the agency). The nature of BM's licence is not known. He does not hold a current licence. MF is a licensed agent.

[4] The property had a wooden bungalow and various other farm buildings.

[5] In 2010, a brick veneer house was relocated onto the property. The effluent disposal plan (15 March 2010) filed with the council stated:

> A relocated four bedroom dwelling is proposed at this site. The existing dwelling will revert to a non habitable dwelling (hay storage shed) with ablution facilities. Water supply will be from roof supply tanks.

[6] On 18 October 2017, the vendor signed an agency agreement with the agency providing for the licensees to market and sell the property by auction.

[7] The vendor provided the licensees with a LIM report from the local council (unseen by the Tribunal). While it stated that the brick house had a code compliance certificate, there was no mention of the wooden bungalow. The licensees noted the apparent lack of resource consent for the bungalow and asked the vendor who advised that consent was not required. The vendor stated that there had been a fire at the council and the records for the bungalow had been lost.

[8] The licensees obtained an updated LIM report (20 October 2017). It recorded a code compliance certificate issued in 2010 for the relocated brick dwelling. The bungalow was not mentioned. The zoning was "General Rural".

[9] The licensees prepared the text of an advertisement, which was approved by the vendor and uploaded onto the agency's website on about 24 October 2017 and later elsewhere:

> Rare as hens' teeth. This ex-poultry farm means sheds galore! 1,100m^2 approx. of quality shedding divided into 6 bays, stables and a huge workshop!
>
> Extended families are well covered here with 2 quality houses (7 bedrooms, 3 bathrooms in total) or rent one out for extra income. Both houses have lockup garaging and are quite private and separate from each other. The main home is brick & tile and has double glazing. But the best thing about this property is the beautiful flat 10 acres of quality grazing land!!!

[10] The agency prepared a rent appraisal (1 November 2017). It gave an estimated rent for both the brick house and the bungalow. The latter was described as a classic family home, with three bedrooms, bathroom, kitchen, dining area and a lounge.

[11] On 4 November 2017, TE viewed the property. He told the licensees he wanted to extend the bungalow and asked if this was possible. According to the licensees, they told him plans would be subject to council approval and that he should make inquiries directly with the council.[1]

[12] On 8 November 2017, the licensees provided the purchasers with the LIM report and other documents. Their covering email stated, "Please refer these to your solicitor for further clarification". There was a standard disclaimer from the agency concerning the accuracy of the documents.

[13] The purchasers attended open homes on 11, 18, 23 and 25 November 2017. They took measurements for extensions to the bungalow they hoped to undertake.

[14] A council Notice of Valuation (20 November 2017) was provided to the Committee by the licensees. Under "Property description", it stated "2 DWG…" (two dwellings).[2] The Committee were also provided with the council's rates information for the 2017/2018 financial year which showed the "Land use" to be "Lifestyle-multi-unit" and the improvements to comprise two dwellings.[3] The transport levy, uniform annual charge and waste management charge recorded two separate parts for each. Both council documents showed one street address for the two dwellings (being Dwelling 1 of the specified street).

[15] On 1 December 2017, the property was passed in at auction.

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[1] Submissions licensees (15 February 2022) at [15].
[2] Bundle of documents at 310.
[3] Bundle of documents at 311–312.

[16] On 2 December 2017, the vendor and purchasers entered into an agreement for the sale and purchase of the property. The price was $2,100,000.

[17] On 4 December 2017, the purchasers paid the deposit and then on 28 March or 1 April 2018, settlement occurred. The new Certificate of Title showed each purchaser to have a half share (one of the purchasers owns the half share with another person).

[18] The purchasers then approached the council to investigate extending the bungalow. While inspecting the council's drainage file, they discovered the information filed in 2010 presenting the bungalow as a hay shed.

[19] The purchasers sought legal advice. Following a letter from the purchasers' solicitor to the vendor, the solicitor for the latter wrote to the purchasers' solicitor on 28 August 2018 stating:

1. The vendor and the licensees did not represent that a code compliance certificate was obtained for the bungalow. It was built before they were issued.

2. Following completion of the brick house, the vendor received a letter from the council stating that the property would be rated for two dwellings (the notice of valuation of 20 November 2017 was enclosed).

3. It was not a condition of building consent for the brick house that the bungalow not be used for residential purposes.

4. The reference to the bungalow on the site plan and design of the effluent system was based on the fact that at the time building consent for the brick house was sought, the bungalow was being used in conjunction with a horse training facility. The reference related to effluent disposal calculations.

[20] On 29 August 2018, the purchasers obtained a retrospective valuation for "forensic purposes", the property to be valued as at 2 December 2017.[4] The valuers inspected the property on 25 August 2018. In the property summary, they stated:

> There are two large sheds, two garage buildings, a brick house and a circa 1940s bungalow which we understand is limited to use as a "hay shed", due to arrangements with council which predates the purchase of the property in December last year. For all intents and purposes, the "hay shed" appears as an ordinary house and it would be considered surprising by prospective purchasers that such a structure would be restricted to use as a "hay shed".

[4] Valuation report (29 August 2018), bundle of documents at 75–117.

[21] The Tribunal notes that the external and internal photographs in the report of the bungalow ("hay shed") show a typical wooden bungalow, with the usual rooms expected in a residential dwelling.

[22] The valuation of the property (at 2 December 2017) was $1,850,000. In reaching that figure, the valuers assumed the bungalow could not be rented as a residential dwelling.

Complaint to agency

[23] On 21 January 2019, the purchasers wrote to the agency and the vendor alleging that they had been misled into believing that both the brick home and the bungalow were fully consented. On inspecting the council's file for an extension, they discovered that the bungalow was a secondary building which was not permitted to be used as a dwelling.

[24] The purchasers' solicitors wrote to the agency on 24 January 2019 stating that misleading representations had been made by the agency. The purchasers were led to believe that both dwellings were fully consented. The purchasers had told MF that they intended to live in the bungalow and rent out the brick dwelling to pay off the mortgage. The marketing information included rent appraisals for both buildings.

[25] The purchasers reviewed the LIM report in carrying out due diligence. It was noted that the bungalow was not listed as a structure. They asked MF. She said that it was "all fine", adding that there had been a fire at the council and the original documents had been lost. She did not say that a resource consent would be required for two consented dwellings, a non-complying activity.

[26] TE then contacted a planner at the council by telephone. The planner agreed that it was possible the files had been lost in a fire and that to rectify this, they could file the current layout plans of the buildings to add to the council's files.

[27] Relying on the marketing material and the enquiries with the council, the purchasers reasonably believed the two dwellings were legally compliant, habitable structures because the most recently built one (the brick house) had a code of compliance certificate with no outstanding conditions.

[28] After settlement, the purchasers considered making additions to the bungalow and inspected the property file. They discovered that the bungalow had been recorded as a hay storage shed on a site layout plan and a wastewater plan filed with the council in 2010.

[29] According to the purchasers' solicitors, MF did not inform the purchasers that the bungalow was permitted to be used as a secondary dwelling only. Having two residential dwellings would be a non-complying activity. Nor did she mention that this non-compliant activity would require a resource consent.

[30] It was alleged that MF knew, or ought to have known, that the zoning restrictions would not allow for two residential dwellings without a resource consent. Her response that the earlier records were destroyed in a fire created the misleading impression that both residential dwellings had been fully consented.

[31] A valuation obtained recently by the purchasers showed that the true market value of the property at the time they purchased it (on the basis the second dwelling was a hay shed) was only $1,850,000, being $250,000 less than the price they paid.

[32] The agency's solicitors replied on 2 May 2019 denying liability. MF had advised prospective buyers the agency could not guarantee that both dwellings were permitted and they should check with the council, which the purchasers did. TE advised MF that he had reviewed the council property file and was satisfied as to the nature of the two dwellings. The purchasers had the opportunity to obtain legal advice prior to purchase, including advice regarding the zoning of the property and the legality of the buildings. At no time did the agency represent the property as being fully compliant.

[33] The purchasers' solicitors responded on 16 March 2020. They say the purchasers were never provided with any verbal or written information that having two houses on the property was conditional on resource consent. Their claim was based on specific oral representations and assurances made by MF. They relied on her oral assurances leading them to believe there was a good explanation for the absence of the bungalow from the LIM report. She said it was the result of a fire and not due to any lack of consent. The council had confirmed there had been a fire and suggested that the best way forward was to get the bungalow's floor plans drawn up and given to the council to have on file.

[34] According to the purchasers' solicitors, the property was marketed as having two quality houses, one to live in and one to either rent out or for extended family. The purchasers relied on this marketing. Without two dwellings, they would not have bought the property. To enable them to get two quality houses, they have incurred substantial costs to obtain resource consent to convert the brick house into a minor dwelling and increase the septic system for the bungalow.

THE COMPLAINT

[35] On about 13 March 2020, the purchasers made a complaint to the Authority.

[36] The purchasers stated that the licensees sold a lifestyle property said to have two quality homes and they provided rental appraisals for both houses. The vendor was then living in the new relocated brick house. The original 1940's bungalow was tenanted. The council's documents showed that the brick house had been relocated, but the bungalow was not listed.

[37] When the purchasers asked the licensees about the absence of the bungalow in the council's records, they were told it was all "sweet". The licensees said there had been a fire at the council and documents had been lost which was why there were no details for the secondary dwelling, but it had grandfather rights to be there. The licensees never inferred that there were any issues with planning consent on the property. As the council had granted a certificate of compliance in 2011 for the brick house to be added to the property and the licensees had said the bungalow was allowed to be there, they believed there was no legal issue having two houses

[38] The property had been advertised as having two quality houses, with no disclaimer that this was dependant on approval by the council. The licensees were aware that the only reason the purchasers were buying was to live in the bungalow and to renovate and extend it, with the brick house rented out. They would then be able to afford the property. Without the income from the brick house, their mortgage would not have been approved.

[39] The purchasers stated that when they started the renovations, they looked through the council's files and found the building consent application the vendor had filed in 2010 for approval to relocate the brick house. He had told the council that the bungalow was a hay shed and workers' ablutions building only. The council had approved the addition of the brick house based on this information and allowed a new waste unit, having a capacity only for the brick house and workers' ablutions. The septic tank system did not have capacity for two residential properties.

[40] An explanation from the licensees was sought by the Authority.

Explanation from the licensees

[41] MF replied to the Authority on 11 August 2020. She said they advertised the property as having two quality homes, as it did. The vendor lived in the brick house and rented out the bungalow.

[42] They were advised by the vendor that the council was aware of two houses on the property and that the bungalow was rented out, so it charged double rates. The council use category was “Multi unit”. The council had allocated two addresses. The vendor told them he had building consent and a code compliance certificate for the brick house. When questioned about the LIM report not showing evidence of consent for the bungalow, the vendor said the records had been lost in a fire. This was a common problem with older properties in the area. He said a resource consent was not required. They had no reason to disbelieve the vendor.

[43] MF said she was with BM when he phoned the council. The officer confirmed the council was aware of two dwellings on the property and that the records for the bungalow had been lost in a fire. She phoned the council the next day and was told there were no outstanding issues or consents for the property. A resource consent was not required.

[44] According to MF, following receipt of the complaint, she had spoken to a council planner who, having reviewed the rules applicable in 2010, confirmed that the two houses were compliant at the time of sale and did not need a resource consent. The planner further advised that the land use consent obtained by the purchasers in 2019 to convert a dwelling into a minor dwelling, was only required under the new rules if alterations were made.

[45] Hence, the requirement for resource consent had only come about after purchase because the purchasers applied to increase the size of the bungalow, necessitating compliance with the new rules. They were required to commit one of the houses to becoming a minor dwelling.

[46] MF added that they had told the purchasers several times to make enquiries at the council about extending the bungalow, which the purchasers did. TE actually confirmed to them that they needed resource consent. They had told him they did not like his chances of obtaining council approval for the extensions, as the bungalow was already too big for a minor dwelling.

[47] BM wrote to the Authority on 13 August 2020. He repeats much of what MF says.

[48] According to BM, the licensees each spoke to a council town planner and were told that the zoning at the time of relocation allowed for two houses without the need for resource consent. They were also told that the consent had been lost in a fire and that the property was in the category “multi-unit”, for two household units. BM said he told

TE that the rates search showed it had a lifestyle, multi-unit designation and comprised two dwellings. The council had said this was correct.

[49] BM said they told TE that when the brick house was signed off in 2010, this would suggest that the council was happy with the bungalow, as usually it would have to be removed or made uninhabitable if two houses were not allowed.

[50] They were transparent with all prospective buyers and urged them to check it out for themselves at the council because the licensees did not know the permit status of the bungalow, given the lack of consent, and they could not guarantee anything.

[51] The purchasers were sent the LIM report twice, with a written recommendation to seek legal advice and talk to the council. The purchasers went to the council four times.

[52] The licensees told the purchasers that it was probably doubtful they could extend the bungalow as it was already oversized for a minor dwelling. The only way to be sure was to apply for a building consent, which would also involve a resource consent.

[53] BM noted in his letter to the Authority that the purchasers had the opportunity of obtaining legal advice prior to entering the agreement, including advice regarding the zoning and the legality of the dwellings.

[54] The purchasers could have lived in the bungalow and rented out the compliant four-bedroom brick house. If the purchasers had left the property as it was when they purchased it, there would have been no need for them to obtain resource consent. It was their desire to extend the smaller house which changed things. The purchasers applied to add extra bedrooms, which always requires an upgrade to the septic tank.

[55] They made the position clear that there were two houses on site with “one consent unknown and no resource consent”. The property was marketed and purchased for what it was, warts and all.

[56] According to BM, the property carried two addresses for council purposes ([Dwelling 1 and Dwelling 2]) and had two driveways and two sets of rates. The vendor received a letter from the council in 2010 advising him that the property had been rezoned to multi use to take account of both houses and from then on, he paid double rates. The licensees saw that letter. The rates demand shows the property as a multi-unit site.

[57] The agency wrote to the Authority on 13 August 2020. The vendor had advised the licensees that the council's records for the bungalow had been lost in a fire. This was verified by a town planner at the council, who confirmed that the council was aware of two dwellings on the property and also that there were no outstanding consent requirements. The council's notice of valuation (20 November 2017) showed two dwellings.

[58] The licensees sent to the Authority their internal "Property Inspection Report".[5] The following manuscript entries are relevant:

> Phoned Council …
>
> NB: No [resource consent] for 2 houses
>
> [vendor] says wasnt needed
>
> 2 dwling – fine – Multi Unit
>
> Site
>
> …
>
> Zoning – lifestyle – Multi
>
> 2 [dwellings]
>
> …
>
> Phoned Council – They said 2 dwellings on site on their records – some records lost in fire.
>
> …
>
> No resource consent for second [illegible]
>
> was required. [The vendor] …
>
> says fully consented.
>
> …
>
> 3 Only needed [Building Consent] – 2nd house
>
> 2 houses were allowed
>
> Question – current zoning law if wanting to do alterations
>
> then – convert to a minor apply LUC – made minor comply… [name of planner] prior
>
> to 2000 – 2010, under Rodney don't need resource consent.

[5] Bundle of documents at 272–282, 536–543.

Decision of Complaints Assessment Committee 2101 on liability

[59] On 31 March 2021, the Committee found unsatisfactory conduct by the licensees, as they had misrepresented the property, in breach of r 6.4 of the Rules.

[60] The Committee found that the licensees had gone to some length to investigate the legality of the two dwellings. They had pointed out to potential buyers at the open homes that there was no consent for the bungalow. They had urged all of them, including the purchasers, to check with the council themselves because they did not know the permanent status of the bungalow. Every potential buyer, including the purchasers, had been sent the LIM report and a written recommendation to seek legal advice and talk to the council. The council knew and accepted there were two dwellings on the property.

[61] The Committee went on to find that, while the licensees had ensured interested parties were alerted to the consent issues, they had failed to disclose "that there may be potential problems in the advertisement used to promote the property".

[62] It appeared to the Committee that the licensees believed they could advertise what was physically on the property, as long as they "advertised" as to any consent issues. They did this by providing the LIM report showing the absence of building consent of the bungalow. Despite being aware of this impediment, they advertised the property as having "2 quality houses" and included photographs of the interior and exterior of both properties with "no disclaimer as to potential consent issues". They also supplied a rent appraisal for both properties, which clearly gave the impression that both properties were available for rent. The licensees were accordingly in breach of r 6.4.

[63] The Committee decided to take no further action against the agency, since the advertising and promotion were in the hands of the licensees.

[64] The Committee went on to consider whether the licensees misled the purchasers about why the bungalow was not on the LIM report. It noted that the licensees had said they relied on assurances from a former town planner which revealed that in 2010, two houses were permitted without the need for resource consent. The purchasers' land use consent of 22 February 2019 (to convert a dwelling into a minor dwelling) confirmed that this was only required under the new rules if alterations were made to one of the existing structures.

[65] The Committee considered that the licensees had made reasonable inquiries in relation to the zoning and that they did not mislead the purchasers about why the bungalow property was not on the LIM report.

[66] The Committee then went on to consider whether the licensees should have known the zoning allowed for one house and a minor dwelling. It found that the licensees knew the general zone only allowed for two dwellings (one house plus a minor dwelling) without the need for a resource consent. A minor dwelling was defined as being no more than 65m^2, but the bungalow was 122m^2.

[67] The council had confirmed both dwellings were able to be lived in and rented out, the only misnomer being the absence of consent for the bungalow on the LIM report because the consent had been lost in a fire. The licensees had urged the purchasers to check with the council themselves because they did not know the permit status of the bungalow. They advised them to ask the council about the requirements for extending the bungalow, which the purchasers confirmed they had done. The Committee decided to take no further action against the licensees on this issue.

[68] Following the Committee's decision on liability, the purchasers sent an email to the Authority. They stated, amongst other things, that in 2010 it was not permitted to have two dwellings on the property. The notice sent by the council to the vendor requiring double rates was to account for half of the barn being used as an office. The current resource consent allowed one house and one minor one. The second house had to be reduced to a minor one. The purchasers sought reimbursement of their costs for the new septic waste system, including obtaining resource consent and building consent (of about $40,000).

[69] On 22 October 2021, the Committee issued its decision on penalty orders. It was satisfied that the licensees had taken appropriate steps to ensure that parties were provided with information which highlighted potential issues with the consent of the bungalow. In contrast, however, the Committee had concluded that the licensees had failed to disclose that there might be potential problems in the advertisement used to promote the property. It ordered that the licensees apologise to the purchasers in writing. It did not believe that the conduct warranted censuring the licensees. The breach was at the "very lower end" of the scale of unsatisfactory conduct, not at the higher end which justified censure.

[70] As for the claim for compensation, the Committee could not make compensation orders under the Act. Nor could the Committee refer the matter of compensation to the Tribunal, as the conduct here occurred before the Committee was given the power of referral. Nor could the Committee order rectification or relief from the consequences of the licensees' error, as the expenses were not incurred as a result of the licensees' omission in the advertising. The purchasers made an informed decision to purchase the property (after the licensees passed on the findings regarding the legality of the two

dwellings) and they were aware of the likely costs of obtaining consents and installing a septic system.

APPEAL

[71] On about 19 November 2021, the licensees appealed to the Tribunal against the liability decision.

Bundle of documents

[72] The Tribunal received from the Authority a paginated bundle of the documents provided to the Committee.

Submissions of the licensees

[73] In her submissions (19 November 2021), Ms Burkhart on behalf of the licensees, contends that it was wrong for the Committee to find that the licensees were not able to advertise the buildings as dwellings, given that the council had confirmed there was no legal impediment to both buildings being used as dwellings. Rates were being charged in respect of both of them. The council had advised the zoning allowed for two dwellings without the need for resource consent.

[74] The licensees were not required to qualify the advertisement because it was an accurate description of the state of the property at the time of sale. Qualification only became a requirement as a result of the purchasers' plan to extend the bungalow. The purchasers had been told by the licensees that the extension plans would likely trigger the need for resource consent.

[75] It is contended that a failure to disclose a potential problem is not the same as a failure to disclose material information about a property. The result of this decision will be that licensees must qualify advertisements to account for the legalities of all possible intended uses of properties by prospective buyers. The Committee's decision imposes onerous and impractical obligations on licensees.

[76] Ms Burkhart further contends that, even if the advertisement was misleading, which is denied, the effect of any misleading omission was corrected by the subsequent provision of information and was of no effect.

[77] In her further submissions (15 February 2022), Ms Burkhart notes that on 21 October 2017, the licensees each spoke with a town planner who told them that the zoning permitted two dwellings on the property without the need for resource consent.

At the time the main dwelling was placed on the property, the zoning allowed for two full-sized dwellings. However, the rules changed in 2016, such that a resource consent would be required if changes were to be made to the existing houses. The changes would need to comply with the new rules. However, the property was compliant with two existing houses.

[78] The licensees both told TE that his plans would be subject to the council's approval and he should make enquiries directly with the council. If the purchasers wished to extend the bungalow to include more rooms, they would also require the council's approval to upgrade the septic tank. It was appropriate for the licensees to advise the purchasers to take further advice in respect of their renovation plans, as these were matters outside their knowledge or expertise.

[79] The purchasers had the opportunity to obtain legal advice prior to entering into the sale and purchase agreement, including as to the zoning and the legality of the dwellings.

[80] It is noted by Ms Burkhart that the licensees went to some length to investigate the legality of the two dwellings. They pointed out the lack of consent for the bungalow to all potential buyers, who were not misled about any aspect of the property.

[81] The Tribunal has previously considered that misleading conduct could be cured by subsequent statements, but this is a question of fact depending on the circumstances.[6] Even if the advertisement was misleading, which is denied, the effect of any misleading omission (such as any failure to include a qualifying statement) was corrected by the subsequent provision of information and had no effect.

[82] The Committee's finding of unsatisfactory conduct is not supported by previous decisions of the Tribunal. The finding and penalty orders should be set aside.

[83] There are additional submissions (23 March 2022) from the licensees, in reply to those of the Authority. It is submitted that the key issues are:

1. Whether, by not referring to the lack of consent for the bungalow, the reference to the property having "two quality homes" was an omission.

2. If there was an omission, whether this was misleading and therefore a breach of r 6.4.

[6] *Feng v Real Estate Agents Authority (CAC 521)* [2021] NZREADT 15.

[84] Ms Burkhart observes that the Committee had noted the property was advertised as having two quality houses, but found that there was no disclaimer as to potential consent issues. However, the Committee did not explain why a qualifying statement or disclaimer in respect of consent was necessary. The buildings were legally able to be used as dwellings at the time of sale, so were able to be advertised as dwellings. The description of the property as having two quality houses was not inaccurate or misleading.

[85] It is submitted that where materials contain a misrepresentation, a breach of r 6.4 does not automatically follow where the misrepresentation is:

1. Technical and trivial (so it is not truly misleading in any meaningful sense).

2. Subsequently corrected by the licensees so that a client is not misled.

[86] In this case, if the lack of a qualifying statement amounted to an omission, which is denied, the effect was trivial and not meaningfully misleading and any potentially misleading effect was corrected by the licensees' actions. The licensees provided full information to the purchasers about the consent issues and recommended they seek further advice from the council.

[87] Ms Burkhart further submits that an omission of qualifying information will not amount to a misrepresentation in breach of r 6.4 where the information is outside the scope of expertise of the licensee.[7] In the case at hand, an omission in respect of consents would not amount to a breach because the purchasers' renovation plans were outside the scope of expertise of the licensees.

[88] Furthermore, the Tribunal's decisions establish that a licensee's corrective action can cure an earlier misrepresentation, so there is no breach of r 6.4.[8]

[89] According to Ms Burkhart, the Authority's submission (that corrective action is only relevant as a mitigating factor in respect of penalty orders) would impose standards of absolute technical accuracy on materials regardless of whether there is a risk to clients of being misled. It would constrain the licensees' ability to use descriptive and colourful language in materials, or to omit details that are not possible to include in an advertisement. Such a pedantic approach would result in findings of a breach even where licensees' conduct could not be faulted and clients are not misled.

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[7] *Wu v Real Estate Agents Authority (CAC 2005)* [2013] NZREADT 79.
[8] *Feng*, above n 6; *QH v Real Estate Agents Authority (CAC 2103)* [2021] NZREADT 52.

[90] It cannot be correct that the licensees' action in this case (of providing full information about the consent issue, including a recommendation to take further advice), would be irrelevant to the inquiry of whether r 6.4 was breached.

[91] In conclusion, there is no basis for an unsatisfactory conduct finding because there was no breach of r 6.4:

1. The advertising of two quality homes was factually accurate.

2. There was no positive statement or omission which amounted to a misrepresentation.

3. The failure to reference potential problems with consent was not misleading by omission.

4. Any omission which amounted to a misrepresentation and was misleading, was cured by the provision of full information and the recommendation to take advice from the council.

Submissions of the Authority

[92] Ms Mok, on behalf of the Authority, provided submissions on 9 March 2022. Counsel examines in some detail the Tribunal's jurisprudence concerning r 6.4 of the Rules. It is noted that the High Court decision in *Vosper* found that there was no requirement for the client to have in fact been misled by a licensee or to have relied on misrepresentation for there to have been a breach of r 6.4.[9] The focus is the licensee's actions and whether he or she made a misleading statement or misrepresentation. In the recent decision of *QH*, however, the Tribunal's primary focus was on whether the client was still misled by the advertisement at the time of purchase, rather than on whether the advertisement itself was in fact misleading and therefore contrary to r 6.4.[10]

[93] Where a misrepresentation has had a transitory impact on the complainant, that may be a factor relevant to whether the breach of r 6.4 is sufficiently serious to warrant a disciplinary response (in making a finding of unsatisfactory conduct). It is not relevant to whether there had been a breach of r 6.4 at all.

[94] It is submitted that the correct approach is whether the content of the advertisement includes positive misrepresentations about features of the property, or is misleading because of its failure to include relevant information.

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[9] *Vosper v Real Estate Agents Authority* [2017] NZHC 453 at [63].
[10] *QH*, above n 8 at [134].

[95] If the advertising contains a misrepresentation in breach of r 6.4, it is submitted that the focus should then turn to considering the nature and gravity of the misrepresentation and whether it is sufficiently serious to warrant a disciplinary finding (a finding of unsatisfactory conduct). If the transgression is not sufficiently serious to attract a disciplinary response, then no further action may be taken. If a misleading advertisement (in breach of r 6.4) warrants a finding of unsatisfactory conduct, any steps taken to correct the misleading information later may be a mitigating factor relevant to the issue of penalty.

[96] In respect of the case at hand, given the Committee's reference to the licensees' failure to include a qualifying statement or disclaimer about the lack of consent, it appears that the Committee determined that the advertisement was misleading by omission.

[97] It is submitted that the key issue for the Tribunal to determine is whether, by not including reference to the lack of consent for the bungalow in the advertisement, the reference to the property having two quality homes was misleading.

[98] Counsel notes that the advertisement did not involve a misrepresentation about a feature of the property. The Tribunal may consider that the advertisement does not on its own create a misleading impression, either expressly or by omission.

[99] In a response (29 March 2022) to the licensees' reply submissions, Ms Mok points out that Ms Burkhart has misread the Authority's submission. It is accepted by the Authority that corrective action is relevant to whether the circumstances warrant a finding of unsatisfactory conduct, not just to mitigation of the penalty. The Committee could therefore decide to take no further action, even where there was a breach of the rule.[11]

Submissions of the purchasers

[100] The purchasers advised the Tribunal on 24 November 2021 that they would not make submissions, as the appeal was largely based on the application of the law.

JURISDICTION AND PRINCIPLES

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

[11] *Vosper*, above n 9 at [71]–[77].

[102] The appeal is by way of a rehearing.[12] It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.[13] After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.[14] If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.[15]

[103] A hearing may be in person or on the papers.[16] A hearing in person may be conducted by telephone or audiovisual link.

[104] This appeal is against the determination of the Committee under s 89(2)(b) that unsatisfactory conduct by each of the licensees was proven. 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.[17] 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.[18]

DISCUSSION

[105] The Committee found the licensees to have breached r 6.4 of the Rules:

> **6** Standards of professional conduct
>
> ...
>
> 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.

[106] The Committee concluded that the licensees "failed to disclose that there may be potential problems in the advertisement".[19] It was noted that the licensees believed they could advertise what was physically on the property, as long as they "advertised" (presumably notified) the prospective buyers as to "any consent issues". The notification had occurred by handing over the LIM report which did not mention the bungalow. The licensees had advertised the property as having "'2 quality houses' … with no disclaimer as to potential consent issues". This was found to be in breach of r 6.4.

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[12] Real Estate Agents Act 2008, s 111(3).
[13] *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] & [83].
[14] At s 111(4).
[15] At s 111(5).
[16] At ss 107, 107A.
[17] *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].
[18] *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22] and the higher court authorities cited therein at fn 9.
[19] Complaint C35916 (31 March 2021) at [3.2](g).

[107] This is not a case about a positive misrepresentation in the advertisement. It is apparent that the Committee considered the licensees to have withheld information. The information withheld in the advertisement was the lack of consent for the bungalow.

[108] It is noted the Committee accepted that the licensees had notified all prospective buyers, including the purchasers, of the lack of consent for the bungalow. There is no doubt that the purchasers knew about the lack of consent prior to purchase. They accept that.

[109] So, should the licensees have done more than notify the purchasers of the lack of consent, and also stated in the advertisement that there was a lack of consent?

[110] The evidence of the licensees is that the bungalow did not need resource consent in its then state at the time of sale. It was erected in about the 1940's, well before resource consent was required. It is their evidence that at the time the brick house was relocated in 2010, resource consent for its placement there was not required. The zoning allowed for two dwellings. The bungalow was not mentioned in the LIM report because the early council records had been lost in a fire. The licensees say this is what one or more council town planners told them.

[111] According to the licensees, the council knew about the two dwellings and rated the property accordingly. It was not until the purchasers sought to extend the bungalow after purchase that the council insisted on compliance with the new rules (which presumably had also been current at the time of sale). One of the dwellings therefore had to become minor.

[112] Furthermore, say the licensees, they did not tell the purchasers at any time that the bungalow had resource consent.

[113] The licensees' version of the events given to the Committee, and apparently accepted by the Committee, is not contested by any party on appeal.

[114] We find that counsel for the licensees is correct in contending that the advertisement was accurate. It depicted precisely what was then on the property, namely two quality houses. The licensees knew at the time of advertising that the bungalow did not have resource consent, but that was not material to the then state of the property. It had two homes which were habitable and were occupied. The evidence before the Committee was that their occupation as residential dwellings was lawful and was known to the council. Whether they met the advertising superlative "quality" was for each prospective buyer to subjectively assess.

[115] The photographs of the bungalow in the valuation report do not show a rundown building. It could not be said that a buyer was required to renovate and extend the bungalow to make it habitable or a quality house. It would not have been obvious to the licensees that all buyers would want to renovate and extend it. If that had been the case, the consent issue would have been 'existing' rather than merely 'potential', since the licensees knew that any extension would trigger compliance with the current rules. That might well have made the advertisement misleading.

[116] As we find that the advertisement accurately described the then state of the property, it could not of itself be described as misleading. The omission to refer to the lack of consent in the advertisement is immaterial. The Committee did not find any other conduct of the licensees to be misleading and nor do we. There was therefore no breach of r 6.4.

[117] The purchasers informed the Committee, after it had issued its liability decision, that two dwellings were not permitted in 2010 (when the brick house was relocated) and the council charged double rates because a barn was used as an office. Apart from the purchasers' assertion, no corroborative evidence was provided to the Committee and the purchasers have not sought leave to produce any such evidence to the Tribunal. Indeed, they have made no submissions on appeal.

[118] The purchasers' contention is contrary to the licensees' evidence to the Committee that the council had told them that two dwellings were permitted in 2010 without resource consent and that the council was aware of the existence of two dwellings. The licensees' evidence is corroborated by the contemporaneous notes of their discussions with the council in the Property Inspection Report. It is also corroborated by the council's notice of valuation (20 November 2017) and rates information (2017/2018) recording the existence of two dwellings.

[119] It is not strictly necessary to consider Ms Mok's comprehensive analysis and thoughtful submissions on the application of r 6.4, in the event that there is misleading conduct. We accept though that evidence of the customer being misled in fact is not required.[20] The question is whether the positive statement or omission is *capable* of misleading a customer. If so, there is a breach of r 6.4. That does not, however, mean that the breach warrants a finding of unsatisfactory conduct. As discussed in *Vosper*, the inconsequential nature of the breach might mean there is no need to mark the breach in that way.[21]

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[20] *Vosper*, above n 9.
[21] At [72]–[74].

[120] Finally, we respectfully note a salutary lesson for all licensees. The licensees could usefully have written to the purchasers recording the information they obtained from the council prior to the sale and purchase agreement as to the lack of resource consent for the bungalow and the relevance of that for any planned extensions or alterations. Not only might that have assisted the purchasers, but it would have corroborated the licensees' version of the events in the event of a dispute as to what the licensees' said, as has occurred here.

Conclusion

[121] We conclude that the Committee's finding of unsatisfactory conduct against each licensee must be vacated. It follows that the penalty orders must be set aside.

OUTCOME

[122] The appeal is allowed. The Committee's decision is reversed.

[123] 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

[124] The Committee directed publication of its decision, stating the names of the licensees and the agency.

[125] In light of the outcome of this appeal and having regard to the interests of the parties and of the public, it is appropriate to order publication without identifying the purchasers, the property, the licensees or the agency.

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D J Plunkett
Chair

_____

N O'Connor
Member

_____

F Mathieson
Member