

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2019] NZREADT 18**

**READT 053/18**

IN THE MATTER OF

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

BETWEEN

MICHELE MARIE DENYER  
Appellant

AND

THE REAL ESTATE AGENTS  
AUTHORITY (CAC 403)  
First Respondent

AND

SHARON KENNY  
Second Respondent

On the papers

Tribunal:

Hon P J Andrews, Chairperson  
Ms N Dangen, Member  
Ms C Sandelin, Member

Submissions received from:

Ms Denyer  
Ms S Cann, on behalf of the Authority  
Mr T Rea, on behalf of Ms Kenny

Date of Decision:

6 May 2019

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**DECISION OF THE TRIBUNAL**

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## **Introduction**

[1] Ms Denyer has appealed against the decision of Complaints Assessment Committee 403 (“the Committee”), dated 14 November 2018, in which it decided to take no further action on her complaint against Ms Kenny. The Committee’s decision was made under s 89(2)(c) of the Real Estate Agents Act 2008 (“the Act”).

[2] Ms Denyer’s complaint was received by the Authority on 24 January 2018. It was first considered by an Authority facilitator, who gathered information from Ms Denyer, and other sources. The facilitator submitted his Initial Referral Report to the Committee, dated 28 June 2018. The Committee determined to inquire into the complaint.

[3] An Authority investigator conducted the inquiry and submitted his Investigation Report, dated 3 September 2018. The Committee held a hearing on the papers on 12 September 2018, and determined to take no further action on Ms Denyer’s complaint. As noted above, the Committee’s written decision was issued on 14 November 2018.

## **Background facts**

[4] Ms Kenny was the listing and selling agent of a property at Auckland. The property comprised two separate dwellings and was being subdivided into two separate titles. The front property will be referred to as “339”, and the rear property will be referred to as “339a”.

[5] Ms Denyer was interested in 339. At the relevant time (between 1 and 24 November 2017), Ms Kenny had a sale agreement in place for 339a with a purchaser (“the purchaser”).

[6] The vendor of 339 and 339a had instructed Meth Test NZ Ltd (MTNZ) to test both dwellings for methamphetamine contamination. The vendor told the Authority that this was “purely for resale purposes and to save time at point of sale as I was heavy on bridging finance”.

[7] There was a dispute between Ms Denyer and Ms Kenny as to the timing of some of the events that followed. The chronology set out below follows that set out in the reports of the Authority's facilitator and investigator.

[8] Ms Denyer viewed 339 on 1 November 2017. She viewed it again at an open home on or about 4 November. She was provided with a copy of a report by MTNZ, which stated that there was no trace of methamphetamine in the dwelling at 339 ("the MTNZ report"). The report consisted of a record of MTNZ's sampling, together with photographs of the dwelling and individual sample sites ("the test report"), and a copy of a Certificate of Analysis recording the results of the analysis of the samples by Analytica Laboratories ("the Certificate of Analysis").

[9] On 19 November, Ms Denyer and Ms Kenny met for the purpose of preparing an offer to buy 339. Ms Denyer raised a concern regarding the MTNZ report. She was concerned that the dwelling was described in the test report as a "townhouse", when it was a villa, and that reference numbers on the photographs in the test report did not match reference numbers on the Certificate of Analysis. She was concerned that she may have been given a copy of a report for a different property.

[10] Ms Kenny's assistant checked the information on the Agency's intranet database, but could not find any other report. Ms Kenny contacted MTNZ and asked them to re-send the report. MTNZ was not prepared to discuss the report or disclose further information, as the report had been prepared for the vendor.

[11] On the basis that the MTNZ report was correct, Ms Denyer's solicitor confirmed on 20 November that her offer could be submitted to the vendor. Ms Kenny advised that she would not be able to do this until 22 November.

[12] On 22 November, Ms Kenny spoke to the vendor (who was at the time with the purchaser at 339a) concerning Ms Denyer's offer and her queries regarding the MTNZ report. Ms Kenny told the investigator that the vendor's response was that she must have transposed the front pages of the reports for 339 and 339a, and there was some discussion of having another test done. Ms Kenny also said that the vendor was not

happy with conditions on Ms Denyer's offer, but countersigned it. Ms Kenny then started to drive away from the property.

[13] Shortly after Ms Kenny left the property, she received a telephone call from the vendor. The vendor told Ms Kenny that she would not proceed with Ms Denyer's offer, and had just agreed to sell 339 to the purchaser. Ms Kenny raised the "multi-offer" procedure with the vendor, but the vendor refused to enter into that procedure. Ms Kenny said that the vendor was "100% adamant" that she did not wish to negotiate further with Ms Denyer, and Ms Kenny was to meet with the purchaser to make up an offer.

[14] Ms Denyer said that she spoke with Ms Kenny during the afternoon of 22 November, and Ms Kenny told her that "we didn't get the house and that we would have to put in a better unconditional offer". Ms Denyer said she would discuss a new offer with the family, and also asked for the "re-sent P report". Ms Kenny denies that there was any such discussion on 22 November. Ms Denyer said she tried to ring Ms Kenny during the morning of 23 November to say she could sign a new offer, and left messages for her.

[15] Later on 23 November, Ms Kenny told Ms Denyer that the property had been sold. Ms Denyer said she was in shock after learning this, and that Ms Kenny had not presented her counter-offer. In an exchange of emails on 24 November, Ms Denyer complained to Ms Kenny that she had not been given an opportunity to put in her best offer, and asked why Ms Kenny had not presented the vendor with a "multi-offer option". Ms Kenny responded that the vendor had the right to decline the multi-offer procedure, she had put this to the vendor, and she had refused.

### **Complaint to the Authority**

[16] In her complaint Ms Denyer stated that she understood that a vendor has the right to refuse to look at other offers (although she considered it unusual in this case, given the sum the vendor was seeking for the property) but was concerned that the new owner may have been misled about the MTNZ report, and be living in a P house with no knowledge or protection.

[17] Ms Denyer further stated that she believed that her offer to purchase the property was not presented to the vendor, because Ms Kenny knew that the MTNZ report was “fraudulent”. She went on to say, however, that she did not want to suggest that the vendor or Ms Kenny had intentionally misled her, or altered the test reports, but there “are errors that need to be corrected”.

[18] The Complaint was first dealt with by the Authority’s Early Resolution Service. The facilitator prepared an Initial Referral Report, in which he identified the key issues confirmed with Ms Denyer as being that:

- [a] Ms Kenny provided her with a misleading methamphetamine report;
- [b] Ms Kenny did not address her concern with the MTNZ report appropriately once she had brought the error to Ms Kenny’s attention;
- [c] She was not provided with an opportunity to submit a revised offer to buy the property; and
- [d] Ms Kenny did not pass on information to the purchaser that should have been passed on and that, consequently, the purchaser may have moved into an unsafe property.

[19] The complaint was not resolved, and was referred to the Committee, which decided to inquire into it. The report by the Authority’s investigator was dated 3 September 2018.

### **The MTNZ reports**

[20] It is necessary to set out information obtained by the Authority concerning the MTNZ reports. Following receipt of Ms Denyer’s complaint, and in the light of her concerns regarding the MTNZ report she was given, the Authority facilitator obtained copies of the reports for 339 and 339a from MTNZ. It is evident from the material obtained by the facilitator that:

[a] Testing at 339 was carried out on 11 September 2017, under MTNZ's Job No 5304.

[b] The MTNZ Analysis Report for 339 (dated 14 September 2017) states:

**Test location: [339]**

We would like to advise you the analysis of the samples at the above address on 11/9/17 showed traces of Methamphetamine but these traces do not exceed the NZS8510:2017 Testing Standard in the house. There were no traces located in the sleepout.

Please refer to the Field Sampling Technician's report and analysis report from Analytica Laboratories for further information.

Above the first paragraph there is a large orange box with an orange tick inside it.

[c] The MTNZ report for 339 then provides the Analytica Laboratories Certificate of Analysis, dated 12 September 2017. The "Results Summary" of the Certificate of Analysis identifies the samples as having been taken from 339, with the reference MTNZ5304. It records a methamphetamine level in the house ("Lab Composite of Field Composite Samples) of 0.55 mcg per sample (noting a "reporting limit" of 0.04 mcg per sample), with a "theoretical maximum level" of 1.10 mcg.

[d] The MTNZ Analysis Report for 339 then provides MTNZ's "Screening Assessment", giving the MTNZ 5304 job number. This states that testing was carried out on 11 September 2017, and includes photographs of the exterior and interior of the property, all of which are labelled with the MTNZ 5304 job number. The property was described as a "townhouse".

[e] Testing at 339a was carried out on 11 September 2017, under MTNZ's Job No 5338.

[f] The MTNZ Analysis Report for 339a, dated 12 September 2017 shows a large green box with a green tick in it and states:

**Test location: [339a]**

We are pleased to report the analysis of samples taken at the test location above on the 8/9/2017 found **NO** traces of Methamphetamine. Please find attached the Field Sampling Technician's report and report from Analytica Laboratories.

- [g] The MTNZ report for 339a then provides a Certificate of Analysis by Analytica Laboratories relating to 339a, dated 13 September 2017. The "Results Summary" of the Certificate of Analysis, identifies the samples as having been taken from 339a, with the reference MTNZ5338. It records a methamphetamine level in the house ("Lab Composite of Field Composite Samples) of <0.04 mcg per sample (noting a "reporting limit" of 0.04 mcg per sample), with a "theoretical maximum level" of <0.08 mcg.
- [h] The MTNZ Analysis Report for 339a then provides MTNZ's "Screening Assessment" of 339a, giving the MTNZ 5338 job number. This states that the testing was carried out on 11 September 2017, and includes photographs of the exterior and interior of the property, all of which are labelled with the MTNZ 5304 job number. The property was described as a "townhouse".

[21] Ms Denyer provided the Committee with the MTNZ report provided to her by Ms Kenny. The report purports to be for 339, dated 12 September 2017. However, the wording of the "Analysis Report" is that for 339a (set out at paragraph [17][f], above, and includes the green box and tick. A Certificate of Analysis by Analytica Laboratories is attached, but while purporting to refer to 339, it gives the MTNZ job number for 339a (MTNZ5338). The recorded methamphetamine levels are those found at 339a (<0.04 mcg per sample). The Photographs attached to the report are of 339, and are labelled with the MTNZ 5304 job number. The property was described as a "townhouse".

[22] In a communication to the facilitator on 20 April 2018, MTNZ confirmed that the reference to a "townhouse" in the report provided to Ms Denyer was an error made by their field technician. In a further communication on 16 May 2018 (after reviewing the copy of the report provided to Ms Denyer) MTNZ advised the facilitator that

“someone has removed the “a” on both the cover letter and certificate of analysis” of that document. MTNZ provided the facilitator with a copy of the report given to Ms Denyer, where the removal of the letter “a” is shown.

[23] It is apparent to the Tribunal that MTNZ provided the vendor with reports for 339 (which showed traces of methamphetamine) and for 339a (which showed no traces of methamphetamine). The address on the report given to Ms Denyer was not an “error”, or “mistake”. Rather, as stated by MTNZ, Ms Denyer was not given the report for 339, she was given the report for 339a, from which the “a” in the address had been removed.

[24] In his report to the Committee, the Authority investigator stated that “[MTNZ], when questioned about the reports and what appeared to be incorrect address numbers confirmed they had made an error in the numbering of the report but confirmed both reports were correct. ... The report provided to [Ms Kenny] by the vendor who then passed it on to [Ms Denyer] was numbered [339] but was the report for [339a].” The investigator did not refer to MTNZ’s communication of 16 May 2018, as to the removal of “a” from the address on the report provided to Ms Denyer.

### **The Committee’s decision**

[25] We set out the following findings made by the Committee in the course of recording the parties’ respective positions, and statements recorded by the investigator:

3.14 ... The Committee considers that the preponderance of evidence is that it is more likely than not that the [MTNZ] report was provided to the Licensee by the vendor and handed directly to Complainant by the Licensee, but we do not consider that it is necessary to determine exactly when this occurred. We are satisfied that both parties agree that the report was provided prior to the Complainants offer being made to the vendor.

3.15: There is insufficient evidence before us to reach a conclusion as to whether an error occurred at the laboratory or at the point of the vendors receipt and forwarding of the report. There is no evidence before us other than the Complainants assertion that the recording of the two addresses (339 and 339a) was anything other than a mistake. The evidence before us does not reach a level that could support a finding that it was deliberate or fraudulent. The resting laboratory has confirmed that both properties tested below the then relevant limit. We can therefore see no reason why either the vendor or the Licensee would seek to conceal that information.

[26] The Committee's "reasons for the decision" to take no further action on Ms Denyer's complaint are set out in paragraphs 4.1 to 4.7 of the decision, as follows:

4.1 Meth Test New Zealand when questioned about the reports and what appeared to be incorrect address numbers confirmed they had made an error in the numbering of the report but confirmed both reports were correct and that both properties tested below the then acceptable level.

4.2 The report for [339a] recorded "No traces of Methamphetamine". The report for [339] recorded traces of Meth, but these were under the guidelines in force at the time of the report.

4.3 The investigator had a telephone conversation with the purchaser who stated he was not concerned with having a Meth test done on the property he initially purchased which was 339a. This was because it had recently been renovated and was being lived in by the owner who did not look like the sort of person to use drugs. He did not even look at the front property (339) when he purchased it, as it all happened so quickly, but he was not concerned about the possible presence of traces of Meth.

4.4 From the evidence put before it the Committee has established the Complainant had the right to rely on the Meth test reports that were given to her by the vendor. The Licensees fiduciary duty was with the vendor. That is a relationship in regard to disclosure and transparency, that has both equal weight for both the vendor and agent.

4.5 In regard to the variances in the "Meth Test NZ" report that the Complainant, through her lawyer, highlighted at the time she made the offer on the 19 November 2017 and her concerns as to the description of the Property being a townhouse and that the numbers on the photographs did not match the numbers on the certificate of analysis, the Licensee did as she should have. She checked the information on the agency intranet data base; she contacted the Meth testing company and asked them to re-send the report, and she also brought the matter to the attention of the vendor to seek their instruction.

4.6 Events then overtook that process when the vendor accepted another offer which she had every right to do, and there was no reason for the Licensee to advise the Complainant further.

4.7 Samples were taken at the test location on the 8 September 2017 found no traces of Meth.

### **Appeal submissions**

[27] Ms Denyer submitted that the Committee reached the wrong decision, and had made incorrect findings on the evidence. She referred to the evidence provided in her complaint.

[28] Regarding the MTNZ report, she submitted that she was given the "fraudulent" MTNZ report, passed off as a report for 339. She said that having pointed out to Ms Kenny that the numbers on the photographs did not match those in the Certificate of

Analysis, she was not given the correct report for 339. She agreed that both of the original reports provided by MTNZ were correct, but she was given a “changed” report for 339, which did not have the orange tick indicating traces of methamphetamine.

[29] Ms Denyer further submitted that Ms Kenny had not corrected incorrect information that she had given to the Committee: in particular, she had not corrected her statements as to providing Ms Denyer with the report, and as to who discovered the errors in the report (she discovered it, not her lawyer). She further submitted that Ms Kenny had had two days after she pointed out the discrepancies in the MTNZ to provide her with a replacement report, as she had requested, but failed to do so.

[30] On the issue of a counter-offer to the vendor, Ms Denyer submitted that when she gave Ms Kenny her offer to present to the vendor, she was expecting a counter-offer. She said she was ready to improve her offer, and Ms Kenny had lied to the Committee, or given it incorrect information.

[31] Regarding the MTNZ report, Ms Denyer submitted that the Committee had made its decision on the wrong information. She submitted that the issue is not about the amount of methamphetamine found at the property, it is about disclosing a known problem with the information provided. She submitted that a report of “traces of methamphetamine” is an indication that further testing is required.

[32] Ms Denyer further submitted that the vendor may have “dropped us as a buyer” to prevent exposure of the fraudulent MTNZ report. She submitted that the circumstances in which the sale to the purchaser happened within minutes were very unusual. She submitted that her concerns with the report had not been addressed.

[33] On behalf of Ms Kenny, Mr Rea submitted that Ms Denyer had speculated as to the MTNZ report having been altered by the vendor, but there was no reason why Ms Kenny would have done so. He further submitted that there was no evidence that Ms Kenny knew of, or was complicit in, any alteration of documents – if that occurred.

[34] Mr Rea further submitted that there was in any event no need for Ms Kenny to disclose the correct MTNZ report for 339, given the low level of methamphetamine

found. Mr Rea also referred to guidance given by the Authority, indicating that there is no need to disclose methamphetamine test results showing less than 15 mcg per 100 cm<sup>2</sup>. He acknowledged that this guidance was given recently (on 17 June 2018), but submitted that the guidance did not change the previous legal position as to disclosure.

[35] Mr Rea submitted that there was no evidence of any relationship between Ms Kenny and the vendor, other than that of agent and principal, and no incentive for her to risk her career by being involved in any dishonest concealment of a test report.

[36] Finally, Mr Rea noted that no complaint as to non-disclosure of the correct MTNZ report for 339 had been made by the purchaser.

[37] Ms Cann submitted that the Committee had correctly concluded that Ms Kenny had not intentionally provided Ms Denyer with an incorrect MTNZ report. She also submitted that there was no evidence that Ms Kenny had fraudulently altered the report, or knew that the report was incorrect before she gave it to Ms Denyer.

[38] Ms Cann submitted that Ms Kenny was entitled to rely on the report provided to her by her vendor (and submitted that the Committee's reference to "the Complainant" in paragraph 4.4 of the decision ("the Complainant was entitled to rely on the Meth test reports that were given to her by the vendor"), was a typographical error, and was intended to read "the Licensee").

[39] Ms Cann further submitted that the Committee was correct in finding that Ms Kenny had adequately addressed Ms Denyer's concerns regarding the MTNZ report.

[40] On the issue of whether Ms Kenny had failed to present Ms Denyer's counter-offer to the vendor, Ms Cann submitted that it is "trite" that it is a matter for a vendor to decide which offer to accept, whether to negotiate further, with whom to negotiate, and when. She submitted that a licensee must act in accordance with the client vendor's instructions unless they are contrary to law. She submitted that in the present case the vendor decided to withdraw her counter-offer, and instructed Ms Kenny not to deal further with Ms Denyer. Accordingly, Ms Kenny had no obligation to give Ms Denyer an opportunity to submit a further offer.

[41] Ms Cann submitted that the Committee was correct in finding that the vendor had accepted another offer, and had every right to do so, and there was therefore no obligation on Ms Kenny to give Ms Denyer an opportunity to submit a further offer, or to advise her further with regard to the MTNZ methamphetamine reports.

[42] With respect to Ms Denyer's complaint that Ms Kenny should have advised the purchaser of the correct MTNZ report for 339, Ms Cann referred to the evidence before the Committee that the purchaser was not concerned about the possible presence of methamphetamine, or to see a methamphetamine test report. She also referred to Ms Kenny's evidence that the purchaser did not discuss methamphetamine testing, or raise any issue as to methamphetamine with her. She submitted that on the evidence before it, the Committee was correct in dismissing Ms Denyer's allegation that Ms Kenny did not provide information to the purchaser.

[43] We note Ms Denyer's reply submissions, in which she stressed her earlier submission that she had not alleged that Ms Kenny had changed the MTNZ report for 339, and that she agrees that Ms Kenny "may not have known herself that the report had been tampered with..." She also stressed that she had not alleged that Ms Kenny intentionally provided her with the incorrect MTNZ report.

[44] She submitted that the issue is what Ms Kenny did after she was told that the report was incorrect. She submitted that Ms Kenny had this information as from 19 November, and therefore had two days to obtain a correct report, and provide it to Ms Denyer before taking Ms Denyer's offer to the vendor on 22 November, but failed to do so.

[45] She further submitted that Ms Kenny knew of the irregularity as from 19 November and was therefore in a position to disclose that to any other potential buyers. Her complaint concerned Ms Kenny's obligation to disclose the possibility of a methamphetamine issue, and to suggest that prospective purchasers do their own due diligence.

## Discussion

[46] A number of aspects of the decision have caused us concern.

[47] First, the Committee did not correctly identify the issues before it regarding the MTNZ report. The Committee addressed whether Ms Kenny “intentionally” provided Ms Denyer with the incorrect MTNZ test report, and considered this in conjunction with whether Ms Kenny addressed Ms Denyer’s concerns appropriately. Ms Denyer had not alleged (and does not now allege) that Ms Kenny intentionally provided her with a report, knowing it to be incorrect.

[48] As a result, the decision focusses on the discussion of, and findings on, matters that were not part of Ms Denyer’s complaint: in particular, as to whether Ms Kenny knew of or colluded in the alteration of the MTNZ report for 339, and whether she intentionally provided Ms Denyer with the incorrect report.<sup>1</sup> That focus led to the Committee failing to address Ms Denyer’s actual complaint which was whether, having been made aware of the discrepancies in the MTNZ report purporting to be for 339, Ms Kenny responded appropriately.

[49] Secondly, it is not clear to us that the Committee considered all of the relevant material: in particular, the correct reports provided by MTNZ for 339 and 339a, and the MTNZ communication of 16 May 2018 pointing out the removal of the letter “a” in the address of the property from the report given to Ms Denyer.

[50] At paragraph 4.1 of the decision, the Committee stated that MTNZ had “confirmed they had made an error in the numbering of the report but confirmed both reports were correct and that both properties tested below the then acceptable level.” We can find no document or other material that was before the Committee that provides evidence of MTNZ “confirming” such an error, although MTNZ did confirm that their field technician had incorrectly referred to the property in the 339 report as a “townhouse”, an error which appears in both the 339 and 339a reports.

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<sup>1</sup> There is no indication in the decision that the Committee decided on its own initiative to inquire into this issue, pursuant to s 78(b) of the Act.]

[51] The MTNZ communication of 16 May 2018 was included in the facilitator's Initial Referral Report to the Committee. Counsel for the Authority advised the Tribunal that it was before the Committee. However, the Committee did not refer to it. Given the nature of the advice from MTNZ, this was a serious omission.

[52] At paragraph 3.15 of the decision the Committee concluded that there was insufficient evidence before it to reach a conclusion as to whether an error (in the 339 report) occurred at the laboratory or at the point of the vendor's receipt and forwarding of the report. The Committee further concluded that there was no evidence before it, other than Ms Denyer's assertion, that the recording of the two addresses (339 and 339a) was anything other than a mistake, and that the evidence before it did not reach a level that could support a finding that it was deliberate or fraudulent.

[53] It is difficult to see how the Committee could have reached these conclusions (in particular, that there was no evidence other than Ms Denyer's assertion) if it had considered the MTNZ communication of 16 May 2018.

[54] We also note that at paragraph 4.7 of the decision, the Committee states: "Samples were taken at the test location on the 8 September 2017 found no traces of Meth". This statement appears to indicate that the Committee did not appreciate (or fully appreciate) the difference between the 339 and 339a reports. The "test location" referred to here is 339a (and repeats an error in the 339a report as to the date the test was carried out). At the "test location" the Committee was required to be concerned with (339), "traces of methamphetamine" had been found, not "no traces").

[55] Finally, other than to set out Ms Denyer's concern, and Ms Kenny's response, the Committee did not address or make any finding as to Ms Denyer's complaint that Ms Kenny should have advised the purchaser about the correct MTNZ report for 339. We note Ms Cann's submission that the Committee was "correct to dismiss the allegation made by the appellant". However, the Committee made no finding on the point.

[56] In the circumstances, it is consistent with our appeal function (under s 111(3) of the Act), and appropriate, that we quash the Committee’s decision and address each issue and the available evidence, and reach our own conclusions on the issues.

### **Did Ms Kenny give Ms Denyer a misleading methamphetamine report?**

#### *Evidence*

[57] The vendor commissioned reports from MTNZ for both 339 and 339a. The Authority’s investigator asked her “I understand you had meth tests conducted on both properties. Was there any particular reason you had this done?” The vendor responded “purely for resale purposes and to save time at point of sale as I was heavy on bridging finance”.

[58] In the same exchange with the investigator, the vendor stated that she “supplied [Ms Kenny] with both reports during the time she was marketing the properties.”

[59] Ms Denyer was given an MTNZ report purporting to be for 339.

[60] The report was incorrect. That is, it purported to be a test report and results for 339, but was not. While the front page of the report referred to 339 (and photographs showed the 339 property and MTNZ job number for the property (5304)), the Certificate of Analysis referred to the MTNZ job number for 339a (5338) and set out the results for 339a. It told her that there was NO trace of methamphetamine at 339. This was not true, as the report for 339 showed traces of methamphetamine.

#### *Discussion*

[61] On the evidence before the Committee, the complaint is established. That is, Ms Kenny gave Ms Denyer a misleading MTNZ report. However, in the absence of any complaint, or evidence, that Ms Kenny knew that the report was incorrect, the finding does not give rise to any disciplinary issue.

**Did Ms Kenny address Ms Denyer's concern about the MTNZ report appropriately when Ms Denyer brought it to her attention?**

*Evidence*

[62] Ms Denyer queried details in the report as to the description of the property as a “townhouse”, and the discrepancy between the numbering on the photographs and the Certificate of Analysis. She asked Ms Kenny to check the report in case properties had been mixed up.

[63] Ms Kenny's assistant checked the agency's intranet database and found no other reports for 339.

[64] Ms Kenny telephoned MTNZ and asked it to re-send the report, to ensure that Ms Kenny had the correct copy, but MTNZ said it would deal only with the vendor.

[65] Ms Kenny discussed the MTNZ report with the vendor, who said she may have transposed the front pages of the two reports, would look into it, and would call MTNZ for a correction and clarification if that were not the case.

*Discussion*

[66] Ms Denyer contends that Ms Kenny should have followed the issue up with MTNZ herself, within the two days before she was able to present Ms Denyer's offer to the vendor, and should have sent Ms Denyer the “correct” report. That submission takes no account of the fact that, as Ms Denyer knew, MTNZ would deal only with the vendor. Ms Denyer also knew that Ms Kenny was not able to contact the vendor during those two days. As far as providing Ms Denyer with the correct report before Ms Denyer's offer was presented to the vendor is concerned, we are not persuaded that there was anything else Ms Kenny could have done, and she was not in breach of any obligation to Ms Denyer.

[67] After Ms Denyer's offer was presented to the vendor, and the vendor accepted the purchaser's offer, there was no mandate for Ms Kenny to do anything as regards Ms Denyer, other than to tell her that her offer had not been accepted and the house

was being sold. From that time, Ms Denyer could have no further interest in the property.

[68] In the particular circumstances of this case, we find that Ms Kenny was not in breach of any of her professional obligations regarding taking further steps to provide Ms Denyer with a correct MTNZ report for 339.

**Did Ms Kenny fail to give Ms Denyer an opportunity to submit a revised offer?**

*Evidence*

[69] Ms Kenny took Ms Denyer's offer to the vendor on 22 November. The vendor counter-signed it.

[70] Almost immediately (and before the counter-signed offer was (or could be) presented to Ms Denyer), the vendor accepted the purchaser's offer.

[71] Ms Kenny advised the vendor as to the multi-offer process, but the vendor instructed her that she did not want to follow that process.

*Discussion*

[72] Neither the Act nor the Rules requires that a multi-offer process must be followed if more than one offer is received. It was open to the vendor, if she so chose, to accept the purchaser's offer and not follow the multi-offer process.

[73] Pursuant to r 9.1 of the Rules, a licensee must act in the best interests of the licensee's client and in accordance with the client's (lawful) instructions. Once the vendor told Ms Kenny that she had accepted the purchaser's offer, and instructed her that she would not go through the multi-offer process, Ms Kenny had no mandate to give Ms Denyer an opportunity to submit a revised offer.

[74] We find that Ms Kenny was not in breach of any of her professional obligations in not giving Ms Denyer an opportunity to submit a revised offer.

**Did Ms Kenny fail to pass on to the purchaser information that should have been passed on to him, as to discrepancies in the MTNZ report for 339?**

[75] We accept Ms Denyer's submission that the issue is what Ms Kenny did after she was told that there were discrepancies in the MTNZ report; in particular, whether she should she have told the purchaser that there were issues with the MTNZ report provided for 339, as a consequence of which he may have moved into an unsafe property.

*Evidence*

[76] Ms Kenny was told by Ms Denyer that the purported MTNZ 339 report had discrepancies in that the property was described as a "townhouse" and there was a mismatch between job numbers on the Certificate of Analysis and the photographs. Ms Kenny contacted MTNZ, and raised the issue with the vendor. The vendor said she may have transposed the front pages of the two reports and would look into it with MTNZ.

[77] Almost immediately after speaking with the vendor, Ms Kenny was told that the vendor had agreed to sell the property to the purchaser. Ms Kenny was instructed to meet with him to prepare an agreement for sale and purchase. She met with the purchaser and completed the paper work with him. She said that the vendor and the purchaser had an agreement in place later the same evening.

[78] The purchaser told the Authority's investigator that he had not considered buying 339 until the vendor said to him "why don't you buy the property" after Ms Kenny had left with the counter-offer on 22 November. He said that the vendor told him how much she wanted for 339, he thought it was a really good price, and he agreed to buy it. The investigator also recorded that the purchaser said that he was not concerned with having a methamphetamine test done on 339a, and did not even look at 339 because it happened so quickly. However, he was not concerned if there were traces of drugs.

## *Discussion*

[79] Ms Denyer's complaint included an allegation that Ms Kenny had not passed on to the buyer of the property her concerns regarding the MTNZ report. In the course of communications with the Authority's facilitator regarding her complaint, Ms Denyer said "I think we need to confirm what information [Ms Kenny] gave to the [prospective] buyer".

[80] The Authority's investigator asked Ms Kenny for a "general narrative describing her involvement in the matter". There is nothing in the material before the Committee that indicates that Ms Kenny was asked to set out what (if anything) she said to the purchaser concerning the MTNZ report.

[81] There is no evidence that Ms Kenny knew what the actual methamphetamine levels found at 339 were at the time of the sale to the purchaser. The evidence is that she knew that Ms Denyer had queried the description of the property as a "townhouse", and had pointed out the mismatch of job numbers if the Certificate of Analysis and photographs in the report provided as being the MTNZ 339 report.

[82] We note Mr Rea's submission that according to Authority guidelines, Ms Kenny was not required to disclose methamphetamine levels that were below the "reporting limit" specified in the NZS8510:2017 Testing Standard. The difficulty with that submission is that Ms Kenny did not know what the test results for 339 were. She did not know whether they showed the presence of methamphetamine (or any other substance) at, below, or above the reporting limit. She had no basis on which she could make a judgment call as to whether she should alert the purchaser to an issue as to the presence of methamphetamine.

[83] On the evidence of (in particular) the discrepancy between the job numbers of the Certificate of Analysis and the photographs, Ms Kenny should have been put on enquiry as to the validity of the MTNZ report she was given for 339. Until such time as she saw a correct report, she had no way of knowing whether methamphetamine had been found above the reporting limit, and at a level which she was required to disclose under the Authority's guidelines.

[84] The MTNZ report was a document given to her by the vendor for the marketing process. The fact that the report was commissioned indicates that it was considered by the vendor to be important, and the fact that the vendor gave it to Ms Kenny indicates that it was intended to be disclosed.

[85] Ms Kenny had the opportunity to raise the issue of the MTNZ report for 339 with the purchaser when she met him to draw up the agreement for sale and purchase (before he was legally bound). Consistent with the consumer-protection purpose of the Act, Ms Kenny had professional obligations under the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 to exercise skill, care, competence, and diligence at all times when carrying out real estate agency work (r 5.1), and not to mislead the purchaser, nor withhold information which should in fairness have been given to him (r 6.4). In order to meet those obligations, she should have told the purchaser that the MTNZ report for 339 had been queried.

[86] Whether the purchaser had any concerns, or took any steps, was a matter for him. But a lack of interest on his part would not have absolved Ms Kenny from complying with her professional obligations.

[87] However, there is no evidence that Ms Kenny was asked during the investigation whether she told the purchaser about the MTNZ report and, if so, what her response was. Further, there is no evidence that the purchaser was asked if Ms Kenny told him about the report. The evidence that was before the Committee suggests that Ms Kenny did not pass on Ms Denyer's concerns about the report to the purchaser. However, when there is no evidence that the issue was raised directly during the investigation, we have concluded that it is not appropriate to make any disciplinary finding against her.

## **Decision**

[88] The Committee's decision is quashed.

[89] Having considered the evidence that was before the Committee, and for the reasons set out above, we have determined pursuant to s 89(2)(c) of the Act that no further action should be taken on the complaint.

[90] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Hon P J Andrews  
Chairperson

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Ms N Dangen  
Member

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Ms C Sandelin  
Member