**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2022] NZREADT 7

Reference No: READT 003/2021 & 004/2021

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| **IN THE MATTER OF** | Appeals under s 111 of the Real Estate Agents Act 2008 |
| | **READT 003/2021** |
| **BETWEEN** | **WM** and<br>**NU**<br>Appellants |
| **AND** | **THE REAL ESTATE AGENTS AUTHORITY (CAC 1906)**<br>First Respondent |
| **AND** | **BENJAMIN CARTWRIGHT**<br>Second Respondent |
| | **READT 004/2021** |
| **AND BETWEEN** | **BENJAMIN CARTWRIGHT**<br>Appellant |
| **AND** | **THE REAL ESTATE AGENTS AUTHORITY (CAC 1906)**<br>First Respondent |
| **AND** | **WM** and<br>**NU**<br>Second Respondents |

Hearing in Auckland 16 March 2022

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| Tribunal: | D J Plunkett (Chair)<br>C Sandelin (Deputy Chair)<br>G Denley (Member) |
| Representation: | |
| WM and NU: | Self-represented |
| Counsel for the Authority: | Mr T Bain, Mr I Sugrue |
| Counsel for Mr Cartwright: | Mr C Matsis |

**SUBJECT TO NON-PUBLICATION ORDER**

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**DECISION**
**Dated 28 April 2022**

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## INTRODUCTION

[1] WM and NU (the complainants) were the purchasers of a property being built. Benjamin Cartwright, a licensed salesperson, was the listing agent. He made representations as to the property being available for occupation the following month. The complainants therefore purchased the property. It was still not ready for occupation five months later when the complainants' agreement was cancelled.

[2] The complainants made a complaint against Mr Cartwright to the Real Estate Agents Authority (the Authority) concerning the representation as to early occupation. A Complaints Assessment Committee (CAC 1906) (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 Cartwright. It later made various penalty orders.

[3] The complainants appeal against the penalty orders. Mr Cartwright appeals against the findings of breaches of the Rules and unsatisfactory conduct, as well as the orders.

## BACKGROUND

[4] Mr Cartwright was at the relevant time a salesperson with Ray White Leaders in Johnsonville, Wellington (the agency).

[5] On 18 December 2018, the developer of a multi house development of 22 properties entered into an agency contract with the agency to sell the houses under construction. Mr Cartwright was identified as the listing salesperson. The contract stated:

> NEW BUILD AWAITING TITLE + CCC COA FOR PARTS OF INTERNAL BUILD

[6] The particular house that interested the complainants ([Redacted]) was advertised online on Trade Me. The advertisement stated:

> With an estimated build completion date of July 2019 you will be enjoying your brand new home in no time at all.

[7] The complainants noticed the listing and contacted Mr Cartwright through the online advertisement. He sent them some FAQ information on the development by email on 17 June 2019:[1]

[1] Bundle of documents at 058.

> Is the Title for the property available?: *Not yet, title will be issued upon build completion*.
>
> Is a LIM Report for the property available?: *No – Property is not yet built, a final CCC and COA will be issued prior to settlement*.
>
> Can we make changes? *No the build is now too far along for any changes*.

[8] The complainants were shown the property on 17 June 2019. At the open home, Mr Cartwright said the property would be ready the following month.

[9] The complainants made an offer of $510,000. Mr Cartwright sent a text to them on 20 June 2019 to say the verbal offer had been accepted. He added that the developer "will cancel the current offer on [Redacted] tomorrow" and sign with them in due course.

*Complainants buy the property*

[10] An offer in the form of a sale and purchase agreement (dated 20 June 2019) was drawn up. It was signed by the complainants and the developer. It had a sunset clause as a special condition:

> **19 Vendor's conditions**
>
> 19.1 This Agreement is conditional upon:
>
> 19.1.1 The Vendor procuring deposit of a subdivision plan to effect issue of a separate fee simple Record of Title for the Property.
>
> 19.1.2 The Vendor achieving Practical Completion for the Dwelling.
>
> 19.1.3 The Vendor obtaining a Code Compliance Certificate or Certificate of Acceptance for the Dwelling.
>
> 19.2 The conditions contained in clauses 19.1.1, 19.1.2 and 19.1.3 are inserted for the benefit of both the Vendor and the Purchaser and are due for satisfaction on 30 September 2019.
>
> …

[11] In explaining this clause to the complainants, Mr Cartwright reiterated that they need not worry about it, as in July they could move in.

[12] The complainants then set about engaging a valuer, solicitor and securing finance.

[13] A valuation for the bank was produced on 25 June 2019. The house was described as "nearly completed".[2] It noted that, as with all new builds, there was uncertainty as to the timing of completion.[3] The report contained photographs of the

[2] Prendos Residential Valuation (25 June 2019) at [1.0].
[3] At n 1.

inside and outside of the house. They showed the house itself to be largely complete, though some building work on the inside was apparent. The grounds and driveway for the development as a whole were plainly substantially incomplete.

[14] The sale agreement became unconditional as to finance on 10 July 2019 and the deposit was paid on 15 July 2019.

[15] On 18 July 2019, the complainants sent an email to Mr Cartwright seeking some minor variations to the house. As there was no response, the complainants had a discussion with Mr Cartwright's colleague on 13 August and sent him an email on 14 August. They complained about Mr Cartwright's unprofessional communication and lack of truthfulness. The latter sent an email on 14 August to say he had forgotten to action their request of the developer, for which he apologised. He would put it to the developer and get back to them. He did not get back to them.

[16] There was an exchange of emails on 22 August 2019 between the complainants and Mr Cartwright. The complainants said they had been waiting for a week. They expressed disappointment as to the lack of an update. They were concerned that on 30 September, there was a risk the developer could pull out and try to make more money. They had accepted the risk initially on the basis that Mr Cartwright was happy to answer their questions and assist with their enquiries. They had no updates on the development and had to work on the basis that cancellation was a possibility, as the move-in date had shifted from July to October and could be even later. They would appreciate some clarity after he had spoken to the developer.

[17] Mr Cartwright replied immediately by email. He said he would follow up with the developer. The complainants responded saying it should not take so long to get an answer and noting the lack of clarity around the completion date. Mr Cartwright promptly replied to say that they should assume the developer's answer would be 'no' to their two requests. He would continue to chase.

[18] On 28 August 2019, Mr Cartwright sent an email to the complainants to say that he had heard back from the developer who was reluctant to customise houses.

[19] The complainants replied by email to Mr Cartwright the following day. They said the more urgent matter was whether they were still looking at a move-in date in the first week of October. An update was sought.

[20] As there was no response from Mr Cartwright, the complainants sent an email to the agency's manager on 8 September 2019, following a discussion with him. They complained about continuously following up, but getting quite short responses, if any.

[21] Mr Cartwright sent an email to the manager on 9 September 2019 to say that a colleague had sent an updating group email on 2 September, which had not been opened by the complainants. It had said that if there were no hold-ups, it was hoped they could move in this side of Christmas.

[22] Mr Cartwright sent a group email to all the purchasers, including the complainants, on 30 September 2019. As for [Redacted], he said that it was complete (minus finishing touches and the installation of appliances). As for houses 1 to 10, they were on site, though two were missing their top layer. The car decks were being installed and were near completion. The "agenda" then listed further work, including the installation of electric cables, fibre telecommunication cables, driveways, landscaping and the "top units" (presumably houses 1-10) to be finished. He said that it looked like practical completion would be in December 2019, following which applications could be made for CCCs, CoAs and titles. It looked like the purchasers could not move in until mid-January at the earliest, or even mid-February.

[23] The developer sent an email to Mr Cartwright on 6 November 2019 requesting him "to offer" [Redacted] again. He needed to maximise the pricing as he was not making any profit on the development. Further cost increases had been communicated that day.

*Sale agreement cancelled*

[24] On 20 November 2019, the developer's solicitor wrote to the complainants' solicitor "to avoid" the sale agreement, citing the sunset clause which could not be satisfied. The deposit was returned.

[25] In February 2020, media articles about the use of the sunset clause in the development reported that completion would occur in March 2020 and the titles would be issued in April 2020. The complainants were among the disappointed purchasers interviewed.

**THE COMPLAINT**

*The complainants' evidence to the Authority*

[26] In about February 2020, the complainants made a complaint to the Authority alleging deceptive and dishonest selling practices by Mr Cartwright. He showed them a property on 17 June 2019, reiterating a move-in date of July 2019. In reliance on that, they made a bid. They moved quickly, got a valuation and rushed to instruct a solicitor to prepare the offer. Mr Cartwright would have known that the property was nowhere near completion because consents had not been granted. If they had been told that

completion would not be for another six to 10 months, they would not have bid. Mr Cartwright had acted with the developer in bad faith in selling these homes.

[27] The deception had led them to sell most of their furniture thinking they would shortly buy new for the new home. Mr Cartwright inconvenienced them financially and disrupted their day-to-day life. They should be reimbursed their costs incurred in relying upon the information about the move-in date. They would also like an apology and possible retraining of Mr Cartwright in ethics.

[28] In an email to the Authority on 27 February 2020, the complainants stated that Mr Cartwright had not been in touch with them since the agreement was cancelled. There had been no courtesy phone call to explain anything.

[29] There was a further email from the complainants on 29 April 2020. They said that Mr Cartwright told them not to worry about the sunset clause as it was only a formality and would never come up. The way the property was sold to them was that there was absolutely no doubt that it would be ready by the following month. They confirmed he drew the clause to their attention.

[30] Then on 16 July 2020, the complainants advised the Authority that they knew the ramifications of the sunset clause, but Mr Cartwright's specific wording "don't worry about it, it won't affect you because you can move in next month", put them at ease.

*Mr Cartwright's evidence to the Authority*

[31] A director of the agency provided a response to the complaint on 11 June 2020. In a chronological summary of events, the director stated:

> The development had previously been listed and sold by another organisation (unknown) but due to circumstances of which the licensee is unfamiliar, the units had come back onto the market as a consequence of operation of earlier sunset clauses.

[32] The director stated that the developer initially advised Mr Cartwright that a July 2019 settlement was anticipated. At the time of the Trade Me advertisement, there was substantial work in progress with considerable investment from the developer and there were no known issues with council's consent, nor any reason to anticipate them. While the complainants had sought updates regarding settlement, Mr Cartwright had been unable to obtain any direction from the developer until the end of September. In the developer's email of 6 November 2019, he requested Mr Cartwright to offer [Redacted] again, but did not specifically notify an intention to activate the sunset clause.

[33] According to the director, the developer cancelled the agreement using the sunset clause which the complainants were aware of from the outset. Mr Cartwright passed on what he knew, when he knew. There was no misleading or false information or withholding of information from him.

*Decision of the Complaints Assessment Committee (CAC 1906) on liability*

[34] On 24 September 2020, the Committee issued its decision. It found Mr Cartwright had breached the Rules and that this amounted to unsatisfactory conduct.

[35] The Committee agreed with the complainants' contention that Mr Cartwright would have known that the property was nowhere near completion, when they were told in June 2019 that in July 2019 they could move in. This was because the consents had not been granted by the councils.[4] The agency contract showed the property was being developed with others in a continuous area and was to be sold with some or all of the others. That contract also stated that the properties were waiting for CCCs, CoAs and titles for internal parts of the build.

[36] Mr Cartwright would have known how those aspects would have affected the intended purchase. However, he did not inform the complainants.

[37] The Committee found that Mr Cartwright did not deal fairly with all parties engaged in the transaction, so he breached r 6.2 of the Rules. Further, he withheld information that should have been provided to the complainants, in breach of r 6.4.

[38] As for the sunset clause, the Committee noted that the complainants said they understood its ramifications, but it was Mr Cartwright's comment not to worry about it because they could move in the following month, which put them at ease. They had relied on this statement. The Committee considered this comment to be misleading and not in good faith.

[39] The Committee noted the agency contract and found it difficult to believe that Mr Cartwright had not been involved in other sales in the development where the sunset clause had been invoked. Publicity showed that other purchasers had been affected. He had advised the complainants after the first viewing that their verbal offer had been accepted and the then current offer would be cancelled. This suggested that Mr Cartwright was familiar with the way the developer would cancel that current agreement.

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[4] Consents were required from two councils as the houses were built off-site in the territory of another council.

[40] The Committee considered that the 6 November 2019 email from the developer was referring to the sunset clause and cancellation of the agreement on [Redacted]. In response to the complainants' allegation that the developer and Mr Cartwright were working in unison, Mr Cartwright said this was not true. The Committee was of the view that just because the developer had exercised his right to invoke the clause, that did not mean Mr Cartwright knew this was going to happen.

[41] The Committee considered that communication between Mr Cartwright and the complainants was poor and the complainants were misled. He had breached rr 6.2 and 6.4. His conduct was unsatisfactory.

*Decision of the Complaints Assessment Committee (CAC 1906) on orders*

[42] On 15 February 2021, the Committee issued its decision on penalty orders. It noted that the complainants had said that since cancellation of the agreement, there had been no communication from Mr Cartwright. He had not expressed any remorse.

[43] The Committee recorded that, for Mr Cartwright to have promoted the property in a deceptive way to prospective purchasers by providing a move-in date that was never going to be possible, he was not dealing fairly with the parties and that was why unsatisfactory conduct had been found. As for the sunset clause, the Committee was disappointed with his cavalier attitude and his blatant disregard for the importance of the clause. The complainants may have understood the ramifications of the clause, however his comment that they need not worry about it because they could move in the following month, was misleading and not in good faith.

[44] The Committee noted that the Tribunal had made a finding of misconduct against Mr Cartwright in 2018 and a Committee had made a finding of unsatisfactory conduct in 2019 (Mr Cartwright's previous disciplinary record will be reviewed later).

[45] It was considered that the conduct of Mr Cartwright was at the upper end of the unsatisfactory scale and that there were no mitigating circumstances. A fine of $7,000 would reflect the conduct.

[46] Mr Cartwright was ordered to:

1. Pay $7,000 to the Authority within 21 days.

2. Provide a written apology to the complainants within 21 days.

[47] The Tribunal is aware that Mr Cartwright has not made the apology. He told the Tribunal that if his appeal is dismissed, he would do so.

## APPEAL

[48] On 11 March 2021, the complainants appealed to the Tribunal against the orders made in the decision of 15 February 2021.

[49] On 15 March 2021, Mr Cartwright appealed against both decisions of the Committee, disputing the substantive findings as to his unsatisfactory conduct and the orders.

*Bundle of documents*

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

*Ruling of the Tribunal*

[51] On 3 August 2021, the Tribunal declined to grant leave to Mr Cartwright to file further evidence and to restrict publication of the Committee's decision. We record that we have not reviewed the further evidence filed in support of the leave application as part of our deliberations for this decision.

## JURISDICTION AND PRINCIPLES

[52] These appeals are pursuant to s 111 of the Real Estate Agents Act 2008 (the Act).

[53] An appeal is by way of a rehearing.[5] It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.[6] After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.[7] If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.[8]

[54] A hearing may be in person or on the papers.[9] A hearing in person may be conducted by telephone or audiovisual link.

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[5] Real Estate Agents Act 2008, s 111(3).
[6] *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] & [83].
[7] At s 111(4).
[8] At s 111(5).
[9] At ss 107, 107A.

[55] Mr Cartwright's appeal is against the determination of the Committee under s 89(2)(b). 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.[10] 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.[11]

[56] Both parties have appealed against the penalty orders. As counsel for the Authority point out in their written submissions, the Tribunal has previously categorised such appeals as appeals against the exercise of a discretion.[12] This requires an appellant to establish that the Committee made an error of law or principle, took into account irrelevant matters or failed to take account of relevant matters, or that the Committee's decision on penalty is plainly wrong. More recently, there has been some controversy as to whether this is the correct approach.[13] The other parties do not address this issue. We accept that the Tribunal's earlier jurisprudence is correct. We will leave it to the higher courts to resolve any controversy.

## DISCUSSION

[57] The Committee found Mr Cartwright to have breached rr 6.2 and 6.4 of the Rules:

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

[58] We will deal with Mr Cartwright's appeal against the liability decision first, whereby he was found to be guilty of unsatisfactory conduct, having breached the Rules referred to above. He contests all the breaches. We will deal with each in turn.

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[10] *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].

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

[12] *Deng v Real Estate Agents Authority (CAC 1901)* [2020] NZREADT 27 at [49], following *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804 at [86].

[13] *Walker v Real Estate Agents Authority* [2021] NZREADT 12 at [17], noting the issue as to conflicting authorities was raised in *Drever v Complaints Assessment Committee 403* [2017] NZHC 2213 at [20].

*Whether Mr Cartwright could have reasonably believed in June 2019 that occupation could occur in July 2019*

[59] It was represented to the complainants and other prospective purchasers by Mr Cartwright in the online advertising in June 2019 that occupation could occur in July 2019.

[60] Mr Cartwright repeated the statement to the complainants when they viewed the property on 17 June 2019. He said they could move in the next month.

[61] And then on about 20 June, when Mr Cartwright was going through the sale agreement with the complainants at the time of their offer and the sunset clause was drawn to their attention, he told them not to worry about it as they would be able to move in the next month.

[62] The Committee found that Mr Cartwright would have known in June 2019 that the property was nowhere near completion. The Committee said he would have known because the agency agreement (18 December 2018) stated that the property was being developed with others in a continuous area and was to be sold with some or all of the others. It further stated that the properties were waiting for titles, CCCs and CoAs.

[63] Mr Cartwright does not dispute making the representation as to moving-in in July 2019, but contests knowing in June 2019 that the house could not be completed and occupied by the end of July, some six weeks later.

[64] Mr Matsis, on behalf of Mr Cartwright, contends that there is no evidence supporting the complainants' view that Mr Cartwright would have known the property was nowhere near completion. Indeed, he says there is direct and indirect evidence showing that no-one had any reason to think that the property was nowhere near completion in June 2019.

[65] While the Committee has, in our view unfortunately, couched its findings in the language of deceit and dishonesty, we conclude that the Committee's overall outcome is warranted.

[66] The Committee adopted the complainants' language of intentional wrongdoing or dishonesty. It found that Mr Cartwright "would have known" the property was nowhere near completion and that he was "deceptive".[14] He did not act in "good faith". He was found to have promoted the property in a "deceptive way" by providing a move-in date

[14] Complaint C34592 Cartwright (24 September 2020) at [3.4]–[3.6] and subheading at top of 5.

that was "never going to be possible".[15] He had a "blatant disregard" for the importance of the sunset clause.

[67] Yet the outcome of the complaint was a finding of unsatisfactory conduct as Mr Cartwright's conduct fell short of the standard that a reasonable member of the public would be entitled to expect from a reasonably competent licensee.[16]

[68] We agree with the Committee's outcome, but not with the extravagant language employed. The evidence does not establish deliberate falsity or dishonesty. We find that for the reasons given below, Mr Cartwright did not exercise the skill, care and judgement expected of a reasonably competent licensee, in representing the property as ready for occupation the following month. In other words, he was negligent, rather than wilfully misrepresenting the true position.

[69] Notwithstanding the Committee's adoption of the complainants' language, we believe that it had negligence or incompetence in mind, given the outcome. Indeed, if there was dishonesty, they should have referred the complaint to the Tribunal to consider whether the more serious charge of misconduct was established.[17] But whatever the Committee had in mind, it is our conclusion that Mr Cartwright breached the Rules, that his conduct fell short of what would be reasonably expected and that he was negligent. It was unsatisfactory conduct as the Committee concluded, not misconduct.

[70] In other words, it is our view that Mr Cartwright "should have" known in June 2019 that the complainants' property was nowhere near completion, not that he "would have" known.

[71] In conjunction with what Mr Cartwright must have observed on-site in June, we agree with the Committee that the agency contract is compelling evidence that the property should not have been considered to be near completion as at about 20 June 2019 when the complainants made their offer.

[72] It would have been clear to Mr Cartwright from that contract that the property was to be developed and sold with others. The development consisted of 22 properties. Plainly, the developer would have told him that in December 2018 and it would have been obvious from his first site inspection presumably about then. He cannot have expected that [Redacted] would somehow be sold and occupied on its own, surrounded by on-going construction. He does not say he did expect that.

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[15] Complaint C34592 Cartwright (15 February 2021) at [3.8]–[3.9].
[16] Complaint C34592 Cartwright, above n 14 at [2.3] and [3.1].
[17] Compare ss 72 (unsatisfactory conduct) and 73 (misconduct) of the Real Estate Agents Act 2008.

[73] As to the state of [Redacted], the Committee identified the critical missing event preventing occupation. It was a CCC and/or CoA from one or two councils and the title. Mr Cartwright knew from December 2018 they were needed. He knew in June 2019 the developer did not have them for [Redacted] (and for much or all of the development). He does not say the developer had told him he had them for [Redacted] or even that he had already applied. Whatever optimism the developer was expressing to him in June 2019 regarding completing the construction and availability for occupation, Mr Cartwright would have known the absence of these documents would be fatal to early occupation.

[74] The evidence shows that a reasonable licensee should not have believed then that the state of [Redacted] was such that completion of that lot at least was imminent and could be expected promptly, let alone the development as a whole. There are photographs of the house at [Redacted] and the immediate surrounds in the valuation report of 25 June 2019 (inspection on 19 June). It shows a house largely complete, though there is building work evident in the kitchen and bathroom. There is a pile of building materials in the lounge room. The driveway for the development, presumably leading to [Redacted], is substantially incomplete. As for other houses, there is a photograph of three lines of houses. The line on the higher ground (perhaps houses 1–10) are nowhere near completed.

[75] It is also clear from Mr Cartwright's group email of 30 September 2019 that, three months earlier at June 2019, a reasonable licensee should not have believed that the development or even [Redacted] specifically was ready to be consented and occupied. While [Redacted] only needed finishing touches and appliances in September, two houses still needed their upper storey. Nor had the car decks been completed. The electric cables, fibre cable and driveway concreting all needed to be finished. It was only after all that work had been done that the certificates and titles could be sought. That was the state of the development (including [Redacted] as to the outside work) three months after the viewing by the complainants. Self-evidently, that and even more work would have been unfinished in June.

[76] The development, including [Redacted], was not certified and occupied until about March 2020. While Mr Cartwright would not have known in June 2019 that it would take so long, the occupation some eight or so months after he represented [Redacted] would be ready is more evidence that no licensee could have reasonably believed in June that occupation could occur within a mere six weeks.

[77] To that we would add the length of time it takes for councils to inspect and consent building work. There is no evidence before us of that, but Mr Cartwright will know that it is not a quick process. The council's process would cause delay, even if the

building work was complete. He had no reason to believe on about 20 June that the relevant application(s) had even been made to the council(s). This is another factor showing that Mr Cartwright cannot have reasonably believed in mid-June that the complainants' house could be occupied by the end of July.

[78] None of this would have been known to the complainants at about 20 June 2019 when they made their offer. They would have observed on-site on the 17th what appears from the valuation report photos to be a largely complete house, with some perhaps minor building work to be done. While they would have seen on-site precisely what Mr Cartwright saw, they would not have understood its implications for occupation. They would have known from the information sent to them by Mr Cartwright on the 17th and from the sunset clause that the title and certificate(s) were missing, but they would not have known the critical documents had not been sought and that the development was not in a state where they could be sought in the near future.

[79] Mr Matsis characterises Mr Cartwright's statement as to moving in as an expression of opinion concerning a future event not within his control, which the complainants would have understood. Whether an opinion or fact, Mr Cartwright must exercise care and expertise in giving accurate information. The distinction between fact and opinion would not have been apparent to the complainants. However the representation is characterised, we accept their evidence that they believed Mr Cartwright when he informed them that they would be in occupation the following month and relied on that statement in deciding to make an offer.

[80] As noted above, we therefore agree with the Committee that Mr Cartwright knew the house was waiting for its title and for the council(s) to issue a CCC and/or CoA. He would have known occupation could not occur until they were issued. He knew such documents would not have been issued for the complainants' house only, as it was being developed with others. He had no reason to believe the developer had applied for them.

[81] The Committee correctly found that Mr Cartwright represented to the complainants in June 2019 that they could occupy the property the following month. He should reasonably have known then that the house was nowhere near being occupied. He did not deal fairly with them, in breach of r 6.2 of the Rules. Furthermore, the complainants were misled, in breach of r 6.4.

[82] Turning specifically to Mr Cartwright's explanation of the sunset clause, the Committee found that his comment that the complainants need not worry because they

could move in next month was not made in good faith and was misleading, in breach of rr 6.2 and 6.4.[18]

[83] In relation to this clause, Mr Matsis criticises the Committee's finding that Mr Cartwright had been involved in other sales in the complex that had their sunset clauses invoked by the developer. It is submitted that to the extent that the Committee was saying that such involvement pre-dated the discussions with the complainants in June 2019, this was denied as there was no evidence to support such a finding.[19] He points out that the agency's director on 11 June 2020 informed the Authority that another unknown organisation had previously been involved in selling the development.

[84] We do not agree that the Committee was referring to any involvement by Mr Cartwright in cancellations prior to June 2019. It was referring to other cancellations relying on the sunset clause at the time of the cancellation of the complainant's agreement.[20]

[85] However, there is one comment of the Committee in the context of the sunset clause that is ambiguous. It noted that Mr Cartwright advised the complainants after viewing the property that the existing offer on [Redacted] would be cancelled and their verbal offer had been accepted. This "suggested" to the Committee that Mr Cartwright was familiar with the way the developer "would" cancel that agreement.[21]

[86] Plainly Mr Cartwright was familiar with the sunset clause and would have known how it could be operated by the developer. If the Committee is suggesting Mr Cartwright knew in June 2019 that the developer intended to cancel the complainants' agreement, there is no evidence to support such a finding. The cancellation of an offer obtained from an earlier marketing campaign by another agency, not involving Mr Cartwright, does not begin to establish this.

[87] The Committee may not, however, have been saying that. This is because the Committee later appear to find that Mr Cartwright was not working in unison with the developer since he did not know that cancellation would happen (the allegation was that he signed up purchasers because the developer needed finance with a view to cancelling later).[22]

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[18] Complaint C34592 Cartwright, above n 14 at [3.10] & [3.20].
[19] Submissions Mr Matsis (8 October 2021) at [45].
[20] Complaint C34592 Cartwright, above n 14 at [3.14]. See the publicity referred to at 157–172 of the bundle of documents.
[21] Complaint C34592 Cartwright, above n 14 at [3.15].
[22] At [3.19].

[88] We agree with the Committee's finding in relation to the sunset clause that Mr Cartwright's statement that they need not worry because they could move in the next month was misleading, in breach of r 6.4. We do not, however, see any lack of good faith.

*Whether Mr Cartwright withheld information about the council's certificates and the title*

[89] The Committee found that not only did Mr Cartwright misrepresent the move-in date, but he did not inform the complainants of "these aspects of the development" and they proceeded with their offer in those circumstances.[23] The aspects were the need to wait for the certificate(s) of the council(s) and the title. Accordingly, he withheld information and breached r 6.4.

[90] We have already found that the complainants did know about the need for one or more certificates and a title. They were informed of that in the FAQ information received on 17 June. They also knew that from the sunset clause. They accepted knowing the ramifications of the sunset clause.

[91] The complainants' evidence is that, despite understanding the sunset clause, it was Mr Cartwright's statement that they should not worry about it since they could move in the following month, that put them at ease and led them to make an offer.

[92] To the extent that the Committee is saying that Mr Cartwright did not inform them of the need for a certificate and title, that is incorrect. It is really the misrepresentation as to the occupation date that is the overriding wrong by Mr Cartwright. While we agree with the Committee that he withheld advising the complainants of the critical nature of those documents for occupation and that the development was not in a state where they could be sought, and that he therefore breached r 6.4 (as to withholding information), that is really just another way of saying he unreasonably dismissed the sunset clause in telling them they could occupy the following month. The withholding of information about the impact of the necessary documents is not a stand alone act of wrongful conduct. We see it as part of the overriding misrepresentation as to the occupation date.

*Whether Mr Cartwright's communication with the complainants was poor*

[93] The Committee found the communication between Mr Cartwright and the complainants to be poor. While the complainants had a general complaint about communication, the Committee focused solely on the developer's email of 6 November 2019 (aside from withholding information about the title and certificate dealt with above).

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[23] At [3.6].

It found that the email contained important information which was not passed onto the complainants.[24] The important information is not specified. The Committee later went on to apparently find that Mr Cartwright was not, however, working in unison with the developer and did not know cancellation was going to happen.[25]

[94] Notwithstanding what appears to be a finding as to Mr Cartwright's lack of knowledge as to the developer's intention, the Committee concluded that the communication between Mr Cartwright and the complainants was poor and that he withheld information, in breach of rr 6.2 and 6.4.[26]

[95] It is difficult to follow the Committee's reasoning here.

[96] To the extent that the Committee is talking about Mr Cartwright's original representation as to moving in, in the discussion concerning the sunset clause, it is correct that he was misleading and withheld information. We would observe in this context that it adds nothing to that wrong to say that his communication was poor. The Committee does not expressly identify the information withheld, but the only information discussed in that section of the decision which the Committee said was not passed on was the 6 November email.

[97] However, we do not accept that Mr Cartwright's failure to pass on the 6 November email to the complainants evidences poor communication. Even if it could be said that the developer's intention to cancel their agreement was clear, we agree with Mr Matsis that the email was confidential information from the developer as to his intention. Until the developer actually cancelled the agreement on 20 November, there was nothing Mr Cartwright was required to tell the complainants. Nor would notice of a possible or even probable cancellation two weeks earlier have been of any assistance to them, except perhaps to the extent they could have started looking for another property earlier.

[98] The Committee's finding that Mr Cartwright withheld the contents of the 6 November email from the complainants is vacated. It follows that its finding that his communication was poor is also set aside. The breaches of rr 6.2 and 6.4 based on the failure to disclose the email are consequently set aside.

*Whether the Committee's penalty orders are appropriate*

[99] It will be recalled that the Committee ordered Mr Cartwright to:

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[24] At [3.17].
[25] At [3.19].
[26] At [3.20].

1. Pay a fine of $7,000.

2. Apologise to the complainants.

[100] There are two appeals concerning the orders. The complainants submit that Mr Cartwright should undergo some retraining. Additionally, they seek to recover certain costs. On the other hand, Mr Cartwright contends that, since the Committee made incorrect findings about his conduct, the penalty was based on incorrect assumptions and was excessive.

[101] Any discussion of the orders has to have regard to Mr Cartwright's previous disciplinary record, as noted by the Committee in setting the orders.

Previous disciplinary record of Mr Cartwright

[102] On 6 July 2018, the Tribunal found Mr Cartwright to be guilty of misconduct, following a plea of guilty.[27] He was censured, ordered to complete a paper (unit standard 23136 – described by the Tribunal as knowledge of misleading conduct and misrepresentation), ordered to pay compensation of $30,518.50 to the purchaser of a property and to pay a fine of $5,000. Mr Cartwright had failed to disclose defects with the property and suggested that the purchaser rely on a building report commissioned by the vendor. He had also sent the purchaser a blank sale and purchase agreement lacking material particulars, a breach of r 9.9 of the Rules. His conduct was found to be seriously incompetent or seriously negligent. The Tribunal found that the defects in the property were obvious to him, but not to the purchaser.

[103] Then, on 25 July 2019, Complaints Assessment Committee 520 ordered Mr Cartwright to reimburse a purchaser $876.89 towards their legal costs and to pay a fine of $3,500.[28] He had received back from the vendor a counter-offer without checking it (a clause inserted by the purchaser had been deleted). This was found to be a breach of r 5.1 and unsatisfactory conduct. The agreement was ultimately cancelled and the deposit refunded. The Tribunal notes that Mr Cartwright's conduct there was in January 2017, before the Tribunal upheld the earlier complaint and ordered some retraining.

Our liability findings

[104] We have upheld the Committee's finding of unsatisfactory conduct (conduct falling short of that of a reasonably competent licensee, to which we would add negligence) based on the following breaches:

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[27] *Complaints Assessment Committee 409 v Cartwright* [2018] NZREADT 25.
[28] Complaint C26065 Cartwright and Martin (25 July 2019).

1. Mr Cartwright represented that occupation could occur the next month when he should reasonably have known that the house was nowhere near ready for occupation, in breach of rr 6.2 (not dealing with the complainants fairly) and 6.4 (misleading the complainants).

2. Mr Cartwright withheld information (as to the effect on occupation of the lack of certificates and the state of the development), in breach of r 6.4.

[105] We will now assess in turn each order made by the Committee or sought by a party.

Fine

[106] The Committee stated that Mr Cartwright had promoted the property to the complainants in a deceptive way. It was disappointed with his cavalier attitude and blatant disregard for the importance of the sunset clause. It considered his conduct to be at the upper end of the unsatisfactory conduct scale and that there were no mitigating circumstances. It noted his previous disciplinary record.

[107] On behalf of Mr Cartwright, Mr Matsis' principal submission is that the penalties reflected what is contended to be the Committee's erroneous view of Mr Cartwright's conduct. It is submitted that the Committee was not correct to describe his promotion of the property as deceptive by providing a move-in date which was never going to be possible.

[108] There is some force in the submission of Mr Matsis in that the language used by the Committee in the orders decision does not reflect the outcome of the liability decision, which was unsatisfactory conduct since Mr Cartwright's fell short of what would be reasonably expected. He was negligent. He was not seriously negligent or dishonest, which would amount to misconduct. While we disagree with the Committee as to the duty to disclose the 6 November email and hence the finding of poor communication, that does not materially affect the overall gravity of the wrongdoing. We find Mr Cartwright's conduct to be at the mid-point of unsatisfactory conduct, rather than the upper end, since there was no intentional deception.

[109] The Committee found there were no mitigating circumstances.[29] We agree. We find there is limited remorse and acceptance of wrongdoing (see the discussion in the apology section next).

[29] Complaint C34592 Cartwright, above n 15 at [3.12].

[110] We accept the complainants' evidence that Mr Cartwright's misrepresentation induced them to enter into the sale agreement. They recovered their deposit, but they were effectively kept out of the market for five months. They found the experience "horrendous". While they are wrong to attribute dishonesty to Mr Cartwright, we acknowledge the emotional and financial effect of the delays on them.

[111] We have found the unsatisfactory conduct to be mid-level and it is noted that the maximum fine is $10,000. Mr Cartwright's disciplinary record is an aggravating factor. Having regard to his record (including previous fines of $5,000 and $3,500), a fine of $7,000 is appropriate.

Apology

[112] Mr Cartwright was directed to apologise to the complainants. He has not done so. Mr Matsis says Mr Cartwright should not have to apologise for any deliberate behaviour (the representation regarding the move-in date), as he does not accept that finding. He acknowledges though that the delay has had an impact on the complainants, as they assert. He confirmed that Mr Cartwright would apologise, as the Committee directed, if his appeal fails.

[113] The Committee noted that the complainants sought an apology in order that Mr Cartwright acknowledge their heartbreak and the effect his conduct had on them. They told the Tribunal it had been a very emotional process for them. They had trusted him and there had been a significant personal cost to them.

[114] The complainants told the Tribunal that at no time had Mr Cartwright even said to them that he was sorry for what had happened (that delays had caused the cancellation of their contract). He lacked awareness of the situation they were left in. We agree. Mr Cartwright could have expressed some remorse, or at least regret, without admitting any intentional misrepresentation.

[115] As we have accepted the Committee's finding as to the misrepresentation concerning the move-in date, which the complainants believed and relied on, it is appropriate that Mr Cartwright apologise. To his credit, he is prepared to do so.

Training

[116] The Committee did not consider whether Mr Cartwright would benefit from any additional training.

[117] The complainants submit that Mr Cartwright should undergo significant ethics training, as this is not the first time he has been disciplined. Mr Matsis denies questionable ethics on the part of Mr Cartwright. It is not accepted that there is a theme or pattern to the complaints against Mr Cartwright. Mr Bain said that the Authority was neutral as to whether the Tribunal should make any training order.

[118] We note that in July 2018, the Tribunal ordered Mr Cartwright to complete unit standard 23136 (knowledge of consumer protection law related to real estate practice). He did so in September 2018. Regrettably, the misrepresentation made here in June 2019 was after undertaking that training. Nonetheless, we do not think it worthwhile to require Mr Cartwright to complete the same course again. We are hopeful he has learned a lesson concerning the accuracy of information given to potential purchasers.

[119] There is no evidence that Mr Cartwright's ethics are compromised.

[120] We decline to order training.

Costs and compensation

[121] The Committee noted that the complainants had requested reimbursement of the monetary costs incurred by the transaction. They provided invoices for valuation and legal fees. In their submissions to the Tribunal, they claim a modest $1,931.60. The Committee was of the view that the costs of purchase would be incurred whether the transaction proceeded or not. It therefore made no order for costs.

[122] The reason given by the Committee for declining such relief is wrong, as the wasted expenditure was a direct result of the complainants' reliance on Mr Cartwright's misrepresentation. If he had not misrepresented the occupation date, they would not have incurred those costs. However, that does not mean that the Committee's conclusion that the complainants were not entitled to recover such expenses is wrong.

[123] The Committee's power to order costs is restricted to "costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee".[30] Plainly, the expenses incurred by the complainants were not incurred in the course of the Committee's investigation and deliberations.

[124] The other potential avenue available for recovery is an order for compensation. The Committee cannot order compensation itself, but has a power to refer a complaint to the Tribunal to consider whether it should make such an order.[31]

[30] Real Estate Agents Act 2008, s 93(1)(i).
[31] At s 93(1)(ha).

[125] That power was inserted into the Act on 29 October 2019. While the Committee's decision post-dated the provision, the power cannot be used to make a referral in respect of conduct that occurred before the power existed.[32]

[126] The complainants made their offer on the property on about 20 June 2019. Counsel for the Authority contends they must have incurred their costs prior to this date. Whether prior to this date or prior to the sale agreement becoming unconditional as to finance on 15 July 2019, they were incurred before 29 October 2019. While the subject of the complaint concerned Mr Cartwright's conduct until cancellation occurred on 20 November 2019, we do not find any of it on or after 29 October 2019 to be wrongful. Moreover, the costs had been incurred well before then.

[127] We accept the submissions of counsel for the Authority that the Committee had no power to refer to the Tribunal what in reality was a claim for compensation.

[128] The Committee correctly awarded no costs or compensation to the complainants.

**OUTCOME**

[129] Mr Cartwright's appeal against the liability decision of 24 September 2020 is partially allowed. The finding that his failure to disclose the email of 6 November and that his communication was therefore poor, thereby breaching rr 6.2 and 6.4 in such respects, is set aside. The appeal is otherwise dismissed as to the outcome of the Committee's decision.

[130] The complainants' appeal against the orders decision of 15 February 2021 is dismissed.

[131] Mr Cartwright's appeal against the orders is dismissed.

[132] 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**

[133] The Committee directed publication of its decisions without the names or identifying details of the complainants, but stating the name of the licensee and the agency.

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[32] *Walker v Real Estate Agents Authority*, above n 13 at [53].

[134] 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 complainants or the property, but naming the licensee and his agency.

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D J Plunkett
Chair

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C Sandelin
Deputy Chair

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G Denley
Member