BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2022] NZREADT 4

Reference No: READT 022/2021

IN THE MATTER OF	An appeal under s 111 of the Real Estate Agents Act 2008
BETWEEN	**CX** Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 2105)** First Respondent
AND	**TF, TH** and **TS Limited** Second Respondents

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:	Z Wisniewski
Counsel for the second respondents:	K Perry, J Tian

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 5 April 2022

INTRODUCTION

[1] CX (the appellant) bought a farm which was not destocked by settlement and which did not have the water supply which had been represented by the marketing. He says that TF (the first licensee), TH (the second licensee) and TS Limited (the agency) gave him misleading information. The licensees and the agency are collectively the second respondent.

[2] CX made a complaint to the Real Estate Agents Authority (the Authority), the first respondent. A Complaints Assessment Committee (CAC 2105) (the Committee) decided on 5 August 2021 that the licensees had passed on information given to them by the vendors, and that they had discharged their obligations to make proper enquiries and take precautions to check the veracity of the information. Accordingly, the Committee decided to take no further action.

[3] CX appeals against that decision.

BACKGROUND

[4] The complaint concerns a rural property of approximately 39 hectares in [region]. At the relevant time, it was leased to a neighbouring farmer who grazed dairy stock.

[5] The vendors obtained a valuation report (5 July 2019). It stated that the lessee had not been contacted (at the request of the vendors) and that the valuation had proceeded on the basis that the information supplied by the vendors was true and correct. As to the water supply, the report stated:[1]

> Currently the lessee has his own water from his neighbouring property [connected], but the subject property does have its own sufficient water supply. There are three water tanks on the property that are fed from the [Redacted] District Water Supply. From here the water is gravity fed to troughs around the property. The property appears to have an adequate water source and good reticulation with troughs in all paddocks.

[6] The vendors signed an agency agreement with the agency on 7 November 2019. It stated:[2]

> Stock Water: Three water tanks on the property, fed from the [Redacted] District Water Supply

[7] The second licensee was identified in the agency agreement as the listing agent. He worked with the first licensee in marketing the property.

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[1] QV Rural Market Valuation Report (5 July 2019) at [5.8].
[2] Agency agreement (7 November 2019) at 8.

[8] The "Property Listing Information" attached to the agency agreement, initialled by the vendors, stated:

> The lease expires 1st May 2020 Month by Month Thereafter.

[9] On 13 November 2019, the vendors sent an email to the licensees approving a number of proofs (draft documents) sent to them. This comprised advertisements and property information, including the water supply. A revised set of proofs (including the water supply details) was sent on 22 November 2019 to the vendors and approved on the same day.

[10] The licensees provided prospective bidders with a Property Report/Information Memorandum (22 November 2019). It had the following "Statement of passing over information":[3]

> This information has been supplied by the vendor or the vendor's agents and [the agency] is merely passing over this information as supplied to us. We cannot guarantee its accuracy as we have not checked, audited, or reviewed the information and all intending purchasers are advised to conduct their own due diligence investigation into this information.
>
> …
>
> To the maximum extent permitted by law we do not accept any responsibility to any party for the accuracy or use of the information herein.

[11] In respect of the water supply, the property report stated:[4]

> Three water tanks, fed from the [Redacted] District Water supply

[12] The appellant viewed the property on multiple open days, the first being on 25 November 2019.

[13] In an email on 28 November 2019 to the licensees, the vendors said that when they farmed the property, they used water from the district water scheme for the stock.

[14] The licensees sent the draft auction documents (Particulars and Conditions of Sale of Real Estate by Auction) to the vendors on 10 December 2019, copied to the vendors' solicitor and accountant. The addressees were asked to review the documents to ensure they were correct.

[15] The accountant sent an email to the licensees, vendors and solicitor on 11 December 2019 stating that the documents looked fine. He commented on one clause.

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[3] Property Report (22 November 2019) at 5.
[4] *Ibid* at 12.

[16] The vendors replied to the licensees on 11 December 2019 confirming they were happy with the documents, subject to a small correction to the asset schedule.

[17] On 13 December 2019 at 11:26 am, the licensees sent another email to the solicitor asking her to comment on the auction documents.

[18] At 12:04 pm on 13 December 2019, the solicitor sent an email to the licensees (copied to the vendors) requesting a copy of the lease "(in accordance with clause 33.0)". The solicitor added that the vendors were checking whether or not the destocking date of 1 April 2020 was achievable. At 12:16 pm on the same day, the licensees sent an email to the vendors (copied to the solicitor) asking them to provide the solicitor with a copy of the lease. The vendors replied at 1:01 pm stating that the lease was prepared by another solicitor at the solicitor's firm and the reception staff had confirmed they had the original lease. The vendors added:

> I have checked with the [lessees] that they can comply with having 2,000 kgDM (as per the lease conditions) without needing to destock.

[19] The solicitor then advised the licensees at 4:37 pm on 13 December 2019:

> Yes all good to go – lease condition is fine…

[20] On 16 December 2019, the licensees sent the finalised auction documents to the vendors and their solicitor and accountant, stating that they would now be available to prospective purchasers.

[21] On the same day, the licensees sent the "Updated Property Documents" to the appellant. The email contained an almost identical "STATEMENT OF PASSING OVER", as inserted in the property reports. He confirmed receipt on 17 December 2019.

[22] The updated property report (17 December 2019) contained the same "Statement of passing over information" as that in the 22 November 2019 report. It described the water supply:

> [Redacted] District Water Supply.
>
> Stock Water: Reticulated around the farm via a gravity feed system and three water tanks and troughs. Backup stream source – not in current use.
>
> Domestic Water: [Redacted] Supply

[23] The report further stated that the property was leased to an adjoining farm owner who ran it together with his dairy unit, with the lease expiring in May 2020.[5]

[5] Property Report (17 December 2019) at 12.

[24] The appellant's company was successful purchasing the property at auction on 19 December 2019.

[25] There is a Memorandum of Contract (19 December 2019). The Particulars and Conditions of Sale of Real Estate by Auction (sale agreement) stated that the property came with vacant possession. The settlement date was 1 May 2020 or as mutually agreed. The sale agreement contained two relevant conditions:

> **33.0 Lease**
>
> The purchaser acknowledges that the majority of the farm is currently leased and farmed by a lessee. The lessee has advised the vendor that he will surrender his lease and deliver up vacant possession of the property on 1 May 2020.
>
> **34.0 Farming**
>
> The Vendor shall use its best endeavours to ensure that the lessee farms the property down to possession date in a good and husband like manner and in accordance with accepted good farming practice in the district and that he shall neither over stock nor under stock the same. The property shall be de-stocked on or before 1 April 2020. The Vendor's obligations hereunder shall be only to "use their best endeavours" to ensure the foregoing and it is agreed that such "best endeavours" shall not in any circumstance require the Vendor to commence litigation against the lessee nor to enter into arbitration with the lessee, nor shall they provide any basis for the Purchaser to make a claim in compensation or damages against the Vendor. That the Vendor shall use "their best endeavours" shall constitute an expression of good faith and moral obligation, but shall not extend to nor become a legal obligation.

[26] The listed farm chattels included:[6]

> Water system with pump and all attached ancillary water supply components for farm and dwellings

[27] The vendors sent an email to the appellant on 1 April 2020 (copied to the lessees). They stated that the licensees had a copy of the lease. The vendors apologised for contributing to any confusion caused by not ensuring that the sale agreement coincided with the lease.

[28] On 20 April 2020, the appellant sent an email to the second licensee querying the information in the property brochure which had been handed out at the open days.

[29] The second licensee responded on 22 April 2020 stating that the information in the Property Information Memorandum and the Auction Sale Terms and Conditions came from the vendors. It was checked and signed off by them and their solicitor prior to publication.

Complaint to the agency

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[6] Sale agreement (19 December 2019) at [46.0].

[30] The appellant made a formal complaint to the agency on 30 April 2020 against the licensees and the agency. He said he had asked for a copy of the lease on the first open day. The second licensee said he did not have a copy and would contact the vendors. He rang back later and said "no". They found out on 30 March 2020 that the sale agreement (which said the property would be destocked by 1 April) did not match the lease (which stated 2,000 kgdm/ha on 1 May 2020). He had been deceived.

[31] A manager at the agency replied on 8 May 2020. The property was sold with vacant possession, so the lease agreement did not form part of the sales documentation. It was not therefore made available to him. As for destocking, the salesperson could not be held responsible for his "representation of the vendor's failure to fulfil the terms of agreement".

THE COMPLAINT

[32] On 7 August 2020, the appellant made a complaint against the licensees to the Authority alleging that the property was fraudulently advertised.

The appellant's complaint

Destocking

[33] The appellant stated that the property was marketed as being destocked by 1 April 2020, but on 30 March 2020 he spoke to the lessee and was told that they were grazing the property until 30 April pursuant to their lease agreement with the vendors. The licensees had a copy of the lease agreement. He had previously requested a copy of the lease agreement, but the second licensee replied that he did not have a copy but would enquire. The second licensee rang back to say that the vendors had refused, but the sale agreement would reflect the lease agreement. The property was sold with vacant possession and the lease agreement did not form part of the sale documentation.

Water tanks

[34] The property was advertised as having three water tanks and a gravity fed system, but on 30 March the appellant found out that the tanks belonged to the lessee. The licensees had listed other leased assets leaving the property, but not these. There was no water system, which would cost $8,000 (plus GST) to replace. Additionally, they were in the process of going to court with the [Redacted] water scheme and the district council because the line from these tanks to the lessee's property was private and going to be redone through the property without discussion with them or their consent. It was

the appellant's understanding that he owned the tanks and that these fed the property, but this was not the case. The legal costs could be $20,000–$50,000.

Compensation

[35] According to the appellant, there would also be additional legal costs of $20,000. The time and emotional compensation for their inability to enjoy their purchase was $50,000. Due to their monetary losses, the appellant was seeking $100,000.

[36] There followed communications between the appellant and the Authority concerning the complaint.

[37] The appellant stated in an email on 8 February 2021 to the Authority that, when the second licensee rang him back after the first open home to tell him that the vendors would not give him a copy of the lease, the second licensee added that the lease conditions would be in the sale documents. The appellant also stated that at the auction the auctioneer read out the main parts, such as vacant possession, destocking by 1 April and takeover by 1 May.

[38] In an email to the Authority on 27 April 2021, the appellant stated that in a telephone discussion with the lessee, the latter denied having any discussions with the vendors. The appellant noted that he had not got on with the lessees for some years. According to the appellant, the lessees had breached the lease agreement throughout April, but the vendors had done nothing against them.

[39] In an email to the Authority's investigator on 12 May 2021, the appellant said he did not buy the property on the basis of "2,000 pasture cover", but because it was to be destocked by 1 April 2020.

Response of the licensees

[40] The second licensee provided a response (15 March 2021) to the Authority. He stated that the vendors did not have a copy of the lease. Despite multiple requests, they never provided it. While the vendors stated on 1 April 2020 in an email to the appellant that the licensees had a copy of the lease, this was not correct. They had asked for a copy on many occasions, but were never provided with it.

[41] Even though they were not given a copy of the lease, they made every effort to ensure that the marketing information was accurate. Clause 34 in the sale agreement was drafted by them based on verbal instructions about the lease from the vendors. Before the clause was finalised, the full sale agreement was sent to the vendors, their solicitor and accountant for confirmation.

[42] The second licensee says he told the appellant that the vendors would not provide a copy of the lease but that the sale agreement would reflect the lease. This was on the third open day on 9 December 2019.

[43] As for the information used to market the property, all of it came from the vendors, their accountant or their solicitor. The draft sale agreement was circulated to all of them for approval. Unless the licensees had reason to doubt the accuracy of the information provided by their clients, the vendors, it was not their role to second guess that information. That was especially so in circumstances where the information was provided by professional experts, such as accountants or solicitors.

[44] According to the second licensee, the appellant took a copy of the property report (22 November 2019) during the first open day on 25 November 2019. The updated report (17 December 2019) was sent to him with the auction documents on 17 December 2019. They contained the "Statement of passing over information", which reminded readers that the licensees were simply acting as conduits and the reader would have to conduct their own due diligence.

[45] The licensees were not aware that two of the water tanks did not belong to the vendors or that the third tank could not be used. The agency agreement specified the existence of three water tanks connected to the district scheme. The marketing reports had been approved by the vendors and their accountant. The valuation report obtained by the vendors said the property had three water tanks and was fed from the district scheme. There was nothing to alert them to the issue concerning water. It would not be reasonable to expect licensees to check the ownership records of every single chattel vendors included in a sale.

[46] A response (15 March 2021) was also provided by the first licensee to the Authority. She confirmed the second licensee's response. The first licensee emphasised that licensees were not expected to be experts on every aspect of a client's property or carry out investigation work akin to cross-examining their client on every piece of information. There was nothing to suggest to them that any of the information from the vendors might be inaccurate. On the contrary, it was confirmed by their accountant and solicitor.

Further investigations

[47] On 9 April 2021, the vendors told the Authority's investigator that they wanted nothing to do with the matter. They said they gave a copy of the lease to the licensees personally.

[48] On 27 April 2021, the Authority's investigator sent an email to the lessees confirming a discussion she had with them that day. She recorded that they had advised the investigator that the lease agreement finished by 30 April 2020. The vendors had demanded the lessees leave by 30 March 2020, but they refused.

Decision of the Complaints Assessment Committee (CAC 2105)

[49] On 5 August 2021, the Committee issued its determination. It decided to take no further action.

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

Destocking

[51] The Committee was satisfied that it was more likely than not that the licensees, despite numerous requests for a copy of the lease, were never provided with one by the vendors. The assertion of the vendors to the Authority that the licensees did have the lease was mistaken. It followed that the licensees did not draft cl 34 of the sale agreement knowing that it was inconsistent with the terms of the lease.

[52] The vendors' refusal to supply the lease to the appellant meant that they were refusing to supply it to the licensees and that the latter had not seen it. They communicated that to the appellant. That was sufficient for the appellant to be on the alert to check that the provisions in the lease agreement and the sale agreement were consistent.

[53] This was not an end to the issue as the second licensee had made a positive assertion to the appellant that the terms of the lease would be reflected in the sale agreement. In doing so, he was under a duty to make proper enquiries and take some precautions to check the veracity of the information. It was found that the licensees had discharged their obligations. The vendors told them that the land would be destocked by 1 April 2020 and that date was specifically recorded in cl 34 of the sale agreement. As they had not seen the lease agreement, the licensees rightfully made enquiries of the vendors' solicitor who had the lease and the response from the lawyer was that the lease condition was fine. The licensees were entitled to rely on the solicitor's advice.

Water tanks

[54] As for the water tanks, the Committee found that there was no issue because there were three water tanks on the property and there was nothing obvious to suggest to the licensees or to put them on notice that these tanks did not belong to the property and that the water supply was not as identified by the vendors. The vendors had told them that water storage was by way of three water tanks and that stock water was fed from the [Redacted] water scheme.

[55] As no specific query about the water tanks had been made by the appellant to the licensees, there was no duty to make reasonable enquiries to check that the information was correct. The property report containing the water information clearly stated that its content had been supplied by the vendors. It further stated that the licensees and the agency could not guarantee the accuracy of that information, as it had not been checked and that all intending purchasers should conduct their own due diligence.

APPEAL

[56] The appellant appeals to the Tribunal against the decision of the Committee of 5 August 2021.

Submissions of the appellant

[57] In the Notice of Appeal (24 August 2021) and his later submissions (7 September and 7 October 2021), the appellant says he was not given the opportunity to reply to new information provided to the Committee by the licensees. He says that important information was withheld by them from himself and other prospective buyers. The appellant believes the property to have been fraudulently marketed.

Destocking

[58] The appellant notes that farms are sold as grass cover on possession date (kg dry matter/ha) or as destocked. This property had been marketed as being destocked by 1 April 2020. The licensees and the agency knew this contradicted the lease.

[59] The property was not destocked by 1 April 2020, as the lease agreement between the vendor and the lessee was due to expire on 1 May 2020 and provided for 2,000 kgdm/ha on 1 May. The property was grazed up to and including 30 April by the lessee, leaving 1,780 kgdm/ha average pasture cover, or 1,840 total on the property as the lessee did not lease all the property.

[60] The licensees were told in the email of 13 December 2019 that the lease stated 2,000 average pasture cover on 1 May 2020. This contradicted the advertising and cl 34 of the sale agreement. The email was before the sale agreement was finalised and circulated to prospective buyers. The licensees repeatedly claim that there were no red flags, but denying them the lease and the contents of the email of 13 December were both red flags.

[61] Six days prior to the auction, the licensees found out the lease agreement condition was 2,000 kgdm/ha average pasture cover, as at 1 May 2020, but they did not notify him. They continued to advertise and then sell the property in conflict with the lease condition which they had been informed of by email on 13 December 2019. The auctioneer read out at the start of the auction that the property was to be destocked by 1 April, for takeover on 1 May.

[62] The licensees did not notify him that they had not viewed the lease agreement. They merely told him that the vendors would not release a copy to him.

Water tanks

[63] On 30 March 2020, one month prior to settlement, the appellant discovered that two of the three water tanks belonged to the lessee and the third tank could not be used, leaving no water system for the property. He temporarily connected the property to the water on his own neighbouring property. This could only be done by finding grazing for his stock elsewhere.

[64] The water system was marketed as being serviced from the [Redacted] water scheme, but only the house was actually connected to the scheme.

[65] The licensees did not correspond with the lessee, despite listing items owned by them. They did not confirm those items or enquire if there were others. If they had done due diligence and spoken with the lessee, they would know what the lessee owned. Nor did they contact the [Redacted] water scheme and/or the district council to see if the property was connected to the water scheme.

[66] The appellant says he specifically asked the second licensee about the location of the water tanks and water system on the first open day. The second licensee duly pointed them out and explained the water system.

[67] At open days and at the auction, the licensees stated that the information being provided was fact, not merely information which was being passed on.

Breaches of law

[68] The appellant contends that the licensees and the agency breached rr 5.1, 6.2, 6.3, 6.4, 9.1 and 10.7 of the Rules. They have also breached s 35 of the Contract and Commercial Law Act 2017 and ss 9 and 14 of the Fair Trading Act 1986.

[69] The appellant repeats his arguments in two sets of submissions on 13 December 2021. He advises that the property was sold on 1 July 2021 for a price below what it should have sold for.

Submissions of the Authority

[70] In her submissions of 4 November 2021, Ms Wisniewski for the Authority records its support for the decision of the Committee.

[71] In *Vosper*, Heath J observed regarding r 6.4 of the Rules:[7]

> [62] …It seems self-evident that for a misrepresentation of the type to which r 6.4 refers to attract disciplinary sanctions, something more than an erroneous statement based on a genuine belief that a state of affairs exists should be required. …
>
> [63] Unlike in civil proceedings, there is no need to focus on whether a person has been misled. There is no requirement for the representee to have relied upon any misleading words or conduct. The focus of the enquiry is on the standard to which the licensee has performed statutory or other duties. In that context, the question must be whether what was done or said was capable of materially affecting a decision on the part of the representee in relation to the transaction; and with actual or presumed knowledge that the information was material…

[72] The Tribunal in *Bellis* set out the general principles on misrepresentation:[8]

1. Licensees are obliged to have familiarity with the properties which they are marketing.

2. If a licensee is asked about a particular aspect of a property, such as the legal boundaries, then the licensee is obliged to make proper enquiries, or advise the potential purchaser that they do not know and advice should be obtained from another professional.

3. Even if a misstatement is innocent or inadvertent, any incorrect information provided by a licensee to a client will nonetheless constitute a breach of r 6.4 and may amount to unsatisfactory conduct. The intent to mislead is a factor relevant to the seriousness of the conduct and in particular whether it amounts to unsatisfactory conduct or misconduct.

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[7] *Vosper v Real Estate Agents Authority* [2017] NZHC 453.
[8] *Bellis v Real Estate Agents Authority (CAC 1907)* [2020] NZREADT 41 at [40].

4. A licensee cannot simply pass on information from a vendor, especially if the information is about an important and complicated feature of the property. Prior to any positive representation being made, a licensee should have at least taken some precautions to check the veracity of the representation.

5. A licensee is not merely a conduit from a seller to a purchaser. A licensee should not place sole reliance on assurances from a vendor, even if they are given in good faith.

6. If a licensee is conveying information themselves, based on information provided by the vendor, the licensee must make it clear that he or she is not the source of the information and that it comes from the vendor and has not been verified.

[73] In *Douglas*, the Tribunal said:[9]

1. The obligation not to mislead does not make a licensee liable where he or she has acted reasonably and in good faith. A licensee is liable where a misstatement is made knowingly, recklessly or carelessly.

2. A licensee does not have an obligation to research background facts where there is no ground for believing the information being passed on is not correct.

Destocking

[74] The licensees did make efforts prior to the auction to ensure that cl 34 and other aspects of the sale agreement and auction documents were not in conflict with the terms of the lease. These efforts are evidenced in the licensees' email chains with the vendors and their solicitor and accountant. They did not solely rely on advice from the vendors but waited to confirm the auction documents, including the sale agreement, only once they were satisfied that the solicitor had a copy of the lease and confirmed that the auction documents were aligned with its terms.

[75] The solicitor's response that the lease condition was fine could be considered ambiguous, as it might relate to cl 33 only or might also encompass cl 34. This ambiguity is not fatal to the licensees' understanding of the confirmation of the sale agreement and other auction documents as it was prefaced generally by "Yes all good to go". Given that

[9] *Douglas v Real Estate Agents Authority (CAC 416)* [2019] NZREADT 31 at [37] & [38].

the licensees did not have a copy of the lease, they were reliant on the solicitor's advice to ensure that the documentation was in accordance with the lease.

[76] Ms Wisniewski notes the appellant's contention that the licensees did not inform him they did not have a copy of the lease. The Committee was correct to find that they did tell him. The burden of proof is on the appellant to establish, on the balance of probabilities, that his version of the events is more likely than not. It is largely irrelevant on which date he was advised there was no copy of the lease, as it occurred prior to him entering into the sale agreement. Whether the second licensee simply said "no" to the request for a copy of the lease, or whether he added that the lease conditions would be in the sale agreement, the appellant was advised that the licensees did not have a copy.

Water tanks

[77] Ms Wisniewski notes that it is not in dispute that the information about the number of water tanks on the property and the water supply was incorrect. Unlike *Bellis*, the information supplied was not in direct response to a query from the appellant. There was no red flag to inform the licensees that the information may not be correct and they should make further enquiries. The information supplied by the vendors had been contained in the independent valuation report. The property report had been checked and double checked and amended by the licensees with the vendors to ensure its accuracy. There was no reason for the licensees to anticipate an issue with the ownership of the water tanks requiring further additional verification.

[78] It is submitted that if questions as to the number of water tanks or the water supply had been raised, then the licensees would have had a further obligation to verify the facts. It could not be said that the licensees should have further caveated each and every representation made in the property report, such as the number of water tanks.

[79] There was no evidence of any indication to the licensees that the vendors did not own the water tanks. The QV report was in accordance with the water supply details provided by the vendors.

[80] While a statement as to the passing over information is not a substitute for licensees complying with their obligations regarding representations, the licensees did not simply pass over the vendor information. They relied on the independent valuation report and confirmation of materials from the vendors' accountant who had specialist knowledge of the property assets. The inclusion of the statement alerted prospective purchasers to do their own due diligence.

Submissions of the licensees

[81] In his submissions of 22 October 2021, counsel for the licensees, Mr Tian, submits that the Rules highlight the need for licensees to provide accurate information to all parties, but also encapsulate the role of a licensee as an agent for their client. The licensee has an obligation to follow the client's instructions, except where doing so would be contrary to law.

[82] It is submitted that r 6.4 of the Rules is not intended to import a wide obligation on licensees to effectively guarantee the accuracy of the information received from their client to pass on, akin to a general warranty. Rule 6.4 requires that a licensee must not knowingly provide false information, knowingly mislead a customer or client or fundamentally fail to appreciate that the information may be false or that a client could be misled.

[83] There are no rules requiring licensees to effectively cross-examine their clients on information provided, especially where the information appears to come from credible sources. Where information has also been verified by their clients' advisers, the licensees ought to be able to rely on such advice as additional verification. Licensees are not expected to have expertise in areas other than their industry and cannot be expected to substitute their views in place of specific advice from professionals such as solicitors or accountants.

[84] The professional obligations of licensees are not synonymous with requiring them to protect prospective purchasers' interests in a transaction or to act as their advisers. Doing so would effectively impart the purchasers' due diligence obligations on the licensees and/or encourage purchasers to treat licensees' obligations as a backstop for having to do their own due diligence.

Destocking

[85] The Committee found that the licensees discharged their obligation to take precautions and check the veracity of information received. They did not simply rely on the vendors' own advice but made enquiries of the vendors' solicitor, who had the lease, to confirm that the destocking clause in cl 34 of the sale agreement was consistent with the lease.

[86] The key point to note is that despite numerous requests, the vendors never provided a copy of the lease to the licensees. Instead, they confirmed to the licensees that their solicitor had a copy of the lease. In the circumstances, the licensees made enquiries with the vendors' solicitor, reasonably expecting that the solicitor would act in the best interests of their mutual vendor clients and check that the agreement was

consistent with the lease. Indeed, the solicitor appears to have been the only party who had the lease.

[87] The Committee found that the licensees did sufficiently communicate to the appellant that they had not seen the lease. The appellant would then have been on alert to check for himself that the sale agreement was consistent with the lease.

[88] The appellant focuses predominantly on an email (13 December 2019) from the vendor stating that the lessee can comply with 2,000 kgdm/ha, as per the lease conditions, without the need to destock. It is alleged this information was not passed on to him and the licensees should have realised the proposed sale agreement was inconsistent with the lease.

[89] It is submitted that viewed objectively in the context of the entire email chain, the allegations are unfounded. The purpose of the emails was for the vendors and solicitor to confirm whether the agreement was consistent with the lease. The vendors' email was followed by the solicitor confirming the lease condition was fine. There was no red flag that the agreement was inconsistent with the lease.

Water tanks

[90] The Committee accepted that the second respondents' representation as to the property having three water tanks, was based on multiple sources:

1. The vendors.

2. The agency agreement signed by the vendors.

3. The valuation report.

[91] All these sources confirm that the property had three water tanks fed by the [Redacted] water scheme. The vendors instructed the licensees to market the property as having three water tanks. This had been confirmed by the third-party QV valuation report and approved by the vendors' accountant who had specialist knowledge of the vendors' assets. It was reasonable for the licensees to rely on such assurances.

[92] In the circumstances, the licensees were required under r 9.1 of the Rules to market the property as having three water tanks as instructed by their vendor client. It would not be reasonable to require licensees to personally critically analyse and check the ownership records of every single chattel that the vendors wanted to include in a sale.

[93] It is also undeniable that the licensees, via the express "Statement of passing over information", alerted prospective purchasers that the information being conveyed was provided by the vendors and they could not guarantee its accuracy.

[94] The appellant suggests that the licensees had an obligation to contact the lessee and the water body and/or the district council concerning the tanks and water supply, to confirm the vendors' information. Such extensive third-party enquiries are akin to due diligence by purchasers. Licensees are not obliged to conduct due diligence for purchasers.

Bundle of documents

[95] The Authority provided to the Tribunal a paginated bundle of the evidence and submissions produced to the Committee.

JURISDICTION AND PRINCIPLES

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

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

[98] A hearing may be in person or on the papers.[14] A hearing in person may be conducted by telephone or audiovisual link.

[99] This appeal is against the determination of the Committee under s 89(2)(c) to take no further action. It is a "general appeal". The Tribunal is required to make its own assessment of the merits in order to decide whether the Committee's determination is wrong.[15] 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.[16]

Directions regarding the hearing

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

[100] The Tribunal issued a Minute on 10 September 2021 concerning the hearing of the appeal and a timetable for submissions. It was revised in Minute 2 issued on 11 November 2021. The Tribunal determined that the appeal would be heard on the papers.

DISCUSSION

[101] In his submissions to the Tribunal, the appellant alleges that he was not given the opportunity to reply to new information provided to the Committee by the licensees. The appellant does not identify the new information. Moreover, any such default would now be 'cured' by his opportunity to address the new information in his submissions to the Tribunal. We presume he has done so.

The substantive complaint

[102] We will now consider the two substantive items of the appellant's complaint, being the date by which destocking was to occur and the water system.

[103] The following provisions of the Rules are listed by the appellant in his submissions to the Tribunal:

> **5 Standards of professional competence**
>
> 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
>
> …
>
> **6 Standards of professional conduct**
>
> ...
>
> 6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.
>
> 6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.
>
> 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*
>
> 9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.

…

10 Client and customer care for sellers' agents

…

Disclosure of defects

10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects[4], a licensee must either—

(a) obtain confirmation from the client, supported by evidence or expert advice, that the land in question is not subject to defect; or

(b) ensure that a customer is informed of any significant potential risk so that the customer can seek expert advice if the customer so chooses.

[4]For example, houses built within a particular period of time, and of particular materials, are or may be at risk of weathertightness problems. A licensee could reasonably be expected to know of this risk (whether or not a seller directly discloses any weathertightness problems). While a customer is expected to inquire into risks regarding a property and to undertake the necessary inspections and seek advice, the licensee must not simply rely on caveat emptor. This example is provided by way of guidance only and does not limit the range of issues to be taken into account under rule 10.7

…

Destocking

[104] The gravamen of this aspect of the complaint is that the appellant says the marketing included a representation that the lessees would destock the property by 1 April 2020. He wanted to undersow new grass so the paddocks would be ready for his stock on or after possession on 1 May 2020. It is not disputed that the property was not destocked until 30 April 2020, with vacant possession given to the appellant on 1 May 2020 as the sale agreement specified.

[105] The appellant contends the late destocking was contrary to what he had been told by the licensees and to cl 34 of the sale agreement. Even the auctioneer had referred to the 1 April destocking date.

[106] Neither the Tribunal nor the Authority has seen the lease, but it is not disputed that the lessee had until 30 April 2020 to destock, though he had to leave a certain level of pasture on the paddocks (2,000 kgdm/ha).

[107] We will first consider the appellant's allegation that the licensees did have a copy of the lease and knowingly drafted cl 34 contrary to the lease.

[108] The Committee found that the licensees did not have a copy of the lease and did not therefore draft cl 34 contrary to the lease.

[109] We note that the vendors said in an email to the appellant on 1 April 2020 that the licensees did have the lease. They told the Authority's investigator the same on 9 April 2021. Notwithstanding the vendors' evidence, we agree with the Committee that the vendors are likely to be mistaken. The licensees' email exchange on 13 December 2019 with the vendors and their solicitor plainly shows the licensees did not have a copy of the lease. There is no other explanation for the licensees' email at 12:16 pm. We agree with Mr Tian that the solicitor was the only person with the lease (though she did not initially realise that).

[110] It follows that the licensees did not draft cl 34 knowing it to be contrary to the lease.

[111] The next issue is whether the appellant was told by the licensees that they did not have the lease. The appellant's evidence is inconsistent. While he maintains they did have a copy, he says that at the first open day when he asked for the lease, the second licensee told him he did not have a copy and would have to ask the vendors.[17] The appellant was later informed by the second licensee that the request was refused. As the Committee found, it is implicit from this episode that the appellant knew that the licensees had not themselves seen the lease.

[112] Having established that the licensees, to the appellant's knowledge, did not have the lease, that does not of itself mean the licensees had no professional obligation as to what was said about the timing of destocking.

[113] First, the appellant was told (in a way we will examine shortly) that the property would be destocked by 1 April 2020, but in fact this did not occur until 1 May 2020.

[114] Second, the appellant was told by the second licensee that while the vendors would not give him the lease, the sale agreement would reflect the terms of the lease. There is some dispute as to whether the second licensee merely said "no" to the appellant being given the lease, or whether he added that the sale agreement would reflect the terms of the lease. The appellant has inconsistently given both versions of the conversation. We accept the licensees' evidence that he did make the additional remark, as the appellant himself has conceded.[18]

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[17] Complaint (7 August 2020) at 5.
[18] Complaint (7 August 2020) at 5, submissions to Tribunal with Notice of Appeal (24 August 2021) at [3.13].

[115] As the Committee notes, the additional remark (that the vendors said the sale agreement would reflect the terms of the lease) meant that the licensees were under a duty to make enquiries to check the veracity of that information from the vendors.

[116] It is clear that the licensees did make enquiries of the vendors and their solicitor, the parties whom the licensees would expect to know whether the sale agreement and lease were consistent, given that the licensees did not have the lease. They sent the draft sale agreement to the vendors and the solicitor on 10 December 2019 for review. The vendors' reply on 13 December 2019 at 1:01 pm shows they did not have a copy of the lease, but the solicitor did. The solicitor initially thought she did not, but it seems her reception staff knew that the firm did have a copy.

[117] The solicitor then advised at 4:37 pm on 13 December 2019:

> Yes all good to go – lease condition is fine.

[118] As Ms Wisniewski points out, there is some ambiguity as to whether the solicitor is referring to cl 33 only (identified in the sale agreement as the lease condition) or both the inter-related cls 33 and 34. The solicitor's earlier email at 12:04 pm refers to both clauses. The most sensible interpretation of the email chain is that the solicitor is advising that the sale agreement as a whole, including both clauses relevant to the lease, is satisfactory.

[119] The appellant alleges that the vendors' email of 13 December 2019 at 1:01 pm to the licensees was a red flag alerting them to an inconsistency with cl 34. The inconsistency is not apparent to us. There is information about grass cover, but no date of destocking or possession is given.

[120] We agree with the Committee that the licensees were entitled to rely on the solicitor's advice (that the sale agreement was good to go), given that they did not themselves have a copy of the lease.

[121] Finally, it is important to have regard to the precise terms of cl 34. It states that the property will be destocked by 1 April 2020, which on its face appears to be inconsistent with the surrender of the lease and vacant possession on 1 May 2020 (as per cl 33).

[122] Clause 34 is, however, heavily qualified. It is a "best endeavours" clause only. Moreover, it expressly states that it creates no legal obligation and does not provide the basis for compensation.

[123] The appellant did, or should have, read cl 34 before bidding at the auction. He says the auctioneer stated ("read") that destocking would be by 1 April 2020.[19] The auctioneer no doubt read out or paraphrased cl 34, including the qualifications.

[124] It would seem from the solicitor's email of 13 December 2019 at 12:04 pm and the investigator's email of 27 April 2021 to the lessees that the vendors did make some effort to bring about destocking by 1 April 2020. Whether the vendors satisfied the best endeavours obligation under the sale agreement (to the extent there was any obligation) is beyond the scope of our assessment.

[125] The written representation made to the appellant in the sale agreement about the timing of destocking was clear. It was to occur on 1 May 2020, but the vendors would use their best endeavours to bring that about by 1 April 2020 (though had no legal obligation to achieve this). It is unlikely that the licensees verbally told the appellant anything different.

[126] In summary, the appellant has not established that the licensees misled him or gave him incorrect information about destocking, or withheld from him any material information about destocking. They did not have a copy of the lease. He knew that. The licensees made enquiries of those whom it would be expected would know if the sale agreement drafted was consistent with the lease. They were advised that it was. That advice was correct, given the heavy qualification to cl 34. There is no breach of cl 6.4 of the Rules, or indeed of any other rule.

Water tanks

[127] The complaint here concerns the statement in the marketing materials (the two property reports) that the property had three water tanks for the stock and they were connected to the district scheme.[20]

[128] It transpired that two of the tanks were owned by the lessee who removed them prior to possession and the third was unusable. Nor were the tanks connected to the district scheme.

[129] The licensees say the vendors gave them the information about the water system, via the agency agreement. They inserted it in the property reports, which were then approved by the vendors.

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[19] Email (8 February 2021) appellant to Authority at [3], Notice of Appeal (24 August 2021) at page headed "Notice of appeal – Complaint number C36410".

[20] There is no evidence that the appellant saw the valuation report which had the same information.

[130] The Committee noted that the property reports containing the information about the water supply had recorded that such information had come from the vendors and the agency could not guarantee its accuracy. It further found that as the appellant had raised no specific query about the water tanks, the licensees had no duty to make reasonable enquiries to check that the information was correct.

[131] As to whether there was any query, the appellant says that he did make an enquiry about the tanks on his first inspection with the second licensee. However, that was an enquiry about their location. There is no evidence the appellant asked the second licensee about ownership or the source of the water.

[132] The appellant further says the licensee could have asked the lessee about the water tanks, as he apparently did about other assets. However, the licensees would have had no reason to raise this with the lessee. They were not to know that the lessee might own some of the tanks or that the stock water was not connected to the district scheme.

[133] We agree with Mr Tian and Ms Wisniewski that the licensees were entitled to rely on the information given by the vendors. It came in the agency agreement, the valuation report, the checking of the property information (for the property reports) and the vendors' email of 28 November 2019 to the licensees.

[134] We do not, however, accept Mr Tian's submission that it was confirmed by the accountant or what he describes as a third-party valuation report. There is no evidence that the accountant confirmed the information in the property reports. The information in the valuation report came from the vendors, as the report makes clear. Their valuation was independent, but not the source of much of the information about the property.

[135] Nonetheless, the licensees could rely on information from their clients, the vendors.

[136] It is not realistic to expect licensees to check the ownership of every asset claimed by the vendors, in the absence of something which alerts them to doubt the accuracy of the vendor's information or there is a specific enquiry from the prospective purchaser. A licensee's professional obligation under r 6.4 not to mislead or provide false information or to withhold information is not a substitute for a purchaser's own due diligence.

[137] Like the destocking complaint, where the appellant has overlooked the precise terms of the sale agreement he signed (cl 34), the appellant has overlooked the precise terms of the document in which he received the information about the water system. It was contained in the two property reports which expressly stated that the information

had come from the vendors, had not been checked and purchasers should conduct their own due diligence.

[138] It could not be clearer. The statement is not an unlawful consumer law avoidance mechanism. It is not buried in fine print at the end of the report. It is in large bold print covering half a page at the beginning of the report. It is legitimate.

[139] Turning to the final report of 17 December 2019, it is about 29 pages in length and has numerous facts about the property, probably hundreds. The licensees cannot be expected to provide something akin to a guarantee for them all.

[140] In summary, the appellant did not specifically enquire about the ownership of the water tanks or their connection to the district scheme. There was nothing to alert the licensees to the possibility that the vendors were mistaken. The licensees had no duty to make any enquiries. They were entitled to rely on the information provided by the vendors. Importantly, they made it clear to prospective purchasers, including the appellant, that the latter should conduct their own due diligence. There is no breach of r 6.4 of the Rules, or indeed any other rule.

Conclusion

[141] The licensees acted reasonably and in good faith in respect of the information provided for the timing of destocking and the water system.[21] The appellant has not established that the Committee was wrong to find that there was no conduct issue warranting action. We find there was no breach of the Rules by the licensees, nor unsatisfactory conduct, nor misconduct.

[142] It is not for this Tribunal to determine whether the appellant has remedies against the licensees, the agency or others in the statutory consumer law he cites.

OUTCOME

[143] The appeal is dismissed. The Committee's determination is confirmed.

PUBLICATION

[144] The Committee made an order on 5 August 2021 directing publication of the decision without identifying the complainant, the licensee or the property.

[145] The appellant disagrees with the names being withheld. He objects to the licensees being able to say that there have been no complaints against them. There is

[21] *Douglas v Real Estate Agents Authority*, above n 9.

no evidence that the licensees would say this in the future. Moreover, this complaint has been dismissed. The purposes of the Act (at s 3) are not served by publicly identifying licensees against whom complaints have been dismissed.

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

_____

D J Plunkett
Chair

_____

N O'Connor
Member

_____

F Mathieson
Member