

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2017] NZREADT 67

READT 002/17 and 003/17

IN THE MATTER OF

Appeals under section 111 of the Real Estate Agents Act 2008

BETWEEN

CHRISTOPHER and MARCIA WOULDES
Appellants

AND

THE REAL ESTATE AGENTS AUTHORITY
(CAC 409)
First Respondent

AND

SIMON TREMAIN and MARLENE
NATHAN
Second and Third Respondents

READT 013/17

BETWEEN

MARLENE NATHAN
Appellant

AND

THE REAL ESTATE AGENTS AUTHORITY
(CAC 409)
First Respondent

AND

CHRISTOPHER and MARCIA WOULDES
Second Respondents

Hearing:

30 October 2017 at Hastings

Tribunal:

Hon P J Andrews, Chairperson
Mr G Denley, Member
Ms C Sandelin, Member

Appearances:

Mr Wouldes
Ms N Copeland, on behalf of the Authority
Mr T Rea, on behalf of Mr Tremain and Ms
Nathan

Date of Decision:

24 November 2017

DECISION OF THE TRIBUNAL

Introduction

[1] This decision concerns two appeals, which were heard together:

[a] The appeal by Mr and Mrs Wouldes against the decision of Complaints Assessment Committee 409 (“the Committee”), dated 8 December 2016 (the substantive decision”);¹ and

[b] The appeal by Ms Nathan against the substantive decision, and against the penalty orders made in the decision of the Committee dated 16 March 2017 (“the penalty decision”).²

[2] The Committee’s substantive decision related to Mr and Mrs Wouldes’ complaint against Ms Nathan as to her conduct during their purchase of an apartment in a multi-level complex in Napier. Ms Nathan was the listing salesperson and marketed the property. In the course of the Committee’s investigation of the complaint against Ms Nathan, it commenced an investigation into Mr Tremain, pursuant to its powers under s 78(2) of the Real Estate Agents Act 2008 (“the Act”). The Committee made a finding of unsatisfactory conduct against Ms Nathan, and decided to take no further action against Mr Tremain. In its penalty decision, the Committee censured Ms Nathan, and ordered her to complete specified training, and to pay a fine of \$5,000 to the Authority.

Background

[3] Mr Tremain is a licensed agent and is the Principal of Tremains Real Estate (2012) Limited, trading as “Tremains” (“the Agency”). Ms Nathan is also a licensed agent and is engaged by the Agency.

¹ Complaint No C13751: Re M Nathan and S Tremain. “Decision to take no further action in the matter of S Tremain” and “Decision finding unsatisfactory conduct in the matter of M Nathan”, Complaints Assessment Committee 409, 8 December 2016.

² Complaint No C13751: Re M Nathan. “Decision on orders”, Complaints Assessment Committee 409, 16 March 2017.

[4] Ms Nathan and her husband bought an apartment in the complex in November 2005, and moved to live in it in May 2009. They subsequently sold their apartment in April 2015. Mr Tremain bought an apartment in the complex in November 2006, and sold it in July 2015.

[5] Mr and Mrs Wouldes entered into a sale and purchase agreement for the apartment on 18 March 2014. They were aware that Ms Nathan owned and lived in another apartment (directly below theirs) in the complex. Mr and Mrs Wouldes asked Ms Nathan if she knew of any issues with the apartment or the complex. Ms Nathan advised them that there was a “relatively minor” noise issue in the top level apartments during strong winds (“the roof deflection issue”), but this was under control.

[6] Mr and Mrs Wouldes read the Minutes of the two most recent Body Corporate Meetings, which referred to the roof deflection issue, an issue with the tiles in the breezeways, and the timing of cleaning steel beams in the breezeways to remove rust. They also sought legal advice. Their purchase offer was conditional on a building inspection. The building inspection focused on the apartment, rather than the complex, and was non-destructive.

[7] Mr and Mrs Wouldes also received a pre-contract disclosure form from the Body Corporate for the complex which stated (as relevant):

10. The unit or the common property is not currently and has never been the subject of a claim under the Weathertightness Homes Resolution Services Act 2006 or any other civil proceedings relating to water penetration of buildings in the unit title development. The Body Corporate has identified a problem with roof deflection and is currently working through a remedial solution. Proceedings have been issued against liable parties pending the extent of remedial works being clarified.

[8] Mr and Mrs Wouldes moved into their apartment in May 2014.

[9] On 24 October 2014 the solicitors for the Body Corporate sent all apartment owners a letter headed “Building Defects Claim”, which enclosed an “authority to uplift” form which authorised the Body Corporate to uplift files held by the owners’ solicitors relating to their purchase of their apartment. A “Proprietors’ Newsletter” dated 14 November 2014 was headed “Building Investigations”, and referred to legal

proceedings issued by the Body Corporate against “parties identified as responsible for various building defects” and identified seven “key issues”, identified in a preliminary inspection by Veron Limited. The newsletter also referred to “a comprehensive report from Mr Joyce”.

[10] Mr and Mrs Wouldes told the Committee that they had not previously been advised of any litigation, beyond that relating to the roof deflection issue, and they had not been previously been referred to a “comprehensive report from Mr Joyce”.

[11] Mr and Mrs Wouldes subsequently received a levy notice from the Body Corporate. Ms Nathan told them that this referred to the cost of remedying the roof deflection, and breezeway issues. The Body Corporate later told them that the levy related to investigation and reporting on building construction defects.

[12] Mr and Mrs Wouldes were then provided with a copy of a report prepared by Mr E Joyce, of AAA Design & Consultancy Limited, dated 17 November 2010 (“the 2010 Joyce report”, and with a copy of a report prepared by Veron Limited, dated 9 April 2015 (“the Veron report”).

[13] It is apparent that a further report was prepared by Mr Joyce, dated 27 October 2011. It is referred to in the Minutes of an “Informal Special Meeting” of the Body Corporate Committee on 29 October 2011 (“the 29 October 2011 meeting”), which Mr Joyce attended. We will refer to this report as “the 2011 Joyce report”. A copy of the 2011 Joyce report was not made available to the Tribunal, but the Minutes of the 29 October 2011 meeting set out the information provided by Mr Joyce.

[14] Mr and Mrs Wouldes made a complaint to the Real Estate Agents Authority in May 2016. The essence of their complaint was that Ms Nathan had misled them as to the significance of the roof deflection issue, and had failed to disclose the 2010 Joyce report.

The nature of this appeal

[15] Section 89(1) of the Act provides that after inquiring into a complaint, the Committee “may” make one or more of the determinations set out in s 89(2). In the present case, the Committee exercised its powers:

- [a] (in relation to Mr and Mrs Wouldes’ complaints against Ms Nathan) to make a finding that she had engaged in unsatisfactory conduct under s 89(2)(b) of the Act; and
- [b] (in relation to its inquiry as to Mr Tremain) to decide to take no further action under s 89(2)(c).

[16] The word “may” indicates that the Committee had a discretion as to what action it took with regard to Mr and Mrs Wouldes’ complaint. In the present case both appeals are against the Committee’s exercise of its discretion. The Tribunal is required to determine:

- [a] whether Mr and Mrs Wouldes have established that in exercising its power to take no further action against Mr Tremain the Committee made an error of law or principle, took irrelevant considerations into account, failed to take relevant considerations into account, or was plainly wrong.³
- [b] whether Ms Nathan has established that in making its finding of unsatisfactory conduct against her, then imposing a penalty, the Committee erred in one or more of those respects.

[17] If the Tribunal is satisfied that the Committee erred in one or more of those respects, it can only exercise such powers as the Committee could have exercised.⁴

³ See *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 2011; *Edinburgh Realty Limited v Real Estate Agents Authority* [2016] NZHC 2898, at [111].

⁴ Section 111(5) of the Act.

Ms Nathan's appeal against the finding of unsatisfactory conduct

(a) Substantive decision

[18] The Committee found that Ms Nathan failed to disclose to Mr and Mrs Wouldes the extent of problems known at the time of their purchase. In particular:

- [a] Ms Nathan knew more than she disclosed to Mr and Mrs Wouldes, and was on notice to make further inquiry from which she could have discovered that the defects were of greater significance than as she presented them to Mr and Mrs Wouldes.⁵
- [b] Ms Nathan said that she did not have a copy of the 2010 Joyce report, but she attended the meeting on 29 October 2011 at which Mr Joyce spoke to his 2011 report. The Committee was not satisfied that Ms Nathan had a copy of either of Mr Joyce's reports,⁶ but was satisfied that Ms Nathan attended the meeting at which the issues identified by Mr Joyce were discussed, and that Mr Joyce spoke to his 2011 report, which covered aspects of the 2010 report.⁷
- [c] The Committee noted the submission by counsel for Ms Nathan that she had asked the Body Corporate secretary after the 29 October 2011 meeting if she could have a copy of the 2010 Joyce report and that she was told that it was very lengthy and not easily understood, and was not given a copy. However, the Committee said that she had an obligation to pursue obtaining a copy of the 2010 Joyce report. If as a lay person she did not fully understand it, she had a duty to consult with a professional adviser to explain it to her, and enable her to alert and correctly advise prospective purchasers.⁸

⁵ Substantive decision, at paragraph 3.9 (and 3.18).

⁶ At paragraph 3.21.

⁷ At paragraphs 3.10 and 3.11.

⁸ At paragraphs 3.12 and 3.13.

- [d] The Committee considered that it was reasonable to infer that the 2011 Joyce report referred to the 2010 report, so Ms Nathan would likely have been alerted to the earlier report. The matters discussed at the meeting on 29 October 2011 could not be described as “not particularly significant” (as had been submitted by counsel on her behalf), and as Ms Nathan was holding herself out as a licensed agent for the sale of the apartments, she could not maintain that her attendance at the meeting was as an apartment owner and did not give rise to any professional obligations.⁹
- [e] The matters discussed at the 29 October 2011 meeting provided a red flag to Ms Nathan to source all available relevant information to provide to prospective purchasers of apartments in the complex. Ms Nathan had a professional obligation to ensure that Mr and Mrs Wouldes could make an informed decision for themselves on the best possible information available at the time, and Ms Nathan failed to do this.¹⁰
- [f] The Committee found that Ms Nathan’s advice to Mr and Mrs Wouldes as to the roof deflection issue was not sufficient disclosure, and it was insufficient for her to advise them to check the Minutes of Body Corporate meetings. Ms Nathan’s failure to disclose information to Mr and Mrs Wouldes, so as to allow them to take expert advice and make an informed purchase decision, misled them and was in breach of rr 6.4 and 10.7 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.¹¹

[19] The Committee also found that Ms Nathan had failed to recognise and deal appropriately with the conflict between her interest as an owner of an apartment within the complex and her duties to Mr and Mrs Wouldes as prospective purchasers. That is, if she had fully informed Mr and Mrs Wouldes of the known and potential defects, it was likely they would have offered a reduced price for the apartment, or not made an offer at all. The Committee considered that knowledge of defects and a reduced

⁹ At paragraphs 3.14–3.18.

¹⁰ At paragraph 3.19.

¹¹ At paragraph 3.21.

sale price would have had a detrimental effect on the values of other apartments in the complex, including those owned by Ms Nathan and Mr Tremain.¹²

[20] The Committee rejected a complaint by Mr and Mrs Wouldes that Ms Nathan should have advised the vendor of the apartment to assign representation rights to them in respect of legal proceedings issued by the Body Corporate.¹³

(b) Appeal issues

[21] Ms Nathan is required to establish that:

- [a] The Committee was wrong to find that Ms Nathan knew of, and failed to disclose, the extent of the problems known to her at the time Mr and Mrs Wouldes bought the apartment, and failed to make further enquiries, and the Committee was wrong to find that Ms Nathan misled Mr and Mrs Wouldes and failed to disclose material information.
- [b] The Committee was wrong to find that Ms Nathan's conduct was unsatisfactory for failing to recognise and deal with a conflict of interest.
- [c] If there were potentially grounds for finding unsatisfactory conduct, the Committee should have exercised its discretion under s 80(2) of the Act to take no further action against her.

(c) Ms Nathan's disclosure to Mr and Mrs Wouldes

[22] The Committee's consideration of Mr and Mrs Wouldes' complaint as to Ms Nathan's disclosure focused on rr 6.4 and 10.7, which provide:

- 6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.
- 10.7 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

¹² At paragraphs 3.22–3.27.

¹³ At paragraphs 3.28–3.32.

likely to a reasonably competent licensee that land may be subject to hidden or underlying defects, a licensee must either–

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

[23] This issue was the principal focus of the appeal hearing. We summarise below the submissions made by Mr Rea (on behalf of Ms Nathan), Mr Wouldes, and Ms Copeland (on behalf of the Authority).

Submissions

[24] Mr Rea submitted that Ms Nathan’s disclosure to Mr and Mrs Wouldes was appropriate based on the information at the time, and her statement concerning the roof deflection issue was a statement of her honestly held opinion based on reasonable grounds, and not a statement of fact. He submitted that Ms Nathan’s opinion was consistent with the understanding of the Body Corporate, the Body Corporate chairman and its secretary, as recorded in the Body Corporate Minutes, and the pre-contract disclosure provided to Mr and Mrs Wouldes.

[25] He submitted that it was not until August 2015, 18 months after Mr and Mrs Wouldes bought the apartment, that the extent of the issues with the complex became apparent, after the Body Corporate commissioned the Veron report. He submitted that the Veron report went significantly further than the 2010 Joyce report, and the only area of overlap was in relation to the “relatively minor” roof deflection issue. He submitted that Mr and Mrs Wouldes had overstated the significance of the 2010 Joyce report.

[26] Mr Rea submitted that the Committee’s finding that Ms Nathan knew more than she told Mr and Mrs Wouldes was founded entirely on Ms Nathan’s attendance at the meeting on 29 October 2011. He submitted that the Committee could not rely on Ms Nathan’s presence at that meeting (three years before Mr and Mrs Wouldes bought the apartment) which Ms Nathan attended in her personal capacity as an apartment owner. Further, the Committee could not draw any inferences as to what may have been

discussed at the meeting, or what was contained in the 2011 Joyce report, which had never been in evidence.

[27] He further submitted that the Joyce reports had been overtaken by subsequent events by the time Mr and Mrs Wouldes bought the apartment, and was no longer considered relevant by the Body Corporate. It was not referred to in Body Corporate Minutes, and the Body Corporate believed everything was in hand.

[28] Mr Wouldes submitted that there was evidence that Ms Nathan knew about the Joyce reports, and knew where to obtain a copy, or at least advise as to where Mr and Mrs Wouldes could find a copy. Ms Nathan's knowledge of the reports is evidenced by her attendance at the 29 October 2011 meeting, and her statement in her response to the complaint that "I am sure [Mr and Mrs Wouldes' solicitor] Mr Twigg had a copy of the [2010 Joyce report] they speak about..." He submitted that Ms Nathan "must have known" of the 2010 Joyce report if she was "sure" that Mr Twigg had a copy of it.

[29] Mr Wouldes submitted that Mr Rea could not submit that the relevance of the 2010 Joyce report had fallen away by the time Ms Nathan marketed the apartment. Such a damaging report could not fall away in significance, and the memory of an experienced agent such as Ms Nathan would be re-ignited every time she got to the section of disclosure in a sale and purchase agreement.

[30] Ms Copeland submitted that the Committee correctly identified and determined that Ms Nathan knew more about the issues affecting the complex than she disclosed to Mr and Mrs Wouldes, and misstated the position to them as to the extent of the defects and their effect on the apartment.

[31] She submitted that the 2010 Joyce report identified issues as to the roof deflection, the air conditioning system, toilet performance (including corrosion of steel fittings and the volume of water required), water ingress to the basement carpark, and concerning the entrance gates and fences to the ground floor apartments.

[32] The Minutes of the 29 October 2011 meeting recorded discussions concerning the 2011 Joyce report, including comments concerning remediation requirements (for example, as to whether all apartment owners wished their apartments to be remedied, that the apartments were not what the owners thought they had bought, time limits for legal proceedings and possible parties to be sued, and a report prepared by “insurer’s consultants”.

[33] The Minutes of an owners’ committee meeting (attended by Ms Nathan’s husband), held on 4 February 2014 recorded discussions of the significant issues with the complex. Ms Copeland submitted that as Ms Nathan’s husband was the building manager for the complex, and as owners of an apartment in the complex, it was likely that Ms Nathan would have had discussions about the issues.

[34] By reference to the terms of r 6.4, and relevant Tribunal decisions, in particular the Tribunal’s overview in its decision in *Masefield v Real Estate Agents Authority (CAC 301)*,¹⁴ Ms Copeland submitted that the Committee correctly found that Ms Nathan knew more about the defects with the apartment and the complex than she disclosed to Mr and Mrs Wouldes, and was obliged to make further inquiries about the extent of the defects and the steps involved in remedying them, including possible litigation.

[35] While Ms Nathan appropriately advised Mr and Mrs Wouldes to review Body Corporate Minutes, Ms Copeland submitted that she was not in a position to make a positive representation about whether any defects, even those she acknowledged knowing about, were “minor”. Nor was she in a position to make a positive representation as to whether they would affect Mr and Mrs Wouldes, without first asking the Body Corporate chairperson as to the position, and referring to various reports, such as the Joyce reports.

[36] Ms Copeland submitted that the Committee correctly found that by virtue of her failure to make those inquiries, and to refer to relevant reports, Ms Nathan made unsubstantiated representations and failed to disclose the true extent of the defects, and breached rr 6.4 and 10.7.

¹⁴ *Masefield v Real Estate Agents Authority (CAC 301)* [2015] NZREADT 30.

Discussion

[37] We accept Ms Copeland's submission that there is no evidence to support Mr Rea's submission that Ms Nathan's understanding of the nature of the issues affecting the complex, and their seriousness, was consistent with that of the Body Corporate, the Body Corporate chairman and its secretary, as recorded in the Body Corporate Minutes.

[38] We reject Mr Rea's submission that the Committee could not reasonably infer that the Minutes of the 29 October 2011 meeting were an accurate record of the advice Mr Joyce gave to the meeting, and the discussion of the issues that were raised. There is no record of any challenge having been made to the Minutes at the time, and no evidence has been put before the Tribunal that would cause us to doubt the accuracy of the Minutes. The Committee was entitled to rely on the Minutes as being an accurate record of the meeting.

[39] We also reject his submission that the Committee could not reasonably infer that the Minutes accurately recorded Mr Joyce's discussion of his 2011 report. Further, notwithstanding that the 2011 Joyce report was (apparently) not provided to the Committee, and has not been provided to the Tribunal, it can reasonably be inferred that Mr Joyce submitted a report dated 27 October 2011, and that his statements regarding the content of the paragraphs referred to in the Minutes are an accurate reflection of those paragraphs. It is apparent from the Minutes that the 2011 Joyce report covered issues covered in his 2010 report.

[40] Further, we reject Mr Rea's submission that the Committee could not reasonably impose an obligation on Ms Nathan to advise Mr and Mrs Wouldes of matters covered in a report of which she did not have a copy, and that were discussed at a meeting she had attended, in her personal capacity, some three years before she marketed the apartment to Mr and Mrs Wouldes. This submission was, in effect, that it was reasonable for Ms Nathan to have forgotten about the meeting and the 2011 Joyce report that was discussed at that meeting.

[41] First, the Committee did not find that Ms Nathan “did not have a copy” of the 2010 Joyce report, it was “not satisfied that she did have a copy.

[42] Secondly, by way of a “Proprietors’ Newsletter” dated October 2013, sent to owners by the Body Corporate, Ms Nathan would have been reminded of the Joyce reports, made aware that the “roof issues” were considerably more serious than may have been thought previously. The newsletter recorded that an independent expert had provided an “initial assessment” which included:

... the noise ameliorating solution does not address all of the issues the documents identify ... the repair solution needs to address all of the various design and construction failings identified in the documentation and this will involve the complete rebuild and replacement of the roof structure. This would include:

- Lifting the membrane.
- Lifting and replacing the substrate.
- Rebuilding the support structure with roof purlins of 400 centers.
- Correctly installing installation.
- Install roof mounted ventilation units.
- Reattach the suspended ceiling to an independent support structure.

...

The building surveyor’s recommendation is that a structural and mechanical engineer be engaged to provide a full report to fully assess the required scope including any remedial obstacles. A QS estimate based on the comprehensive scope to remediate can then be developed.

...

Undoubtedly the initial prognoses will be extremely disappointing to all owners. Hopefully the further investigations may suggest a lesser solution is workable. The further report will at least ensure that all issues are properly identified and can be appropriately resolved in due course.

[43] The newsletter is dated four months before Ms Nathan marketed the apartment to Mr and Mrs Wouldes. Its contents are inconsistent with Ms Nathan’s characterisation of the roof deflection issue as “minor” and with Mr Rea’s submission that Ms Nathan’s understanding of defects, and her disclosure and advice, were consistent with information provided by the body corporate.

[44] Further, Ms Nathan’s statement that the roof deflection issues were “minor” cannot be disregarded as being expressions of her personal opinion. They were positive representations concerning the apartment, made in response to questions asked of her in her capacity as a licensee. Irrespective of her specific knowledge of

issues affecting the complex, and the apartment she was marketing to Mr and Mrs Wouldes, we accept Ms Copeland's submission that as a licensee, Ms Nathan was obliged to make inquiries and refer to relevant reports before making any positive representations in the course of marketing.

[45] The Tribunal included an overview of licensees' obligations as to representations when marketing a property in its decision in *Masefield v Real Estate Agents Authority* (CAC 301).¹⁵ The Tribunal said:

The point is that an agent should make sure before a positive representation is made that they have taken at least some precautions to check the veracity of the representation.¹⁶

An agent has an active role to play in conveying information about the property to a potential purchaser and must be cognisant of that role and carry it out to the best of his/her ability.¹⁷

[46] It was open to the Committee to find that Ms Nathan had failed to provide Mr and Mrs Wouldes with relevant and material information and in so doing had misled them as to the property they were considering purchasing, and to find that she had breached rr 6.4 and 10.7. It has not been established that the Committee erred in making that finding.

(d) Conflict of interest

Submissions

[47] Mr Rea submitted that the Committee was wrong to find that Ms Nathan had a conflict between her interest as salesperson of the apartment, and her interest as owner of an apartment in the complex. He submitted that a conflict between licensees' fiduciary duties to a vendor and their obligations to prospective purchasers does not involve a conflict of interest, rather, it involves a conflict of duties, and that conflict is inherent in every case where a licensee acts for a vendor in dealings with prospective purchasers.

¹⁵ Above, footnote 15.

¹⁶ *Donkin v Real Estate Agents Authority* (CAC 10057) [2012] NZREADT 44, at [9].

¹⁷ *Fitzgerald v Real Estate Agents Authority* (CAC 20007) [2014] NZREADT 43, at [20].

[48] He also submitted that despite finding that Ms Nathan's personal interest by virtue of her ownership of an apartment caused her to face a dilemma in that full disclosure of defects may have affected the price offered by prospective purchasers, the Committee fell short of finding that Ms Nathan was actually influenced by such a perceived conflict. He submitted that the Committee left open the possibility that Ms Nathan was negligent.

[49] Mr Rea further submitted that, in any event, Mr and Mrs Wouldes knew that Ms Nathan owned the apartment directly below theirs.

[50] Mr Wouldes submitted that without doubt, there was a conflict between Ms Nathan's interest in protecting the capital value of her investment in the apartment complex and the fact that she derived income from the sale of apartments in the complex. He submitted that her behaviour was influenced by her own interests, and her decision-making and judgement were clouded to the extent that she believed her lack of disclosure was lawful.

[51] Ms Copeland submitted that Ms Nathan had a financial interest, albeit indirectly, in obtaining the best price for the apartment directly above her own, as the sale value of surrounding properties would likely affect the value of her own apartment. She submitted that this personal financial interest is capable of being captured by s 136 of the Act. However, she acknowledged that this is a novel case, and the Authority is not aware of any decision of the Committee or the Tribunal that has considered the point. She submitted that in the circumstances, it may have been appropriate to exercise the discretion to take no further action.

Discussion

[52] Section 136(1) of the Act provides:

A licensee who carries out real estate agency work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee, or any person related to the transaction, may benefit financially from the transaction.

[53] We do not accept Mr Rea's submission that to find there was a conflict arising out of Ms Nathan's interest as an owner of an apartment in the complex would be akin to finding a conflict in every case in Auckland where a salesperson who owns a property sells other property, as property values are affected by other sales. Nor do we accept Mr Rea's submission that to find that s 136 of the Act is engaged in this case requires a strained interpretation of the section.

[54] The circumstances of this case are not the same as those more frequently encountered, where a salesperson is selling a property he or she owns or in which he or she has a direct interest. Here, Ms Nathan owned an apartment in the same complex. Her apartment was directly below the apartment she was marketing. However, there would obviously be a close connection between the value of her apartment and the price at which the apartment above it had been sold. This is a far more direct connection than that arising out of simply owning properties in the same city.

[55] This was a case where Ms Nathan might benefit financially from the sale to Mr and Mrs Wouldes, albeit indirectly by way of maintaining the value of her own apartment. She should have recognised that and given the requisite written disclosure. The fact that Mr and Mrs Wouldes knew she owned the apartment below the one they were interested in does not absolve her from her obligations under the Act.

[56] We accept that knowledge of defects in a property is likely to have an effect on the price paid for the property, and possibly on whether the property sells at all. The defects disclosed in the 2010 Joyce report may well have had that effect in the present case. We are not persuaded that the Committee was wrong to find that Ms Nathan failed to recognise and deal appropriately with that conflict.

(e) Discretion to take no further action against Ms Nathan

[57] The Committee had the power to decide to take no further action in respect of the complaint made by Mr and Mrs Wouldes. Section 80(2) of the Act provides:

... the Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

Submissions

[58] Mr Rea submitted that in all of the circumstances of the case, if there could potentially have been a finding of unsatisfactory conduct, the Committee should have exercised its discretion under s 80(2) of the Act to take no further action. In support of this submission he referred to the response to the complaint made on behalf of Ms Nathan:

Ms Nathan has 27 years' experience in the real estate industry. She is a licensed real estate agent, being the highest level of qualification under the Act. She has previously operated her own real estate agency business for 15 years, employing staff of between 20 to 25. Ms Nathan has no disciplinary history whatsoever, at any level.

The basis for the complaint is speculative, based on suspicion, with the benefit of hindsight gained from an increased awareness of issues within the body corporate that arose subsequent to the transaction in issue. There is no direct evidence supporting any allegations against Ms Nathan. The onus of proof of a complaint lies with the complainants. It is submitted that in view of the circumstantial nature and unreliability of the evidence, and the onus of proof, it is appropriate that the Committee should determine to take no further action.

[59] Mr Rea submitted that these submissions (against a finding of unsatisfactory conduct) were equally applicable to the appropriateness of the exercise of the discretion under s 80(2) of the Act, given Ms Nathan's long and unblemished career and contribution to the real estate industry, and the marginal nature of the evidence presented in support of the allegations against her.

[60] Ms Copeland submitted that it would not have been appropriate for the Committee to exercise its discretion under s 80(2) of the Act once it had found that Ms Nathan had breached rr 6.4 and 10.7. As the definition of unsatisfactory conduct (as set out in s 72(b) of the Act) includes real estate agency work that "contravenes a provision of this Act or any regulations or rules made under this Act", a finding of a breach of the rules is effectively a determination of unsatisfactory conduct.

[61] Ms Copeland also submitted that to find unsatisfactory conduct then use the s 80(2) power to take no further action would be contrary to the consumer protection focus of the Act. She further submitted that if a Committee or the Tribunal is to take no further action on a complaint then it benefits licensees to have the discretion exercised before there is any finding of unsatisfactory conduct. She referred to the

comments of his Honour Justice Heath in *Vosper v Real Estate Agents Authority*, that the purpose of the discretion is the “avoidance of the stigma of a finding of unsatisfactory conduct...”¹⁸

Discussion

[62] We accept Ms Copeland’s submissions. We have rejected the submission that the Committee should not have made a finding of unsatisfactory conduct. The Committee made findings that Ms Nathan was in breach of rr 6.4 and 10.7, and that she had failed to recognise and deal appropriately with a conflict of interest. There was then no basis on which it could reasonably have exercised the discretion under s 80(2) of the Act to take no further action.

[63] Further, we are not persuaded that this was a case where (as Mr Rea submitted), if there could potentially have been a finding of unsatisfactory conduct, the Committee should have exercised its discretion under s 80(2) of the Act to take no further action. It could not be said that the complaint was speculative, based on suspicion and unreliable evidence. The factors as to Ms Nathan’s length of time as an agent, her unblemished record, and her contribution to the industry may be considered in the context of penalty.

[64] We are not persuaded that the Committee should have determined, having had regard to all the circumstances of the case, that any further action was unnecessary or inappropriate

Ms Nathan’s appeal against penalty

Penalty decision

[65] The Committee assessed Ms Nathan’s conduct as being at the mid to serious level of unsatisfactory conduct. This was on the basis of the following considerations:

¹⁸ *Vosper v Real Estate Agents Authority* [2017] NZHC 453, at [74].

- [a] Irrespective of whether she had a copy of the 2010 Joyce report at the time Ms Nathan attended the 29 October 2011 meeting, Ms Nathan was a professional salesperson as the holder of an agent's licence, and would have had a greater understanding of potential issues with the complex than an ordinary member of the public would have had.¹⁹
- [b] The information discussed at the 29 October 2011 meeting was significant in terms of the building's structural integrity, in particular, a missing structural support wall for the roof, and faults in the roof itself. The roof defects, missing structural wall, and leakage into the building were ongoing when Mr and Mrs Wouldes bought their apartment in 2014, and Ms Nathan's insufficient disclosure was insufficient and misled them by minimising the problems.²⁰
- [c] Ms Nathan had a duty to discover all information available about known defects, and to disclose that information to Mr and Mrs Wouldes. She had enough knowledge about the defects with the building to be on notice to make further investigation.²¹
- [d] Ms Nathan's "watering down of the problem with the roof put [Mr and Mrs Wouldes] off the scent and is causative in depriving them of the opportunity to discover the true nature of the serious defects in the roof". The Committee also referred to the stress, distress, and financial loss they suffered.²²

[66] The Committee recorded that because they had not found that Ms Nathan's conduct and failings were the consequence of her failing to recognise and address the conflict of interest, their finding as to that failure had not had a significant impact on the penalties imposed.²³

¹⁹ Penalty decision, at paragraph 3.3.

²⁰ At paragraph 3.5.

²¹ At paragraph 3.7.

²² At paragraph 3.8.

²³ At paragraph 3.18.

[67] The Committee also recorded that it regretted that it did not have power to award Mr and Mrs Wouldes compensation for their losses associated with their purchase of an apartment in a building with serious defects.²⁴ Its formal order was to censure Ms Nathan, ordered her to complete specified training regarding misleading and deceptive conduct, and ordered her to pay a fine of \$5,000.²⁵

Appeal issue

[68] Ms Nathan is required to establish that in imposing the fine of \$5,000, the Committee made an error of law or principle, took irrelevant factors into account or failed to take relevant factors into account, or was plainly wrong.

Submissions

[69] There was no challenge to the order for censure, or the order for Ms Nathan to complete specified training. However, Mr Rea submitted that the \$5,000 fine, being 50 percent of the maximum fine available, in fact reflected conduct towards the higher end of the scale for unsatisfactory conduct, if the Committee took account of Ms Nathan's lack of any previous disciplinary history, her 27-year unblemished career, and her contribution to the real estate industry.

[70] Mr Rea submitted that other mitigating factors relevant to the level of the fine were that there had been no finding that Ms Nathan had actual knowledge of the 2010 Joyce report, thus there was no intentional withholding of information; the significant passage of time between attending the 29 October 2011 meeting and her marketing the apartment to Mr and Mrs Wouldes, the disclosure made in the pr

[71] e-contract disclosure form, and Ms Nathan's advice to Mr and Mrs Wouldes to seek further information from the chairman of the Body Corporate.

[72] Ms Copeland submitted that the fine imposed was appropriate to the circumstances, and available to the Committee within its discretion as to penalty. She

²⁴ At paragraph 3.31.

²⁵ At paragraph 2.

submitted that the disclosure obligations go to the heart of the consumer protection focus of the Act, and Ms Nathan clearly knew more about the defects at the property and failed to disclose them to Mr and Mrs Wouldes. She further submitted that Ms Nathan chose to make positive representations to Mr and Mrs Wouldes without having made requisite enquiries. She submitted that these failings were serious and necessitated a fine at the upper end of the available fine.

Discussion

[73] The maximum fine available to the Committee after a finding of unsatisfactory conduct is \$10,000.

[74] Mr Rea's submissions set out at paragraph [70], above, are contrary to the Committee's findings, and cannot therefore be taken into account as mitigating factors. We accept Ms Copeland's submission that the disclosure obligations in rr 6.4 and 10.7 go to the heart of the consumer protection purpose of the Act, set out in s 3(1):

The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.

[75] It was open to the Committee to assess Ms Nathan's conduct as being at the mid to serious level, for the reasons it set out. In the absence of any mitigating factors relating to Ms Nathan, a fine of \$5,000 cannot be challenged.

[76] However, there is no indication that the Committee took into account Mr Rea's submissions as to Ms Nathan's long and unblemished career in real estate and contribution to the real estate industry. Those factors may be relevant to the penalty imposed. The Committee did not indicate that it considered but rejected them as mitigating factors. We have concluded that the Committee failed to take relevant mitigating factors into account.

[77] We have concluded that the proper fine, taking into account the mitigating factors we have referred to, is \$4,000.

Mr and Mrs Wouldes’ appeal against the Committee’s decision to take no further action with regard to Mr Tremain

Substantive decision

[78] We record, first, that Mr and Mrs Wouldes also appealed against the Committee’s findings in respect of Ms Nathan. While they accepted the finding of unsatisfactory conduct, they sought to have the question of compensation re-addressed. Neither the Committee nor the Tribunal has the power to make such orders.²⁶

[79] In the course of its investigation into the complaint the Committee exercised its power under s 78(b) of the Act to, “on its own initiative, inquire into and investigate allegations” about Mr Tremain. The Committee recorded that Mr Tremain had stated that he “had no knowledge of the Joyce report” and “was only aware of the roof and structural issues to the extent of the information in the pre-contract disclosure document”. The Committee found it not proved that Mr Tremain failed to disclose information in respect of defects at relevant times.²⁷

[80] The Committee also considered whether Mr Tremain had any obligations as to supervision of Ms Nathan. It recorded that he was not Ms Nathan’s supervising manager. The Committee also recorded that at all relevant times Ms Nathan held (and continues to hold) an agent’s licence and, as such, there was no supervisory obligation imposed on the Agency or Mr Tremain.²⁸

[81] Accordingly, the Committee exercised its discretion under s 89(2)(c) of the Act and decided to take no further action in respect of Mr Tremain.

²⁶ See s 93 of the Real Estate Agents Act 2008 and the judgment of the High Court in *Quin v Real Estate Agents Authority* [2012] NZHC 3557].

²⁷ Substantive decision, at paragraphs 3.36 and 3.37.

²⁸ At paragraphs 3.38 and 3.89.

Appeal issues

[82] Mr and Mrs Wouldes are required to establish that the Committee was wrong to

- [a] find that he had no supervisory obligation with regard to Ms Nathan; and
- [b] find that Mr Tremain had no knowledge of the 2010 Joyce report, and was only aware of the roof and structural issues to the extent of the information in the pre-contract disclosure document.

Supervision of Ms Nathan

[83] We accept the submissions by Mr Rea for Mr Tremain, and Ms Copeland for the Authority, that as Ms Nathan held an agent's licence she did not, as a matter of law, require any supervision. For that reason, there was no error in the Committee's rejecting Mr and Mrs Wouldes' complaint as to Mr Tremain's supervision of Ms Nathan.

Further material admitted by the Tribunal

[84] Following an application made by Mr and Mrs Wouldes, the Tribunal gave leave for two further documents to be admitted at the appeal hearing.²⁹ Those documents were a report prepared by Hawkes Bay Building Certifiers & Consultants Limited, dated 31 August 2009 ("the HBBC report") and a letter dated 23 November 2009 under cover of which the HBBC report was sent by the solicitors for the owners of another apartment in the complex to Mr Tremain ("the Langley Twigg letter").

[85] The HBBC report and the Langley Twigg letter were not before the Committee, as Mr and Mrs Wouldes only became aware of them after they received the Committee's substantive decision.³⁰ The Tribunal found that the report and letter were relevant to the issues to be determined in (in particular) Mr and Mrs Wouldes' appeal

²⁹ *Wouldes v Real Estate Agents Authority (CAC 409)* [2017] NZREADT 36.

³⁰ See paragraph [7] of the Ruling.

against the Committee's decision to take no further action against Mr Tremain, and would assist it in determining those issues.³¹

[86] The HBBC report is headed "Report on building issues to apartments (in particular) 513/7 [at the complex], and it sets out "points of concern" under headings "1. Noise from building roof movement", "2. Substandard finish of ceiling linings", "3. Possible roof leak", "4. Structural steel corrosion", "5. Dampness in basement stairwell". The "Summary" included the statement:

I believe the points identified above are, as noted, failing to perform to the requirements of the building code. The works, with the exception of the defect ceiling linings are all parts of the building structure and could be considered the responsibility of the Body Corporate.

[87] The Langley Twigg letter was sent to Mr Tremain by fax on 23 November 2011. The letter referred to the HBBC report, and the possibility of there being other issues concerning the complex, and ended as follows:

I am happy to discuss this with you further, however believe that full disclosure of the building defects should be made to each of the unit owners.

[88] Langley Twigg acted for Mr and Mrs Wouldes in 2014 in respect of their purchase, but were not acting for them at the time of the letter to Mr Tremain. The letter was sent on instructions from their then client, who was the owner of another apartment in the complex. The Langley Twigg letter, and the HBBC report, were later released to Mr and Mrs Wouldes on instructions from that client, after the Committee's substantive decision was issued. The opinion referred to in the Langley Twigg letter was not included in the material later provided to Mr and Mrs Wouldes, or to the Tribunal.

Mr Tremain's statements to the Committee

[89] Mr Tremain's statements to the Committee were by way of responses to questions put to him by the Authority. He was asked to provide (among other things) "a response to the issues identified by [Mr and Mrs Wouldes]". Mr Tremain's answers

³¹ At paragraphs [26] and [[32].

to the questions relating to “the issues identified by [Mr and Mrs Wouldes]” were stated to be:

1. Whether you also owned an apartment in this complex and when it was purchased and sold

Yes I did purchase an apartment ... in the said complex from the initial development in November 2006 ... I sold my apartment ... on the attached ‘s&p agreement’ on the 31st of July 2016.

2. Whether you were advised of the issues in the complex by the body corporate

I knew exactly what was disclosed in the Body Corporate pre-contract disclosure statement as attached – I had no further knowledge.

3. Whether you had knowledge or were in receipt of the building report dated [17 November 2010]

No I had no knowledge of this report to my knowledge. I have not read or sighted the report referred to.

4. Whether you were aware of the roof issues

Only to the extent as disclosed in the Body Corporate disclosure statement.

5. Whether you were aware of the structural issues in the complex

Only to the extent as disclosed in the Body Corporate disclosure statement.

Submissions

[90] Mr Wouldes submitted that a fax transaction report clearly established that the Langley Twigg letter and the HBBC report were clearly sent to Mr Tremain. He submitted that on receiving the HBBC report and Langley Twigg letter, Mr Tremain should have ensured that all salespersons engaged in marketing apartments in the complex were made aware of the report and the letter, and that they made appropriate disclosure to prospective purchasers.

[91] He also submitted that Mr Tremain’s statement that his knowledge of defects was limited to what was in the Body Corporate’s pre-contract disclosure statement provided to them was false, as he had been sent the HBBC report and Langley Twigg letter. He submitted that the HBBC report contained information that was not referred to in the pre-contract disclosure.

[92] He further submitted that it was inconceivable that, as the owner of an apartment in the complex, Mr Tremain was not aware of the Joyce reports, and the discussion of the reports by the Body Corporate. He submitted that the Committee should inquire further.

[93] Mr Rea submitted that the Committee was correct to decide to take no further action against Mr Tremain. He submitted that Mr Tremain had no involvement in the sale to Mr and Mrs Wouldes, and had no recollection of the Langley Twigg letter or the HBBC report, although he is and was aware of issues affecting the development, which he disclosed to the purchasers of his apartment.

[94] Ms Copeland submitted that it was open to the Committee to decide to take no further action against Mr Tremain, on the information it had before it.

Discussion

[95] Under s 89(2)(c) the Committee had the power, after its investigation into Mr Tremain, and considering the information it received, to:

[determine] that the Committee take no further action with regard to the complaint or allegation or any issue involved in the complaint or allegation.

[96] We note, first, Mr Rea's submission that the "attached pre-contract disclosure statement" (referred to in Mr Tremain's answers to questions 2, 3, 4, and 5, set out in paragraph [88], above), was that included with the sale and purchase agreement for the sale of Mr Tremain's apartment in 2016. Unsurprisingly, that statement contained considerably more information than that provided to Mr and Mrs Wouldes in 2014.

[97] We cannot accept that Mr Tremain was saying in this answer that his knowledge of defects at the time he bought his apartment was that set out in pre-contract disclosure at the time he sold it. If he was indeed referring to his knowledge at the time he sold his apartment, then that knowledge is irrelevant to the question of his knowledge when Mr and Mrs Wouldes bought their apartment in 2014. Further, if Mr Tremain had, in 2014, the information included in the pre-contract disclosure made when he sold his apartment in July 2016, it establishes that he had a great deal of knowledge as to defects in the complex.

[98] For present purposes, we assume that in his answer to the second question, Mr Tremain was referring to the knowledge he had at the time Mr and Mrs Wouldes bought their apartment, and was saying that that knowledge was to the extent set out in the pre-contract disclosure provided to Mr and Mrs Wouldes.

[99] We have no doubt that if the HBBC report and the Langley Twigg letter had been available to the Committee, the Committee would have considered them in the course of its investigation into Mr Tremain. We have concluded that the proper course is to refer the Committee's decision back to the Committee for reconsideration.

[100] Reconsideration is of course a matter for the Committee, but the Committee may wish to consider:

- [a] Whether the fax transaction report, if accepted by the Committee, provides grounds to conclude that Mr Tremain received the HBBC report and Langley Twigg letter.
- [b] Whether the HBBC report, if accepted by the Committee, sets out issues relating to the complex which were relevant to the disclosure a salesperson marketing an apartment would provide to a prospective purchaser.
- [c] The Committee may also wish to consider the Tribunal's observation in *Martin v Real Estate Agents Authority (CAC 407)*, in which a listing salesperson had withheld information as to a vendor's price expectation, and the level of interest in a property, from other salespersons in the in the agency:³²

... the Tribunal expresses concern at the evidence given for the [agency concerned] that a listing salesperson does not pass on to other salespersons information that is relevant to the listing. In order for licensees to comply with their obligation to act in good faith and deal fairly with all parties (r 6.2) an agency should put in place systems to enable the agency's licensees to work together for the common good of all parties to the transaction. This would appear to be inconsistent with one salesperson withholding from other salespersons information that is relevant to a listing.

³² *Martin v Real Estate Agents Authority (CAC 407 [2016] NZREADT 67, at [98].*

That observation may be relevant to a consideration of the actions a licensee might take on receipt of information that is relevant to other licensees' obligations as to disclosure.

Outcome

[101] Ms Nathan's appeal against the Committee's finding of unsatisfactory conduct is dismissed.

[102] Ms Nathan's appeal against the penalty imposed is allowed. The order that she pay a fine of \$5,000 is quashed and replaced by an order that she pay a fine of \$4,000. In the event that Ms Nathan has not already paid the fine, it is to be paid to the Authority within 20 working days of the date of this decision.

[103] Mr and Mrs Wouldes' appeal against the Committee's decision to take no further action regarding Mr Tremain is allowed. That decision is referred back to the Committee for reconsideration.

[104] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

Hon P J Andrews
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member