

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2022] NZREADT 2

Reference No: READT 009/2021

IN THE MATTER OF

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

BETWEEN

BX
Appellant

AND

**THE REAL ESTATE AGENTS AUTHORITY
(CAC 1907)**
First Respondent

AND

PAUL TAPPER
Second Respondent

Hearing on the papers

Tribunal:

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

Representation:

The appellant: Self-represented
Counsel for the first respondent: C Walker
Counsel for the second respondent: A Darroch

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 28 February 2022

INTRODUCTION

[1] BX (the appellant) was the purchaser of a [property] (the property). Paul Tapper was a licensed salesperson who listed the property on behalf of the vendors. The appellant discovered that various improvements lacked council consent and that the vendors' son committed suicide at the property, all of which she says were undisclosed or at least not adequately disclosed.

[2] The appellant made a complaint to the Real Estate Agents Authority (the Authority). A Complaints Assessment Committee (CAC 1907) (the Committee) found breaches of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) and therefore unsatisfactory conduct on the part of Mr Tapper. It made various penalty orders against him.

[3] The appellant appeals to the Tribunal contending that the Committee should have made further findings against Mr Tapper and imposed additional penalties.

BACKGROUND

[4] On 1 October 2016, the vendors entered into an agency agreement with PGG Wrightson Real Estate Ltd (the agency) to sell the property, with Mr Tapper identified as the salesperson. The agreement noted that there were three dwellings on the property, being a main dwelling, a second dwelling and a loft. The "2nd Dwelling" contained a bedroom and had resource consent as (*verbatim*) "commercial. able to be used for multiple options". The loft was described as being self-contained and comprising two bedrooms, a kitchen, a toilet and a bathroom which was rented out. It stated that the loft was not permitted. Multiple tenants were noted.

[5] The vendors renewed the agency agreement on 9 January 2017. The property was withdrawn from the market on 30 June 2017.

[6] The appellant viewed the property with Mr Tapper on 31 October 2017.

[7] A market appraisal report was prepared on 13 November 2017 by Mr Tapper for the vendors. The Tribunal has not been informed of whether it was provided to the appellant. The appraisal stated that the property included two houses with the second able to be used for commercial purposes, for example as a restaurant. The main house was rented out at \$500 per week. The main building included a self-contained loft which was also rented out. The property was producing rental income which exceeded \$1,300 per week.

[8] On 14 November 2017, the agency agreement was again renewed. It recorded that there were three dwellings, with the second dwelling being a cottage with resource consent for commercial use which in the past had been a café. It was also noted that the loft was not permitted. Multiple tenants were identified, with the loft rented at \$400 weekly and the balance of the property at \$1,200 monthly.

[9] On 20 November 2017, the appellant signed an agreement for sale and purchase of the property. A deposit of 10 per cent was payable with the balance to be paid on 18 January 2018. It was conditional on approval of the title and the land information memorandum (LIM) by the appellant's solicitor, as well as due diligence and finance. It contained the standard clause whereby the parties acknowledged that, before signing the agreement, it had been recommended they sought legal, technical and other advice.

[10] The council's LIM report (24 November 2017) was obtained by the appellant's solicitor. It recorded the existence of consent to erect a dwelling and consent to establish and operate a café and B&B. There were consents to erect various farm buildings.

[11] On 8 December 2017, the sale agreement was confirmed as unconditional by the appellant and the deposit was paid. The vendors requested early release of the deposit on 11 December 2017. While raised with the appellant, it did not in the end occur.

[12] On about 4 January 2018, the vendors' son committed suicide at the property.

[13] Settlement of the property duly occurred on 18 January 2018.

[14] The appellant subsequently approached the local council to regularise an unconsented septic tank. This led to a discussion about other unconsented work.

[15] On 6 November 2018, the council issued a notice to fix to the appellant. It recorded that there was no record of building consent for the horse stables or for the alterations creating the upstairs and downstairs accommodation areas within the consented hay barn. Only one secondary dwelling was allowable, being the café building. The appellant was required to cease using the barn for accommodation, to remove the unconsented work and to apply for a certificate of acceptance to retain the mezzanine floor area (including the barn's septic tank).

Complaint made to agency

[16] The appellant made a complaint against Mr Tapper to the agency on 22 August 2019, alleging:

1. Mr Tapper told her the barn was consented, which she took to mean all the improvements inside, but she was told by the council after purchasing the property that the improvements inside the barn were not consented. He did tell her that the septic tank was not compliant. It will cost her thousands of dollars to make it compliant.
2. Prior to purchase, the vendors' son committed suicide at the property. Mr Tapper told her "something big" had happened, but when she asked for details, he suggested it was private. He refused to tell her about the suicide. She recently tried to sell the property, but local buyers knew of the suicide and offered over \$100,000 less than its true value. There is stigma now associated with the property.
3. She had major issues obtaining insurance because the vendors' insurance policy number provided by Mr Tapper was incorrect. She had to obtain a lot of information from him. He called and abused her over the phone. She had the speaker phone on and a previous landlord witnessed the conversation. Mr Tapper told her she should not need any additional insurance details and he would cost her the sale if she asked for more information.
4. When she initially inspected the property, the grease trap was covered. It was full. This adverse property feature should have been disclosed.
5. Mr Tapper put immense pressure on her to go unconditional and pay the deposit early, to prevent him from losing the sale. Once it was paid, he demanded she authorise its release before the statutory 10 working days period had expired.

[17] In conclusion, the appellant said in her complaint that she could not now sell the property due to the suicide and the unconsented improvements. The vendors had played a large part in her terrible situation, but Mr Tapper had heavily influenced the decision to purchase by his material non-disclosures and professional misconduct. She estimated it would cost \$25,000 to make the unconsented work compliant. She sought compensation of that amount from the agency

[18] On 13 September 2019, the agency's manager wrote to the appellant responding to the allegations:

1. Mr Tapper informed her that the barn only was consented. He told her that the improvements and the septic tank were not compliant.

2. The sale agreement was conditional on her solicitor's approval of the title and all matters disclosed in the LIM report. She acknowledged in the agreement that it had been recommended that she obtain legal and other advice.
3. The suicide occurred after the agreement was unconditional, but prior to possession. She had no right of exit for such a sensitive, unfortunate event. Mr Tapper had been asked by the vendors to keep the matter private. He did not have authority to advise her.
4. The agent was never informed by the vendors of the grease trap and had no reason to suspect its existence.
5. Mr Tapper strenuously denied the abusive phone call. The vendors had called her regarding insurance and paying the deposit.
6. Mr Tapper denied putting pressure on her to go unconditional or pay the deposit early. She was under no obligation to agree.

THE COMPLAINT

The appellant's evidence to the Authority

[19] On about 25 November 2019, the appellant made a complaint to the Authority alleging:

1. The property was advertised as having a loft housing a kitchen, bathroom, toilet and bedroom, none of which were consented. She was not advised of this.
2. She had been advised verbally that a septic tank had been installed but not signed off. It was made to sound like it was a simple job to get it signed off but when she contacted the council, she was informed there was no record of the tank and a new system would have to be installed if she was to use the toilet in the barn. She was then informed that the other improvements in the barn were not consented and had to be removed.
3. Mr Tapper did not inform her of the suicide of the vendors' son on [redacted]. On becoming aware after taking possession, she was told that the contract had become unconditional, so she had no right to exit the agreement. She had tried to sell the property twice since finding out this unsettling information only to find that disclosure of the suicide meant there

was little to no interest in the property. Buyers were offering \$250,000–\$350,000 less than it was worth.

4. Mr Tapper told her in a phone call to stop requesting more information regarding the property, as it was going to cost him the sale.
5. She was advised against getting a building report. The pages in the agreement with the clauses relating to this do not have her initials and she did not see them.
6. It was not correct, as the agency claimed, that she was aware of the unconsented work on the barn as a result of not being able to obtain insurance. She had trouble obtaining insurance because she had been given the wrong insurance policy information by Mr Tapper and the vendors.

[20] The appellant provided a statement (18 August 2019) from a friend, EI. The appellant, who was living in his house at the time, told him she was having a problem transferring the insurance as the policy number given by the vendors did not relate to the property. That night the phone rang and a very angry agent abused the appellant and told her she was going to cost him the sale of the property. She was shaking and in tears and told him it was Mr Tapper. He also rang demanding that she release the deposit early, which did not sound right.

[21] The appellant produced an affidavit from EI (15 July 2020). A very angry Mr Tapper rang, abusing the appellant while stating that she could cost him the sale of the property. He witnessed another of Mr Tapper's calls when he informed her that something big had happened on the property, but he refused to elucidate. They discovered the incident several days later and were shocked. The appellant was also subjected to another ultimatum by Mr Tapper over the phone, as he demanded she release the deposit.

[22] Further information was provided by the appellant to the Authority on about 16 July 2020.¹ She said the original sale brochure (unseen by the Tribunal) did not state that the second dwelling and loft were unconsented. She was not notified that the loft alterations were unconsented until she contacted the council for a certificate of acceptance for the barn's septic tank. The appellant said she had been told by Mr Tapper that she could obtain acceptance for the septic tank by paying the council's

¹ Bundle of documents at 303–306.

fee, but the council advised her that the septic tank would need remedial work to bring it up to code. She was not financially able to do so.

[23] As for the suicide, the appellant told the Authority that she would never have purchased the property had the grim and unsavoury truth been disclosed. Mr Tapper had been instructed not to disclose it. The son was known to her and was going to be a tenant. Both the vendors and Mr Tapper acted deceitfully for their own benefit and denied her the ability to withdraw from the purchase. Mr Tapper was aware that her niece had committed suicide which had a devastating effect on her, so it was unethical and deplorable that he involved her in this grave and distressing situation.

[24] According to the appellant, there were issues with the insurance because Mr Tapper was trying to get her name transferred directly over to the policy. She was not trying to insure it as a third dwelling. The policy and EQC numbers Mr Tapper supplied were incorrect.

[25] In her further information to the Authority of 16 July 2020, the appellant said that when Mr Tapper called into the property after settlement, she brought to his attention the grease trap which he had missed. She had asked the vendors to cover half the cost of emptying it. She had it emptied at her own expense.

[26] The appellant said that Mr Tapper had requested that she bring the deposit forward by two weeks, so the vendors could secure the property they had purchased. This left her little time to carry out checks.

[27] The appellant concluded her comments to the Authority by stating that, due to the bulldozing attitude of the vendors and Mr Tapper, she was misguided into believing that the consents were in place.

[28] On 12 August 2020, the Authority's investigator received an undated letter from the appellant.² She stated that many unconditional sales did not settle for various reasons and it would have been for her legal team to address that with the vendors, but she was never given the opportunity due to the planned non-disclosure of the suicide.

[29] The appellant noted that the agency manager could not provide evidence of a discussion with the Authority regarding non-disclosure of the suicide.

[30] The appellant sent another undated letter to the Authority (replying to an email dated 20 October 2020).³ One of the vendors, an undischarged bankrupt, had conspired

² Bundle of documents at 356.

³ Bundle of documents at 358.

with Mr Tapper to conceal facts affecting her purchase of the property. She had trusted and relied on the professional integrity of Mr Tapper, in order to come to an informed and huge decision regarding a property offering rental income exceeding \$1,300 per week. There was an “illegality of the quoted income streams” for the unconsented buildings and rooms.

[31] According to the appellant, there had been a convenient absence of acknowledgement from the Authority regarding the suicide. While Mr Tapper said she could not have withdrawn from the settlement, this was incorrect. Withdrawals had happened before when purchasers made a discovery, prior to settlement, that they had been misinformed or duped. The information only became apparent to her after settlement, as had been planned. Mr Tapper said the vendors would not have allowed withdrawal, but that would have been between her solicitor and the vendors. That opportunity had been made impossible by the conspiracy between the vendors and Mr Tapper.

[32] In her submission (14 April 2021) to the Committee on possible penalty orders after its liability decision, the appellant stated that the Committee had disregarded the seriousness of non-disclosure of the suicide on her mental health. She had an ability to withdraw from the purchase due to the failure to disclose a significant issue. While the agency had said the Authority informed the manager that there was no obligation to disclose, this could not be authenticated by the Authority’s investigator. Furthermore, the Committee had disregarded the affidavit of her friend. There were at least two bullying exchanges from Mr Tapper by phone. It was submitted by the appellant that the penalty needed to be \$100,000 and the commission had to be refunded.

[33] In a further submission (12 May 2021), the appellant noted again that the Authority’s investigator confirmed there was no evidence of any communication with the manager concerning disclosure of the suicide. It was a sensitive issue, as Mr Tapper was aware she had moved due to the stress of her niece’s suicide and the murder of a close family member.

Mr Tapper’s evidence to the Authority

[34] Mr Tapper wrote to the Authority on 11 March 2020, stating that:

1. He informed the appellant that the barn only was consented and that the other improvements, including the loft, accommodation and septic tank, were not compliant. There were conditions in the sale agreement relating to due diligence and her solicitor’s approval of title and a LIM report.

2. It was denied that the appellant had been informed that it would be a simple process to obtain consent for the septic tank. The real estate industry was aware that obtaining retrospective consent for unconsented works was often drawn out, expensive and complex.
3. He sought advice from the Authority on the appropriate action regarding the suicide before advising the appellant that “something big” had occurred, in accordance with that advice. He had express instructions from the vendors not to disclose the matter to her. As the sale agreement was unconditional, even if he had been able to disclose the matter, she would not have been able to exit the agreement without the vendors’ consent.
4. It was not true that he was worried she would discover the improvements to the barn were not consented, if she spoke to the insurer. He had already disclosed this to her. It was unlikely that the appellant had trouble obtaining insurance because the vendors provided the incorrect policy information. The barn was insured only as a barn and both he and the vendors had advised the appellant of this. Despite his disclosure to her of the unconsented nature of the improvements and the probable difficulty in obtaining insurance, the appellant decided to proceed with the purchase.
5. The allegation of verbal abuse was strenuously denied. He understood that the appellant may have had unpleasant interactions with the vendors after having difficulty obtaining her desired insurance and may be incorrectly remembering them as interactions with him.
6. As for the alleged pressure to release the deposit early, the appellant stated that he had done so to ensure that she would not discover the unconsented improvements to the barn. However, he had disclosed the unconsented nature of the improvements to her. She was under no obligation to agree to release the deposit.
7. As for the unconsented cottage, he was not aware of any missing consent. It had previously been run as a café, with the requisite council licence.
8. The existence of certain terms of the sale agreement on a separate page was normal and had no bearing on their enforceability. There was no requirement to initial those pages.

9. The appellant was not advised not to obtain a building report. He advised her of the lack of consents for the various unconsented alterations and a building inspection was not of any concern to him. The appellant had actually initialled the page of the agreement containing the “conditions box” where the purchaser could elect to obtain such a report.

[35] Mr Tapper sent a further letter of explanation to the Authority on 19 May 2020. He said that he always dealt in good faith and honestly with the appellant, based on the information provided to him by the vendors. In answer to the questions put to him by the Authority, Mr Tapper repeated the information given in his letter of 11 March 2020. He additionally stated:

1. The appellant was taken to the property in the absence of a current agency agreement. The vendors were adamant they would not enter into an agreement unless the appellant was interested in buying. The breach of the Rules was acknowledged.
2. As for the suicide, in accordance with the advice that the sales manager obtained from the Authority, he advised the appellant that something significant had occurred and that she would have to make her own enquiries.
3. The appellant initialled various pages of the sale agreement relating to obtaining a building report and other conditions. It was common to initial the page and not the clauses themselves, unless there had been a change in a clause requiring ratification by both parties. The appellant had the full benefit of these clauses, despite the absence of her initials.
4. Insurance was a matter dealt with between the appellant and her insurer and he had no involvement in it. The barn was insured only as a barn and he understood the appellant attempted to insure it as a dwelling but was unable to do so since the improvements were unconsented.
5. As for the missing consent for the cottage, of which he was unaware, he noted that he did not have a LIM report.

[36] Mr Tapper sent an additional letter of explanation to the Authority on 29 July 2020. He repeated the comments made in his earlier correspondence. The agency had no written record of the conversation between the named sales manager and the Authority concerning the suicide.

[37] On 7 September 2020, Mr Tapper sent further comments to the Authority. At the time of the agency agreement, the property was rented to multiple tenants who were spread across the main home, the cottage, the stables (including the loft), the horse paddocks and facilities. The cottage was a second house with residential facilities and held resource consent. When the property was being marketed, the vendors were living in the cottage. The vendors' son was renting some space in the stables. At the time of the second agency agreement, there was no advertising material in circulation for the property.

[38] Mr Tapper provided to the Authority an email (11 October 2020) from one of the vendors. The vendor said that before the sale, he walked around the property with the appellant and explained to her that the loft was not compliant with the council.

[39] Mr Tapper provided further comments to the Authority on 9 November 2020, repeating information he had given earlier.

[40] On 5 May 2021, following the Committee's decision on liability, Mr Tapper wrote to the appellant unreservedly apologising for any distress caused by breaching the Rules.

[41] There were submissions (5 May 2021) from Mr Tapper to the Committee on the appropriate penalty orders. In mitigation, Mr Tapper observed that the finding against him was the first in his career of 19 years.

[42] Mr Tapper stated that the appellant had made all manner of baseless character accusations against him. The stress of attending to them had taken a heavy toll and he had brought forward his retirement, not having worked since February 2021. It was submitted by Mr Tapper that:

1. The breach concerning the rental of the loft was unintentional and at the lower end of the scale.
2. The breach concerning the cottage was also at the lower end of the scale. It was not obvious that the commercial property was inappropriate for residential use. The cottage was initially constructed for residential use and had a prior history of residential use. Furthermore, the lack of consent could be relatively simple to remediate.
3. He advised the vendors to obtain legal advice and as part of the ordinary process, lawyers directed attention to the standard warranties.

4. A fine would be inappropriate given that the long legal process had served as a proxy for punishment. If a fine was appropriate, it should be no more than \$2,000.

Decision of the Complaints Assessment Committee (CAC 1907) on liability

[43] On 26 March 2021, the Committee issued its decision. It found Mr Tapper had breached the Rules and that this amounted to unsatisfactory conduct.

Consents

[44] The appellant said she did not know the loft in the barn was unconsented. Mr Tapper had told her the barn was consented, which she took to mean all the improvements. It was Mr Tapper's evidence that he told the appellant. Furthermore, after signing the sale agreement, the appellant contacted him to assist with insurance. The insurer would only insure the barn as a barn, not as a residential dwelling.

[45] The Committee noted Mr Tapper's evidence that the vendors had also told him that they had reminded the appellant, in a discussion about insurance, that only the barn had consent. An email (11 October 2020) from one of the vendors confirmed this. The Committee considered the vendor's statement to be of limited weight, as it was not signed. It was also unclear if the explanation took place before the appellant signed the sale agreement.

[46] The appellant said that the original sale brochure did not state that the loft and cottage were unconsented. However, the appellant later said that Mr Tapper introduced the property with no listing brochure or relevant property information. As the property was not listed when first viewed by the appellant, it is likely she did not receive any marketing information.

[47] The Committee considered that the information concerning disclosure of a lack of consent for the loft was evenly balanced and it was not possible to find that Mr Tapper failed to disclose this to the appellant.

[48] In relation to the cottage, the Committee noted that Mr Tapper said that the vendors were living in it. He had been told that it previously operated as a café and had resource consent for that use. He was not aware of any missing consent.

[49] The Committee was satisfied that the cottage had commercial use consent, but not consent to be rented out as a residential dwelling.

[50] It was understood by the Committee that the appellant sought to turn the café into living spaces and intended to move into it herself. It was satisfied that Mr Tapper viewed the cottage as capable of being let as a residential dwelling to unrelated parties, but he failed to ensure that it could be rented out for that purpose.

[51] It seemed to the Committee that the changes required to make the cottage habitable were not major. While the appellant could have discovered the issue with the cottage consent when she obtained the LIM report, the focus of the inquiry was on the standard to which a licensee had performed his or her duties.

[52] It was found that Mr Tapper failed to appreciate that the cottage did not have the appropriate consent to be rented out as a dwelling. As he did not provide the appellant with information about the cottage, he breached r 6.4 of the Rules.

[53] The Committee went on to consider the effect of the lack of consents on the rental income represented for the property. Mr Tapper had passed on to her all information relating to the tenancies.

[54] It was noted by the Committee that Mr Tapper submitted that, by informing the appellant the loft was non-compliant, she received sufficient information to inform her the rental stream was unlawful.

[55] The Committee found that the loft and the cottage were represented by Mr Tapper as legal rental income streams. But they lacked consent. Mr Tapper was therefore required to clearly inform the appellant that there may be issues with the ability to rent the loft and she needed to obtain independent advice. He should also have made it clear that the rental of the cottage relied on information from the vendors which needed to be independently verified. He failed to do so, in breach of r 6.4.

[56] As for the barn's septic tank, the appellant stated that Mr Tapper downplayed what would be involved in rectifying the issues. She was told only of the need to go to the council, pay a fee and a certificate of acceptance would be issued. Mr Tapper denied this. He said he was well aware obtaining retrospective consent was a complex process. The Committee found that there was insufficient evidence to find that Mr Tapper downplayed what was required to rectify issues with the septic tank.

Suicide

[57] The vendors' son committed suicide [redacted]. He was known to the appellant. He had been renting a studio unit attached to the barn and she had agreed with him a rental of \$150 weekly. The appellant said she was told by Mr Tapper that something big

had happened, but that it was private. She said that the death had affected the rental income expected from the property. There was also a terrible stigma which affected her ability to sell the property. She believed an unconditional sale could be cancelled.

[58] The Committee noted that Mr Tapper said that the suicide occurred after the sale became unconditional. The vendors asked him to keep the tragic matter confidential. He sought advice from his manager, who in turn sought advice from the Authority. In accordance with the Authority's advice, he advised the appellant that something big had happened and she needed to find out. As the sale agreement was unconditional, disclosure would not have enabled her to exit the sale.

[59] The Committee was not satisfied that the appellant was able to legitimately cancel the sale agreement. Whether such a sensitive issue required disclosure depended on the facts of the case.⁴ In *Barfoot & Thompson*, the High Court determined that a suicide 12 months prior to the sale was not required to be disclosed.

[60] As the suicide occurred after the contract was confirmed as unconditional, the Committee was not satisfied that Mr Tapper was required to disclose it. No further action would be taken.

Agency authority

[61] The Committee found that Mr Tapper showed the property to the appellant without a current agency agreement, which he acknowledged. The vendors had told him they did not want to sign another agency agreement unless the appellant was genuinely interested.

[62] The Committee regarded an agency agreement as a fundamental requirement and a key safeguard for clients and licensees. Mr Tapper was required by r 9.6 to renew the agreement before introducing the appellant to the property. He breached r 9.6. However, the vendors gave consent. They had entered into an agreement earlier, which had been extended. They were fully informed of the details of the agency. The breach was minor and did not warrant a finding of unsatisfactory conduct.

Verbal abuse and undue pressure

[63] The appellant said she needed to obtain a large amount of information from Mr Tapper for insurance, which resulted in him abusing her over the phone as it was

⁴ *Barfoot & Thompson Ltd v Real Estate Agents Authority* [2014] NZHC 2817.

going to cost him the sale. She believed he acted in this way to stop her digging deeper and discovering she may not be able to insure the property.

[64] As for the affidavit from the appellant's friend, the Committee found some of the contents concerned information from the appellant and little weight could be placed on such content. The friend's direct observations included his presence when the appellant received a phone call from Mr Tapper. The friend stated that Mr Tapper abused the appellant.

[65] The abuse was strenuously denied by Mr Tapper. He considered that the appellant may have incorrectly remembered interactions with one of the vendors. The agency in its letter responding to the appellant's complaint stated that it was the vendor who called the appellant about insurance.

[66] The Committee observed that the accounts of the appellant and Mr Tapper were in direct conflict. The friend may have incorrectly identified the caller. While the Committee was satisfied the appellant was upset by the phone call, the information as to Mr Tapper's conduct was finely balanced. It was not possible to find that it was more likely than not that Mr Tapper was abusive in his dealings with the appellant. No further action would be taken by the Committee.

[67] As for the allegation that Mr Tapper pressured the appellant to release the deposit early, he said that he requested it and told her to speak to her solicitor. In the end, it was not released early as the solicitor did not sign the relevant form. The Committee found that, given the differing accounts, it was not possible to find that Mr Tapper pressured the appellant to release the deposit early.

Grease trap

[68] The appellant claimed the grease trap used by the café was full and an adverse feature of the property which was not disclosed. Mr Tapper said there was no noticeable odour and he was not aware of any issue. The Committee found there was insufficient evidence to find a breach.

Building report and acknowledgement of advice

[69] The appellant stated that Mr Tapper advised her against getting a building report. She said that cl 23 of the sale agreement (where the parties acknowledge that it had been recommended they seek legal, technical and other advice before signing) was not initialled by her, nor was the bottom of the page (unlike other conditions). She said she did not see these pages.

[70] Mr Tapper strongly rejected the claim. She had initialled the page referring to the election to obtain a building report. He noted that the sale agreement was conditional on the approval of the appellant's solicitor, which was confirmed without any changes.

[71] The Committee found that, given the differences between the parties, it was not possible to find that Mr Tapper advised the appellant not to get a building report.

[72] The Committee found it unusual that the page containing cl 23 was not initialled by the appellant, but had been by the vendors. It raised a suggestion that it had been subsequently added, but that was not raised as an issue by the appellant's solicitor. It was therefore not possible to find that it had been inserted later, or had not been agreed by the appellant.

[73] It was decided that no further action would be taken on the building report or the clause concerning seeking advice.

Vendor warranty

[74] It was noted by the Committee that cl 7 of the sale agreement provided for various vendor warranties, including that any work on the property had any consent required by law.

[75] Mr Tapper told the Committee that due to the significance of the warranties, he preferred vendors to discuss them directly with their lawyers. He advised the vendors in this transaction to seek legal advice before signing the sale agreement.

[76] The Committee was satisfied that Mr Tapper did not discuss the warranties with the vendors directly, despite the unconsented work. A lawyer's knowledge of the physical attributes of a property could be limited to matters specifically brought to the lawyer's attention. In circumstances where the warranties were known to be significant, Mr Tapper was required to ensure that the vendors' lawyer had been made aware of the matter before he (Mr Tapper) drew up the sale agreement for signing.

[77] Mr Tapper failed to ensure that the vendors and their lawyer were aware of a potential issue concerning the warranty that all relevant building consents had been obtained for the property, in breach of r 5.1.

Decision of the Complaints Assessment Committee (CAC 1907) on penalties

[78] On 16 September 2021, the Committee issued its decision on orders. It was noted by the Committee that it had found Mr Tapper's conduct to be unsatisfactory in three areas:

1. He failed to appreciate that the cottage did not have the appropriate consent to be rented out as a dwelling, in breach of cl 6.4.
2. He failed to flag for the appellant a potential issue concerning the legitimacy of renting out two areas of the property, in breach of r 6.4.
3. He failed to ensure that the vendors and their lawyer were informed of a potential issue concerning the warranty for building consents, this amounting to a failure to exercise skill, care and diligence, in breach of r 5.1.

[79] The Committee accepted that the breaches were unintentional though it was not satisfied that the breach concerning rental income for the loft was inadvertent. The legitimacy of renting out the loft would have been clear from knowledge that the loft improvements were unconsented. The failure by a licensee to disclose a potential issue concerning the available rental income could have a considerable impact on a purchaser relying on such income to fund their purchase. Such an impact could be reduced by disclosure of the lack of consent. Here it was not established that the appellant was not informed that the loft improvements were unconsented. It was also accepted that the failure to disclose the legitimacy of rental income from the cottage, which was never compliant for residential use, had less impact.

[80] The Committee considered that the degree of departure from reasonably expected standards was at the lower end of mid-level unsatisfactory conduct. There were two mitigating factors personal to Mr Tapper:

1. His unblemished record of over 19 years.
2. His written apology for the conduct found to be unsatisfactory.

[81] The Committee went on to consider the potential penalty orders.

Fine

[82] As the conduct was at the lower-mid range and noting a maximum fine of \$10,000, a starting point of \$4,000 was considered appropriate. Having regard to the mitigating factors, the fine was set at \$3,500.

Censure

[83] A censure was appropriate to reflect the importance of ensuring that relevant information was checked and to ensure the maintenance of professional standards.

Refund

[84] The appellant had sought a refund of the commission paid by the vendors to Mr Tapper but, as the appellant had not been charged fees, such an order would be inappropriate.

Rectification and relief

[85] The Committee found that rectification of Mr Tapper's error would not be practical as the error had already occurred and the property had been purchased. The potential consequence of Mr Tapper's error was that the appellant was deprived of the opportunity to refuse to buy or to negotiate to purchase at a lower price. It was unclear the degree to which the appellant relied on information about income from the loft and the cottage in making her decision to purchase.

[86] It could not be concluded that the costs sought by the appellant (\$25,000 in compliance costs) provided relief from Mr Tapper's disclosure around the income earning potential of the property. What the appellant appeared to be seeking was more correctly described as compensation for what she expected to gain from the purchase. The appellant also sought \$100,000 in "penalties", but it was unclear if she was seeking compensation. As to this claim, the Committee had no power to make an order for compensation.⁵ Nor could it send the issue of compensation to the Tribunal, as the relevant statutory provision did not come into force until 29 October 2019.

APPEAL

Submissions of the appellant

[87] In her notice of appeal (13 April 2021), the appellant states that the extent of damages personally to her health and finances has not been covered in the penalties as the facts have either been dismissed or trivialised.

[88] The appellant's friend witnessed a heated and bullying telephone call from Mr Tapper regarding insurance and current rentals. As the conversation became

⁵ *Edwards v Bridge* [2019] NZHC 2286.

aggressive, she switched to speaker phone and he could not mistake who was calling and the tone and content of the conversation.

[89] There was a lack of documented evidence regarding the individual accommodation, which was required to finance the mortgage. This was another lack of disclosure for the benefit of Mr Tapper and the vendors.

[90] The appellant urges the Tribunal to understand the enormous effect that conspiring to withhold the suicide had on her mental health and ability to function normally at the property. The non-disclosure was for the benefit of the vendors and Mr Tapper and is condoned by the Authority and the Committee. When she questioned the Authority's investigator, he could find no record of a conversation with the agency's manager regarding the suicide. This lack of honest transparency was a massive denial by the Committee of a critical material fact. The son, whom she had met several times and discussed continuing to rent the property, [redacted]. She had explained that her relocation from the North Island was due to the murder of a close family member and the suicide of a niece, which had shattered her life.

[91] According to the appellant, from the start of inspection of the property to settlement, she had been subjected to unprofessional collusion by the vendors and Mr Tapper. There was a total lack of disclosure of critical and necessary material facts. One of the vendors was a disclosed bankrupt and seriously needed to sell the property. The nightmare had left her in dire financial and mental stress.

[92] The appellant contends that the suicide is a material fact and if she had been made aware of it, she would not have settled and would have instructed her solicitor to overturn the confirmation and recover the deposit.

[93] The Tribunal should recognise how serious this had been to her as an unsuspecting member of the public relying on transparency and Mr Tapper's professional duties. She had already tried unsuccessfully to sell it and had no funds to remediate and repair, including the unconsented septic tanks and buildings, to enable a future sale. The appraisal of the property on an 'as is where is' basis, including disclosing the suicide, would be several hundred thousand dollars below her purchase price and associated costs.

[94] A penalty of \$100,000 needs to be applied, together with a refund of the total commission payable.

[95] The appellant sent to the Tribunal attachments listing other items of complaint:

1. Mr Tapper had no listing authority when he took her to view the property.
2. She was never notified that the loft alterations to the barn were unconsented until she contacted the council for a certificate of acceptance for the barn's septic tank.
3. Mr Tapper told her that to obtain acceptance for the septic tank, all she needed was to go to the council and pay a fee.
4. There were issues with insurance because Mr Tapper was trying to get her name directly transferred to the insurance policy. She was not trying to insure it as a dwelling. Mr Tapper supplied the incorrect policy and EQC numbers.
5. The grease trap sits in a fenced area outside the cottage's kitchen window. The smell was overwhelming throughout the cottage and at the main house. She arranged for it to be emptied at her own expense.
6. Mr Tapper requested her to bring the deposit forward by two weeks so the vendors could secure their new property. This left her little time to carry out checks.
7. The cottage was unconsented.

[96] In an email to the Tribunal (4 November 2021), the appellant states that the fraudulent and deceptive sale process is far worse than negligence and is not a low level unsatisfactory occurrence.

[97] There are further submissions (8 December 2021) from the appellant, replying to Mr Tapper's submissions (12 November 2021). In addition to the points made earlier, the appellant states that she has been professionally manipulated and deceived due to her naivety and trust in an unprofessional corporate firm and senior agent. Their only intention was to secure a sale at any cost. The cost had been to her health and finances.

Submissions of the Authority

[98] There are submissions (15 November 2021) from Ms Walker, for the Authority.

Suicide

[99] At the heart of the appellant's complaint is the impact and consequences of purchasing a property at which suicide occurred prior to settlement.

[100] Rule 6.4 provides that a licensee must provide information that should in fairness be provided, and r 9.1 that a licensee must act in accordance with a client's instructions. These rules reflect a balancing act between a duty of fairness to customers and a fiduciary duty to a client.

[101] This can be a difficult balancing act. Whether or not to disclose a sensitive event at a property will depend on the facts of the particular situation. Some guidance is provided by the High Court decision in *Barfoot & Thompson*.⁶ There is professional guidance on the Authority's website. A licensee must have the client's consent to disclose and should take advice if they believe the matter should be disclosed but the client disagrees. The licensee may need to cease to act if the non-disclosure would place the licensee in the position of breaching their professional obligations.

[102] The Committee placed weight on the fact that the suicide occurred after the sale had been confirmed and, in those circumstances, it was not satisfied that Mr Tapper was required to disclose more about the unfortunate event than he did.

Consents

[103] The Authority notes that the appellant's grounds for challenging the specific findings are not specified. She refers to a number of matters such as a lack of documented evidence and vague descriptions of the rentals.

Agency authority

[104] In relation to the agency authority, the Committee found a breach of r 9.6 though regarded it as minor and not warranting a finding of unsatisfactory conduct. This approach is consistent with the principle that not every breach will necessarily result in a disciplinary finding.

Miscellaneous complaints

[105] In relation to various allegations (unconsented barn loft, verbal abuse, pressure to release the deposit early, grease trap, building report and acknowledgement of

⁶ *Barfoot & Thompson Ltd v Real Estate Agents Authority*, above n 4.

recommendation to seek advice), the appeal does not identify any specific errors or contrary evidence showing the Committee erred.

Conclusion

[106] In conclusion, the Authority submits that it was open to the Committee to make its findings and the specific penalty orders on the basis of the evidence before it.

Submissions of Mr Tapper

[107] There are submissions from Mr Darroch (12 November 2021), on behalf of Mr Tapper.

[108] Mr Tapper accepts the Committee's decisions and acknowledges that he breached the Rules in the way set out. He says his errors were inadvertent and were not intended to disadvantage the appellant.

Consents

[109] Mr Tapper does not agree with the appellant's contention that she was not informed that the loft was not consented for use as accommodation. She was told about this on a number of occasions. This issue was identified by the appellant when she sought insurance for the property before the sale went unconditional. The insurer told her that the barn was not insured as a dwelling.

[110] The vendor provided an email (11 October 2020) stating that he had told the appellant several times that the loft was not compliant. This was before the sale. The Committee considered the email to be of limited weight because it was not signed or corroborated by other evidence. This approach was somewhat unfair to Mr Tapper. The vendor was an independent witness who corroborated Mr Tapper's comments.

[111] While the Committee found the evidence as to what the appellant was told to be evenly balanced, it determined to take no further action.

[112] However, the Committee went on to find a breach because Mr Tapper had failed to disclose or qualify the legality of the rental income from the loft. The written evidence about this issue was limited, as there was no marketing material provided to the appellant. Mr Tapper completed two agency listings, both of which recorded that there were three dwellings at the property. The loft was recorded as "non-permitted".

[113] Mr Tapper acknowledges the overall conclusion reached by the Committee, being the loft consent and its connection to the legitimacy of the rental income. He maintains that the appellant was aware of the issue but agrees this might have been dealt with more directly. It would have been more certain if he had recorded the issue of the loft and its impact on the rental income in writing to the appellant.

[114] The cottage on the property had previously been consented for use as a café. Only limited and relatively insignificant changes were required before it could be used as a dwelling. Mr Tapper acknowledges that he assumed the cottage could be used as a dwelling. He accepts the Committee's decision. He points to the availability of the LIM report and due diligence, but as mitigation rather than as an excuse.

[115] The appellant claims Mr Tapper downplayed issues in rectifying the barn septic tank. Mr Tapper does not accept this.

Vendor warranty

[116] Mr Tapper accepts that he did not specifically mention the warranty to the vendors in connection with the unconsented work and accepts the Committee's finding that this was a breach of r 5.1. It is Mr Tapper's usual practice to leave it to vendors to discuss warranties directly with their lawyers.

Agency authority

[117] Mr Tapper introduced the appellant to the property before the agency listing was renewed because one of the vendors refused to sign a new listing prior to being satisfied the appellant was genuine. The Committee confirmed this was a breach and this is appropriate. The vendors were aware of the visit. It is a technical breach, which had no substantive effect, especially on the interests of the appellant.

Suicide

[118] Mr Darroch submits that Mr Tapper discussed the issue with his manager who contacted the Authority. As a result, he advised the appellant something serious had occurred, but he was not able to say anything more. It appears that she did take some action and was informed about the suicide. Her friend stated that they found out several days later.

[119] There is limited industry guidance about how such issues are to be dealt with. Licensees cannot disclose information without the vendor's consent. Mr Tapper was instructed not to disclose it but, as he remained uncomfortable, he decided to take a

middle ground and inform the appellant in very general terms. This was based on advice from the manager, obtained through the Authority.

[120] The Committee's conclusion was appropriate. Mr Tapper did not ignore the issue but sought advice before providing limited information to the appellant. She had the opportunity to find out more before settlement took place.

Verbal abuse and undue pressure

[121] It is recorded by Mr Darroch that Mr Tapper does not accept that he said anything abusive to the appellant. His conduct in relation to her was courteous and professional. This conversation may have occurred between the appellant and the vendor. The Committee's conclusion that the evidence was finely balanced and its determination not to take any further action, were appropriate.

[122] The statement from the appellant about the telephone call is inconsistent with the overall tenor of the transaction and the way it was carried out. There was no mention of such a problematic discussion in any email or other correspondence. The affidavit of the friend is worded in the broadest terms and there is no further detail to substantiate the call(s). It is a serious allegation which needs cogent evidence to support it.

[123] As for the deposit, Mr Tapper says he did not pressure the appellant, but conveyed a request from the vendors and advised her to speak to her lawyer. The deposit was not released early. Given the differing accounts, it is not possible to make a finding.

Building report and acknowledgement of advice

[124] Mr Tapper does not agree that he advised the appellant against getting a building report or that the pages in the agreement relating to this and the recommendation to seek advice were inserted subsequently. The agreement was conditional on the approval of the appellant's solicitor and no changes were made. The Committee appropriately concluded that there was insufficient evidence and decided to take no further action.

Grease trap

[125] Mr Tapper says he was not aware of any issue with the grease trap. The Committee appropriately decided to take no further action.

Conclusion

[126] According to Mr Darroch, the appellant's complaints are wide ranging. They derive from her general distress and attempt to demonstrate fault on Mr Tapper's part. The Committee identified limited deficiencies in his conduct. He accepts this. The Committee appropriately assessed the breaches as unsatisfactory conduct (in the lower range of mid-level). This was reasonably open to it. There are insufficient grounds to suggest that this prosecution decision should be altered by the Tribunal.

[127] It is submitted that the penalty, being a censure and fine of \$3,500, were appropriate in the circumstances.

Bundle of documents

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

JURISDICTION AND PRINCIPLES

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

[130] The appeal is by way of a rehearing.⁷ It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.⁸ After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.⁹ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.¹⁰

[131] A hearing may be in person or on the papers.¹¹ A hearing in person may be conducted by telephone or audiovisual link.

[132] To the extent that the appeal is against determinations of the Committee under s 89(2)(c) of the Act 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.¹² An appellant has the onus of showing on the

⁷ Real Estate Agents Act 2008, s 111(3).

⁸ *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] & [83].

⁹ At s 111(4).

¹⁰ At s 111(5).

¹¹ At ss 107, 107A.

¹² *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].

balance of probabilities that their version of the events is true and hence the Committee is wrong.¹³

[133] The appellant also contends that Mr Tapper's wrongful conduct is more serious than just unsatisfactory conduct. While she does not articulate her argument in such terms, this is a challenge to the Committee's decision not to refer certain heads of complaint to the Tribunal to assess whether there was misconduct (s 89(2)(a) of the Act). Such appeals are against prosecutorial discretions. The grounds of appeal available are narrower. It must be shown that the Committee made an error of law or principle, or took irrelevant considerations into account, or failed to take relevant considerations into account, or the decision was plainly wrong.¹⁴

[134] The appellant also challenges the Committee's penalties. There is conflicting authority as to whether these are general appeals or appeals against the exercise of a discretion.¹⁵ We do not intend to resolve the conflict, but will adopt the wider appeal criteria of a general appeal, in the appellant's favour.

[135] The Tribunal will also assume that the appellant is appealing against the Committee's decision to take no action on the breach of r 9.6 of the Rules. This was a decision under s 80 of the Act. This is also an appeal against the exercise of a discretion and the stricter appeal criteria applies.¹⁶

Directions from the Tribunal

[136] The Tribunal issued a Minute on 28 September 2021 directing that the appeal be heard on the papers and setting a timetable for the bundle of documents and submissions.

DISCUSSION

[137] 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.

...

¹³ *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22] and the higher court authorities cited therein at fn 9.

¹⁴ *Moseley v Real Estate Agents Authority* [2021] NZREADT 19 at [55].

¹⁵ *Walker v Real Estate Agents Authority* [2021] NZREADT 12 at [17].

¹⁶ *Hammond v Real Estate Agents Authority* [2020] NZREADT 34 at [43].

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.

9 Client and customer care

General

...

9.2 A licensee must not engage in any conduct that would put a prospective client, client, or customer under undue or unfair pressure.

...

9.6 Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property

...

Committee's decision on liability

[138] The appellant makes numerous complaints against Mr Tapper.

Suicide

[139] It is clear that the gravamen of the appellant's complaint is the non-disclosure of the suicide of the vendors' son at the property after the appellant had confirmed the sale agreement was unconditional and the deposit had been paid. She contends that had she known, she would not have settled the property. It is plain that the appellant regards this event as very distressing.

[140] Mr Tapper says he disclosed to the appellant that something big had happened, that it was private and he could not disclose anything more. She was advised to make her own enquiries. He says he did not tell her it was a suicide as he did not have the vendors' authority to do so. The limited information given to her was consistent with advice from his manager following advice the manager had obtained from the Authority. He adds that, in any event, the appellant had no right to exit the agreement at that time, even if she had been told of the suicide.

[141] The appellant says she was deprived of the opportunity to cancel the agreement and recover her deposit. In answer to Mr Tapper's contention that she had no legal right to do so, she states that would have been a matter between her solicitor and the vendors' solicitor.

[142] The Committee was not satisfied that the appellant was able to legitimately cancel the sale agreement as a consequence of the suicide, given its timing. It was not satisfied Mr Tapper was required to disclose more.

[143] We note that the Committee did not deal with the appellant's doubts as to the veracity of Mr Tapper's statement that he had advice from his manager who had asked the Authority. She noted that the Authority's investigator could not authenticate the manager's enquiry.

[144] We agree with the appellant that the lack of any evidence corroborating the alleged advice from the Authority and hence to Mr Tapper is material. It is not just that the Authority has no file note. That is conceivable, even if there was such a conversation. What is more telling is that there is no statement from the manager to the Authority. It would have been straightforward for Mr Tapper to have arranged for his own manager to corroborate the claimed advice, in the face of the appellant's repeated questioning of the veracity of his assertion that the limited information he gave her was consistent with advice from the Authority.

[145] Mr Tapper may have had advice from his manager, but we do not accept that any such advice derived from the Authority. In particular, we do not accept that any advice from the Authority (if such an enquiry was made) was consistent with the information Mr Tapper gave the appellant.

[146] However, the absence of any advice from the Authority (or advice consistent with what Mr Tapper told the appellant) does not establish that the information given to the appellant breached any professional rule or amounted to unsatisfactory conduct. There is no reason to disbelieve Mr Tapper's evidence that the vendors did not want that sensitive and private information disclosed. That being the case, he faced a dilemma. On the one hand, he must disclose information that should be provided in fairness (r 6.4), but on the other hand, he must act in accordance with his client's instructions (r 9.1).

[147] In *Barfoot & Thompson*, the High Court was not satisfied that it was unreasonable for the licensee to decide not to disclose a suicide 12 months prior to the sale.¹⁷

¹⁷ *Barfoot & Thompson v Real Estate Agents Authority*, above n 4 at [85].

[148] Mr Tapper chose a middle path. He disclosed that a significant event had taken place without giving details. The appellant was told to make her own enquiries.

[149] It is apparent from the friend's affidavit that the appellant did so and found out "several days later".¹⁸ She says though that she did not know until after possession. Unless Mr Tapper told her only one or two days before settlement, that is surprising. The appellant appears to have had the opportunity to find out beforehand. She could have asked her lawyer to ask the vendors' lawyer, or she could have visited the neighbours herself. Nonetheless, it is the appellant's case that she did not know before possession and we will accept this.

[150] The appellant therefore contends she missed out on the opportunity to cancel the agreement and recover her deposit, something she says her solicitor could have sought. However, the loss of an opportunity to seek cancellation may not have helped her. She presents no evidence of any realistic prospect of the vendors agreeing. This is a property which had been on and off the market unsuccessfully for a prolonged period of time. In the circumstances, there can be no assumption the vendors would have agreed to cancellation.

[151] The appellant also contends she was legally entitled to cancel. She says that purchasers have done so when misinformed or duped. However, she presents no legal argument or precedent for the right to cancel for the failure to be informed of a suicide after the agreement had become unconditional.

[152] We conclude that there is no evidence of a real, as against fanciful, prospect of the vendors agreeing to allow her to cancel. Nor is it accepted that the appellant had any legal right to cancel the agreement and recover her deposit. Like the Committee, we are not satisfied that Mr Tapper was required to disclose more about the event. We agree with the Committee's conclusion to take no further action.

Consents

[153] The appellant alleges that Mr Tapper told her the barn had council consent, which she understood to mean all the improvements, notably the loft accommodation. Mr Tapper says he told her the loft improvements were not consented.

[154] The Committee found the information concerning the loft consent to be evenly balanced and that it was not possible to find that Mr Tapper failed to disclose it.

¹⁸ Affidavit Mr Habershon (15 July 2020).

[155] The Committee considered an email from one of the vendors, confirming that the appellant was told, to be of limited weight. It noted that the email was not signed and it was unclear if the explanation had taken place before the appellant signed the sale agreement. Mr Darroch, for Mr Tapper, submits that the Committee's rejection of the vendor's email was unfair. He contends the vendor is an independent witness who corroborates Mr Tapper's evidence.

[156] The vendor's email of 11 October 2020 relevantly states:

...

Before Paul had sold the property to [name of purchaser] the purchaser, he asked me to walk around the property with [name of purchaser] and with Paul present. I explained to **[name of purchaser] that the loft was not compliant with the council.**

...

[vendor's emphasis]

[157] We do not accept the Committee's reasons for rejecting the vendor's email. While an email purporting to be from the vendor does not carry the weight of a signed statement, there is no reason to believe it was not from the vendor. Furthermore, the author makes it clear that the discussion with the appellant occurred before the property was "sold". The most sensible interpretation of "sold" is before the sale agreement was signed, not after that and sometime before settlement.

[158] We find that the vendor's email provides some independent corroboration of Mr Tapper's position that he told the appellant the loft was not consented.

[159] It also seems to us highly unlikely that Mr Tapper would not have told her, as it is clear from the agency agreements that it was the vendors' expectation that prospective purchasers would be told. The vendors were transparent about that in their dealings with Mr Tapper. That being the case, we see it as most unlikely he would take the risk of not disclosing it, contrary to the vendors' expectation.

[160] There is another reason why Mr Tapper's version is likely to be correct. He knew that the appellant or her solicitor were going to obtain a LIM report.¹⁹ Accordingly, he would expect that the appellant could readily discover the lack of consent. That she and her solicitor failed to do so from the LIM report obtained does not detract from what he would reasonably have expected.

[161] Accordingly, we find that Mr Tapper did disclose the lack of consent for the loft.

¹⁹ The LIM report clause in the sale agreement records this (bundle of documents at 057).

[162] As for the cottage, the Committee found that Mr Tapper failed to appreciate that it did not have the appropriate consent to be rented out as a residential cottage. He did not therefore provide this information to the appellant. This was a breach of cl 6.4 of the Rules. Mr Tapper does not dispute this.

[163] The Committee then went on to consider the effect of the lack of consents on the rental income represented for the property. It found that Mr Tapper had represented the loft and cottage rents as legal income streams. Since they lacked consent, he had failed to clearly inform the appellant of the issues with the rent and of the need to obtain independent advice. The Committee found that Mr Tapper should also have made it clear that the cottage rental relied on information from the vendors which needed to be independently verified. He was found to have breached r 6.4 in respect of the two income streams (for the loft and the cottage). Mr Tapper does not dispute this finding.

[164] As for the barn's septic tank, the appellant's allegation is that Mr Tapper downplayed what would be required to rectify the problem. Mr Tapper denies this, stating that the real estate industry is well aware of the complexity of obtaining retrospective consent.

[165] The Committee found there was insufficient evidence that Mr Tapper had downplayed the rectification of the septic tank's lack of consent.

[166] It is apparent that the appellant knew the septic tank was not consented. This was the critical fact. It was her responsibility to find out what was required to rectify that, before confirming the sale agreement as unconditional, if that was material to her. That is the point of the due diligence clause in the sale agreement (initialled by her).

[167] We agree with the Committee that there is insufficient evidence to make a finding against Mr Tapper. Furthermore, even if he had downplayed the problem, it is doubtful that such a misrepresentation would be serious enough to justify finding a breach of the Rules.

[168] We agree with the Committee's decision on the consent issues and the breaches of r 6.4 identified.

Verbal abuse and undue pressure

[169] The appellant claimed she needed to obtain a lot of information from Mr Tapper for insurance, which resulted in him abusing her over the phone as it was going to cost him the sale. An affidavit from her friend who overheard the call, confirmed the abuse.

[170] Mr Tapper denies being abusive towards the appellant. He raises the possibility that she was attributing to him unpleasant conversations with the vendor about her insurance problems.

[171] The Committee placed little weight on certain contents of the affidavit which had come from the appellant. The friend's direct observations, according to the Committee, included an abusive phone call from Mr Tapper accusing the appellant of possibly costing him the sale.

[172] The appellant in her submissions emphasises that she has a witness to the bullying phone calls, who has produced an affidavit. Mr Darroch notes the broad terms of the abuse allegation, with no further detail. He further notes that it was not referred to in any written communications.

[173] In general terms, we agree with the Committee's approach to the affidavit. Some of the contents are from the appellant herself, so they do not independently corroborate her evidence. But we do not agree that the information in the affidavit about the phone call all came directly from the friend. In the affidavit, the friend says that Mr Tapper made the abusive call, but that is not how he described knowing the identity of the caller in his earlier statement (18 August 2019).²⁰ There he said that "a very angry chap" had abused the appellant over the phone and the appellant "told me it was Paul Tapper".

[174] There is no reason why the friend would be able to recognise Mr Tapper's voice over the phone. There is no suggestion he accompanied the appellant on any visit or meeting.

[175] The Committee also questioned whether the friend incorrectly identified the caller. It observed that the friend made a simple error in describing the licensee as from [Company]. This is not an error. The licensee was from [Company].²¹ So, while we agree with the Committee that the friend may have made an error in identifying the caller, it was not the error mentioned by the Committee.

[176] Nor has the appellant or the friend provided any details of the caller's alleged abuse, beyond the statement that she could cost him the sale (which could equally have come from the vendor) presumably in a raised voice. Nor did the appellant ever refer to it in any contemporary communication or make any allegation against Mr Tapper at the time. There is some force in Mr Darroch's submission that the alleged call is inconsistent with the overall tenor of the way the transaction was carried out.

²⁰ Bundle of documents at 275.

²¹ Bundle of documents at 037, 046 & 293.

[177] While we accept that the appellant was subject to an aggressive call which upset her, that call may have come from the vendor, as Mr Tapper suggests.

[178] We agree with the Committee that it is not possible to find on the evidence that Mr Tapper made the abusive call.

[179] It is also alleged by the appellant that Mr Tapper pressured her to release the deposit early. Mr Tapper denies this. He says he requested early release on behalf of the vendor and advised her to speak to her solicitor.

[180] The Committee found that, given the differing accounts, it was not possible to find that Mr Tapper pressured the appellant to release the deposit early.

[181] The appellant's allegation that undue pressure was being put on her to release the deposit is vague. She does not mention pressure in her submissions to the Tribunal, only that she was "requested" by Mr Tapper to do so.²² In any event, the appellant and/or her solicitor successfully resisted any pressure. The Committee correctly found it was not possible to find Mr Tapper pressured the appellant.

Building report and acknowledgement of advice

[182] The appellant alleged Mr Tapper advised her against getting a building report. She noted that she had not initialled certain conditions or even pages in the sale agreement and queried whether a page (initialled by the vendors, but not her) had been added after her signature.

[183] Mr Tapper denies advising her against getting a building report, which was of no issue to him. He noted that while the page containing the parties' acknowledgement (that he had recommended they seek advice) was not initialled by the appellant (though had been by the vendors), the appellant's solicitor had not raised this as an issue.

[184] The Committee decided that given the differences between the parties, it was not possible to find that Mr Tapper advised the appellant not to get a building report. It further decided that no further action would be taken on either the building report or the acknowledgement condition.

[185] The Tribunal agrees with the Committee. There is no reason why Mr Tapper would have advised against a building report. As Mr Tapper says, it was irrelevant to him. The lack of initialling by one party of the page with the acknowledgement condition is unusual but not suspicious. It was not raised as an issue by the appellant's solicitor.

²² Attachment 2(c) to Notice of appeal (13 April 2021).

Agency authority

[186] Mr Tapper does not dispute that he showed the appellant the property without an agency agreement. This was because the vendors would not enter another agreement unless the appellant was interested.

[187] The Committee found that Mr Tapper had breached r 9.6, but that it was minor and did not warrant a finding of unsatisfactory conduct. It noted that the vendors were fully informed of the agency from the earlier agreements.

[188] We agree with the Committee that r 9.6 was breached. We further find that the Committee made no error in declining to find unsatisfactory conduct was made out. There was no prejudice to the vendors, let alone the appellant. As Ms Walker submits, it is a recognised principle that not every rule breach will necessarily result in an adverse disciplinary finding.²³

Grease trap

[189] The appellant claims the grease trap was full and an undisclosed adverse feature of the property. She says the odour was overwhelming and throughout the cottage and at the main house. She emptied it at her own expense. Mr Tapper says he was not aware of any smell or of such a problem.

[190] The Committee found there was insufficient evidence of a breach of the Rules.

[191] We agree with the Committee. If the smell was as pronounced as the appellant states, it would have been obvious on viewing the property and she would have raised it with him then.

Vendor warranty

[192] It was the Committee which raised an issue as to whether Mr Tapper had drawn to the vendors' attention the standard warranties, including that any work on the property had consent.

[193] The Committee found that, in the circumstances, this specific warranty was significant, given the unconsented work. He should have drawn this to the attention of the vendors and their lawyer. In failing to do so, he had breached r 5.1. This amounted to unsatisfactory conduct.

²³ *Vosper v Real Estate Agents Authority* [2017] NZHC 453 at [72]–[77].

[194] Mr Tapper does not contest the Committee's findings.

Conclusion

[195] We conclude that the Committee correctly found breaches of rr 5.1 (vendor warranty) and 6.4 (cottage consent and cottage / loft rental income) and dismissed the other heads of complaint. It correctly found the breaches amounted to unsatisfactory conduct. It correctly found a breach of r 9.6 (agency authority) and did not err in deciding to take no action.

[196] The appellant contends that Mr Tapper's conduct is more serious than unsatisfactory conduct. To the extent she is contending that Mr Tapper's breaches amount to misconduct and should have been referred to the Tribunal, we reject that. His behaviour does not meet the statutory definition of misconduct and the appellant does not explain why it does.²⁴ The appellant has not identified any error (of law or principle, or concerning relevant / irrelevant factors), and nor is the decision plainly wrong.

Decision on penalties

[197] The Committee censured Mr Tapper and imposed a fine of \$3,500, having found his conduct to be at the lower end of mid-level unsatisfactory conduct. It noted the maximum fine of \$10,000. It found the breaches to be "unintentional", though it was not satisfied that the breach concerning the loft's rental income was "inadvertent". This is because the issue concerning the legitimacy of renting out the loft would have been clear from knowledge that the loft improvements were unconsented.

[198] Whether or not the breach concerning the loft rental was inadvertent or unintentional, we agree with the Authority and Mr Tapper that the Committee's assessment of the gravity of his unsatisfactory conduct (at the lower end of mid-level) was open to it. Indeed, we find it is correct. We particularly take into account our finding that Mr Tapper did disclose the lack of consent for the loft, a factor which reduces any responsibility he may have for rental loss, as the Committee noted.²⁵

Fine

[199] The appellant contends that \$100,000 would be an appropriate financial penalty. This is far in excess of the maximum fine. The appellant may have in mind compensation, which we will address shortly.

²⁴ Real Estate Agents Act 2008, s 72 (definition "unsatisfactory conduct") and s 73 (definition "misconduct").

²⁵ Committee's decision (16 September 2021) at [4.9].

[200] The Authority submits that the Committee followed a clear and principled process in identifying the appropriate penalty. There was no identifiable error of law or principle, nor irrelevant consideration nor omission of any relevant factor, which would lead to a conclusion that the Committee's decision was plainly wrong.

[201] Mr Darroch submits that the fine of \$3,500 was appropriate in the circumstances.

[202] The maximum fine that could be imposed by the Committee was \$10,000. As it found, this indicated a fine of about \$3,000 to \$7,000 for moderate or mid-level conduct.

[203] We agree that the Committee's starting point of \$4,000 was appropriate. Having regard to the mitigating factors (an unblemished record over 19 years and a written apology to the appellant), we further agree with the Committee's conclusion that \$3,500 was fair and proportionate.

Censure

[204] It is not contested by Mr Tapper that censure is appropriate. We agree with the Committee.

Refund

[205] As for a refund of fees sought by the appellant, the Committee correctly dismissed this. She was not charged any fees. There is no complaint from the vendors.

Rectification and relief

[206] In its decision of 16 September 2021, the Committee dealt with possible rectification by Mr Tapper of his errors and, where that was not practicable, relief.²⁶ The appellant makes no submissions regarding rectification and relief, except to the extent she repeats her claim for a penalty of \$100,000. No details are given of this claim, but it will be assumed she is seeking compensation.

[207] The Committee correctly found that it had no power to order compensation.²⁷ To the extent that the appellant seeks lost rent, we agree with the Committee that this would amount to compensation for the income she expected to gain from the purchase, which the Committee cannot order.

²⁶ Real Estate Agents Act 2008, s 93(1)(f).

²⁷ *Edwards v Bridge*, above n 5 at [57].

[208] The Committee was also correct in finding that it had no power in this case to refer the matter of compensation to the Tribunal under s 93(ha) of the Act. This was because that statutory provision was inserted into the Act on 29 October 2019, whereas the conduct here occurred no later than January 2018.

OUTCOME

[209] The appeal is dismissed. The outcome of the Committee's decision is confirmed.

[210] 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

[211] The Committee directed publication of its decisions without the names or identifying details of the appellant and any third parties, but stating the name of the licensee and the agency.

[212] 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 the appellant, the property or any third party, but naming the licensee, his agency and the Authority.

D J Plunkett
Chair

N O'Connor
Member

F Mathieson
Member