

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 15

Reference No: READT 022/2022

IN THE MATTER OF

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

BETWEEN

CHARLOTTE CARLYLE WILSON
Appellant

AND

**THE REAL ESTATE AGENTS AUTHORITY
(CAC 2102)**
First Respondent

AND

EE
Second Respondent

Tribunal:

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

Representation

The appellant:	Self-represented
Counsel for the first respondent:	M Djurich
The second respondent:	No appearance

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 27 June 2023

INTRODUCTION

[1] Charlotte Carlyle Wilson, the appellant and a licensee, handled the sale of a residential property (the property). It was marketed as providing a 'Home and Income', but the separate renting of the downstairs area for residential purposes was not permitted. She was found by Complaints Assessment Committee 2102 (the Committee) to have breached various provisions of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules) and to be guilty of unsatisfactory conduct under the Real Estate Agents Act 2008 (the Act).

[2] Ms Wilson has appealed to the Tribunal, primarily arguing that income from a commercial business in the downstairs area would have been allowed.

BACKGROUND

[3] Ms Wilson is a licensed salesperson under the Act and at the relevant time was engaged by Browns Real Estate Ltd, trading as New Zealand Sotheby's International Realty (the agency). Ms Wilson was the listing agent for the property.

[4] EE, the second respondent, bought the property in question through a company (the purchaser). He has chosen to take no active role in the appeal.

[5] Essentially, the purchaser's complaint was that the property was advertised as a 'Home and Income' when it was not consented as such by the local council. The potential for income concerned a downstairs area with its own outside entrance, a bathroom, a kitchen, a bedroom and a dining/lounge room.

[6] A listing (agency) agreement was signed by the vendor and Ms Wilson on 31 October 2016. Under the "Style" section of the property's description, the boxes labelled "House" and "Home and Income" were marked.¹

[7] The Information Memorandum (undated) for the property prepared by Ms Wilson and handed to prospective buyers stated:²

Downstairs is self-contained with its own bathroom, kitchen, bedroom and dining.

[8] The Memorandum also stated that the property had, "2 kitchens plus Pantry".³

¹ Listing Agreement (31 October 2016) at 118 of the Authority's bundle of documents (the bundle).

² Information Memorandum (undated) at 98 of the bundle.

³ At 108 of the bundle.

[9] A rental appraisal (10 November 2016) obtained by Ms Wilson stated that downstairs there was a rumpus room which could be renovated into separate accommodation. It gave a rent range of \$180 – \$195 per week for the “Downstairs self-contained flat”.⁴ She provided this to the purchaser and presumably other prospective buyers as part of her marketing.

[10] A conditional sale and purchase agreement was signed by the vendor and purchaser on 18 January 2017.

[11] On 27 January 2017, the purchaser sent an email to Ms Wilson seeking a reduction in the price as a result of faults and problems identified in undertaking due diligence. The Tribunal notes that there is no item for the downstairs area.

[12] On 22 February 2017, Ms Wilson provided a transaction report (undated) to the agency.⁵ Under “What representations were made?”, Ms Wilson recorded:

Kitchen downstairs not consented, including the Oven.

[13] The transaction settled on 17 March 2017.

[14] The purchaser subsequently rented out the property as two self-contained flats.

[15] The council informed the purchaser in late 2020 that the downstairs kitchen was unconsented and would have to be removed.

[16] On 16 December 2020, almost four years after settlement, the purchaser sent an email to Ms Wilson stating that after consulting his lawyer, he was of the view that the unconsented work on the second kitchen should have been disclosed. He asserted that the remediation costs would have to be met by the vendor or the agent.

Complaint to the Authority

[17] The purchaser made a complaint to the Real Estate Agents Authority (the Authority) on about 9 February 2021. He said the property was set up, viewed and purchased as two self-contained flats, both with fully functioning kitchens. However, he had received a notice from the council requiring the removal of the unconsented downstairs kitchen. It had been his intention to rent both upstairs and downstairs as a residential property. At no time was he made aware of the unconsented works.

⁴ Rental Appraisal (10 November 2016) at 90 of the bundle.

⁵ Email (22 February 2017) with attached transaction report (undated) at 436–438 of the bundle.

[18] On about 16 April 2021, the property was returned to the market by the purchaser. It was marketed under the slogan, “Beach, Sun and Income”.⁶ The advertisement referred to the recently refurbished downstairs area as ideal for long term rental or holiday accommodation.

[19] On 4 May 2021, the Authority sent an email to Ms Wilson advising that a complaint concerning the property had been received and it would be referred to the Committee. At about the same time, an officer from the Authority rang Ms Wilson. She then sent an email to the officer on the same day stating she would provide a report of the matters addressed in the discussion, including the ‘Home and Income’ marketing.

[20] On 5 May 2021, Ms Wilson sent an email to the purchaser asking him to withdraw the complaint about false advertising as he had put the property back on the market, with his marketing stating that income was possible.⁷ She asked him to pay \$3,000 which were her legal expenses addressing his false accusations. She added that she had marketed it as a business rental, not accommodation, which was allowed by the council.

[21] The Committee decided on 27 May 2021 to inquire into the complaint.

[22] The purchaser, and it is assumed Ms Wilson also, were informed on 18 June 2021 of the Committee’s decision to inquire into the complaint.

[23] On an unknown date, Ms Wilson provided a written explanation to the Authority.⁸ She said that the property was marketed as ‘Home and Income’ as the downstairs area was ideally located for a business, being just 150 metres from the local shopping precinct. The council’s rules allowed people to run businesses from their home or to rent out space to a tenant to run a business. Ms Wilson said she was unaware that there was nothing on the council’s plans for the downstairs area, as the vendor did not provide the LIM report. The purchaser was made aware there was no LIM report. She was certain there were issues with the downstairs kitchen and specifically mentioned it to the purchaser. Her Transaction Report had recorded under “What Representations Were Made?” that she had said the downstairs kitchen was not consented.

[24] As for the 5 May 2021 email, Ms Wilson said to the Authority she did not know at the time that the complaint had gone to the Committee. While she had received a phone call from the investigator about the false accusation of marketing the property as ‘Home and Income’, she had only been made aware of an official Committee complaint and

⁶ Reproduced in Ms Wilson’s submissions (1 May 2023).

⁷ Email Ms Wilson to the purchaser (5 May 2021) at 72 of the bundle.

⁸ Ms Wilson Response to CAC Enquiry (undated) at 183–216 of the bundle.

case number on 18 June 2021. She had not contacted the complainant since a “CAC Number” had been issued.

[25] The purchaser advised the Authority on 15 October 2021 that he had never discussed with Ms Wilson running the property as a business. He said it was a residential property.

[26] An investigator from the Authority interviewed Ms Wilson on 28 October 2021. Ms Wilson advised him that her reference to “income” in “Home and Income” was to running a business from there. As for the downstairs kitchen, Ms Wilson was sure she had discussed with the purchaser that it may not have been consented because of its state (the ceiling tiles, the wiring, the scaffolding poles, the water damage, the oven not fitting). It was her own assumption it was not consented. She did not talk to the vendor about her concern, as she thought she was covered by inserting a due diligence clause and also since the transaction was subject to a LIM report.

[27] In relation to the email of 5 May 2021, Ms Wilson described the complaint as nonsensical. She thought that was fairly obvious since the purchaser was himself marketing the property as ‘Home and Income’. He had not obtained any consent for the property and the whole thing needed to be thrown out. The Tribunal notes that in the interview Ms Wilson initially denied knowing (at the time she sent the email) that it was going to the Committee. However, later in the interview she stated she might possibly have known it was going to the Committee, but had not recalled that.

Decisions of the Committee

[28] The Committee relied on the following provisions of the Rules:

5 Standards of professional competence

- 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

...

6 Standards of professional conduct

...

- 6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.
- 6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.
- 6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

10 Client and customer care for sellers' agents

...

Disclosure of defects

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

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

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

...

[29] In its decision dated 18 May 2022, the Committee noted Ms Wilson's acceptance that she advertised the property as 'Home and Income'. It was found this would suggest to the average person that the downstairs area would generate the advertised income as a rental property. This was supported by Ms Wilson's failure to disclose that the downstairs area was unconsented and her supply of a rental appraisal for that area. Ms Wilson's suggestion that a business would be ideally located downstairs because of the property's location was not credible.

[30] The Committee determined that Ms Wilson had not disclosed to the purchaser that (both findings are given):

- 1. The downstairs area was not consented for use as a rental yet it was advertised as a 'Home and Income'.
- 2. The downstairs area was not consented.

[31] This was found to be a breach of rr 5.1, 6.2, 6.4 and 10.7 of the Rules, and unsatisfactory conduct.

[32] The Committee further found that Ms Wilson's contact with the purchaser after the complaint was referred to the Committee, denying and then admitting it, was a breach of r 6.3 and also unsatisfactory conduct.

[33] The Committee issued its penalty orders on 1 August 2022. It made an order “censuring or reprimanding” Ms Wilson (it does not say which) and fined her \$5,000.

APPEAL

Submissions of the appellant

[34] In her submissions (1 May 2023), Ms Wilson contends that income was legally allowed by the council since commercial businesses could be run from downstairs. It is her view that the issue is one of consent. According to Ms Wilson, the downstairs area was and remains consented. There was no abatement notice from the council.

[35] Ms Wilson alleges that the purchaser did not undertake a renovation of the existing building. It is contended that the only mention of just one tenant being allowed in the existing building was made after the purchaser had built a second building and been issued with resource consent permitting subdivision of the property. The downstairs area could no longer be used for commercial purposes. Ms Wilson submits that such post purchase plan changes are not the responsibility of a licensee.

[36] According to Ms Wilson, there were no notices from the council to cease use of the bathroom or kitchen. The LIM report showed the downstairs area was consented and it still is. Recently, the property had been resold as having a consented downstairs area. The recent marketing showed the same number of bedrooms and bathrooms, as well as the possibility of an income, as her earlier marketing had shown. There was no record of any changes to the LIM plans. Ms Wilson contends that the property was recently marketed as “4 bed 2 bath Home and Income” without any plan changes. No evidence had been provided that anything downstairs was unconsented.

[37] Ms Wilson produces an on-line advertisement for the existing dwelling on the property (by this time subdivided) stating it has four bedrooms, two bathrooms and income could be obtained. The advertisement is undated but refers to the property being sold in July 2021. The downstairs area is said to be ideal for long term rental or holiday accommodation. The property had been refurbished with a new kitchen point and floor coverings.

[38] Also produced by Ms Wilson is a printout of certain Council Notes (5 July 2021). She has highlighted a resource consent dated 30 July 2020. We note also a resource consent for a subdivision dated 25 February 2021 and a building consent for a new residential sleepout dated 27 February 2018. These dates are all after the purchaser had bought the property.

[39] In her submissions (19 June 2023) responding to those of the Authority, Ms Wilson repeats that there is no legal evidence that the downstairs area was unconsented. In her entire real estate career, she has never lied. This is not how she operates her business. She mentioned to the purchaser that the kitchen may not be functioning, but did not put it in the contract as such concerns were then covered off with a strong due diligence clause. However, since 2019 there had been additional training and she now highlights any potential issues with an additional clause. This was not standard practice when the property was sold. A censure or reprimand seems unfair, since there is still no evidence the downstairs area is unconsented.

Submissions of the Authority

[40] In the Authority's submissions (6 June 2023), Mr Djurich notes Ms Wilson's submission that there was no evidence before the Committee that the downstairs area was unconsented. That is not correct.

[41] It is submitted that the appeal turns on whether Ms Wilson ought to have made enquiries to determine if the downstairs area was consented. A reasonably competent licensee would have done so and the Committee was correct to find her failure was a breach of rr 5.1, 6.2, 6.4 and/or 10.7 of the Rules. Licensees cannot simply pass on information from a vendor to a purchaser.⁹

[42] Ms Wilson asserts she did not know the downstairs features were unconsented. This is inconsistent with her transaction report. The report is unequivocal as to the fact that aspects of the downstairs area were unconsented. If that report is taken at face value (that she knew the kitchen to be unconsented) then it follows, based on the complaint (the purchaser says he was unaware), that Ms Wilson did not disclose that the downstairs area was unconsented. Had she informed him, the purchaser would have raised it during the due diligence exercise.

[43] There was available evidence to support the Committee's conclusion that Ms Wilson knew that aspects of the downstairs area were unconsented, but nonetheless advertised the property in a manner inconsistent with this fact and did not disclose it to the purchaser. Ms Wilson was plainly alive to the potential issue as to the property's rental capability. It was an important feature of the property. It was therefore necessary for her to verify, in light of her concerns about the workmanship, whether or not it was consented.

⁹ *CX v Real Estate Agents Authority* [2022] NZREADT 4 at [72].

[44] It is not a defence to the complaint to rely on the due diligence clause contained in the sale and purchase agreement.

[45] It is submitted that the Committee was correct to conclude that Ms Wilson's advertising of the property as a 'Home and Income' was misleading. The Information Memorandum prepared by Ms Wilson clearly marketed it as a suitable rental property. There was no mention of the property being an ideal location from which a business could be operated. Ms Wilson was aware of the purchaser's intention to rent out the property. She emphasised on a number of occasions the fact the upstairs and downstairs were effectively separate properties. The Committee's conclusion is supported by the provision of a rental appraisal.

[46] The Committee was therefore correct to conclude that Ms Wilson's use of the words "rental property" and the downstairs area being "self-contained" were references to traditional rent, as opposed to business rent or income. It correctly concluded that her statements relating to whether the property could be a "rental property" were misleading and a breach of rr 5.1, 6.2, 6.4 and 10.7 of the Rules.

[47] As for Ms Wilson's communications with the purchaser and the Authority/Committee after the complaint had been referred to the Committee, a prerequisite for finding unsatisfactory conduct is that the conduct amounts to "real estate agency work", as defined in s 4 of the Act. The email of 5 May 2021 was sent four years after settlement and the transfer of the property had been completed. Ms Wilson's conduct does not fall within the scope of the definition.¹⁰

[48] The unsatisfactory conduct finding in respect of the email cannot be upheld.

[49] If so, it will be necessary to adjust the quantum of fine imposed on Ms Wilson. The Tribunal might be assisted by two cases, *Burn* and *Vucich*.¹¹ Ms Wilson's conduct is most comparable to *Vucich*. An appropriate fine for the 'Home and Income' and consent issues would be in the vicinity of \$3,000. The "censure or reprimand" remains appropriate.

[50] The Authority has produced a bundle of the documents that were before the Committee.

¹⁰ *House v Real Estate Agents Authority* [2013] NZHC 1619 at [51].

¹¹ *Burn v Real Estate Agents Authority* [2014] NZREADT 56; and *Vucich v Real Estate Agents Authority* [2015] NZREADT 40.

Submissions of the purchaser

[51] There are no submissions from the purchaser.

JURISDICTION AND PRINCIPLES

[52] This is an appeal pursuant to s 111 of the Act.

[53] The appeal is by way of a rehearing.¹² It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.¹³ After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.¹⁴ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.¹⁵

[54] A hearing may be in person or on the papers.¹⁶ A hearing in person may be conducted by telephone or audiovisual link.

[55] This appeal is against the determination of the Committee under s 89(2)(b) that unsatisfactory conduct was proved. It is a “general appeal”. The Tribunal is required to make its own assessment of the merits in order to decide whether the Committee’s determination is wrong.¹⁷ An appellant has the onus of showing on the balance of probabilities that their version of the events is true and hence the Committee is wrong.¹⁸

Directions of the Tribunal

[56] The Tribunal issued procedural Minute 1 on 8 September 2022 and a Ruling declining Ms Wilson’s application to file further evidence on 21 March 2023. In Minute 2 (6 April 2023), the Tribunal directed that the appeal be heard on the papers.

DISCUSSION

[57] The Committee found Ms Wilson to have breached rr 5.1, 6.2, 6.3, 6.4 and 10.7 of the Rules, as set out above.

¹² Real Estate Agents Act 2008, s 111(3).

¹³ *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] and [83].

¹⁴ Real Estate Agents Act, s 111(4).

¹⁵ Section 111(5).

¹⁶ Sections 107 and 107A.

¹⁷ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] and [16] and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112].

¹⁸ *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22], citing *Stichting Lodestar*, above n 17, at [4]–[5] and *Scandrett*, above n 17, at [112].

'Home and Income' and whether downstairs area consented

[58] The Committee found that advertising the property as 'Home and Income' referred to residential income for the downstairs area. It further found that the area downstairs was not consented for renting out.

[59] Ms Wilson accepts the property was advertised as a 'Home and Income', but submits she was referring to commercial income. She further says no evidence was provided that the downstairs area was not consented.

[60] Ms Wilson may well be right when she says the downstairs area could have been used for a business and separately rented for that purpose. We do not know. However, it is self-evident that the reference to income in the advertising was intended to refer to income from residential use, not any commercial use:

1. The Information Memorandum created by Ms Wilson and used for marketing stated:

Downstairs is self-contained with its own bathroom, kitchen, bedroom and dining.
2. Prospective purchasers were given a rental appraisal for the "Downstairs self-contained flat".
3. There was no reference in the advertising materials or the rental appraisal to using the downstairs area for a business. Nor was this discussed between the purchaser and Ms Wilson.

[61] We note that the Committee dealt with the argument that "income" in the advertising material was a reference to a business and rejected it.¹⁹ We agree.

[62] Ms Wilson says there was no evidence the downstairs area was not consented. As Mr Djurich contends, this is not correct. First, there was the purchaser's evidence to the Committee that the downstairs area was unconsented.²⁰ In particular, he complained that the kitchen in that area was not consented.²¹ Second, Ms Wilson's own internal transaction report at the time recorded that the downstairs kitchen was not consented.²² Indeed, that report even recorded that she had told the purchaser about the unconsented kitchen. She said the same to the Authority's investigator on 28 October 2021.

¹⁹ Complaint C40820 (18 May 2022) at [3.4].

²⁰ Email exchange between the purchaser and the Authority (5–7 May 2021) at 79 of the bundle.

²¹ Email purchaser to the agency (17 December 2020) forwarded to the Authority, at 5 of the bundle.

²² Sotheby's Transaction Report (undated) at 138 of the Authority's bundle.

[63] Third, the plan of the downstairs area in the LIM report does not contain any bathroom, kitchen or bedroom, only a large rumpus/games room and a laundry.²³ Ms Wilson submits that the LIM report shows the downstairs area to be consented. She does not identify any document or plan to support that allegation. Her submission is contrary to the relevant plan in the report and inconsistent with her own transaction report and her evidence to the Authority on 28 October 2021. It is even inconsistent with the submissions attached to her notice of appeal which state that it is clear from the LIM plan that there was no consented bathroom or kitchen downstairs.²⁴ The downstairs area was consented only to the extent of a rumpus/games room and laundry.

[64] Ms Wilson bears the burden of proof on this appeal. She has produced no evidence to establish that the Committee was wrong to find that the downstairs area, specifically as to the kitchen, was unconsented.

[65] Ms Wilson says there was no abatement notice from the council, contrary to the purchaser's allegation. This is not material. The existence of an abatement notice was not relied on by the Committee. Nor does its absence establish that residential income could be earned from the downstairs area (separate from the upstairs) or that the kitchen downstairs was consented.

[66] Ms Wilson is correct that post-purchase plan changes are not the responsibility of the licensee, but again this is not material. The evidence establishes that, at the time of sale to the purchaser, the downstairs area could not be used for residential purposes and the kitchen (at the very least) was unconsented.

[67] The due diligence clause inserted in the agreement for sale and purchase does not justify Ms Wilson's failure to disclose the unconsented downstairs rooms. This was a defect she was aware of.

Contact with the purchaser

[68] The Committee also found to be unsatisfactory Ms Wilson's contact with the purchaser after the complaint was referred to the Committee, denying it then admitting it. According to the Committee, the purchaser said Ms Wilson had sent an email to him which he found threatening, unprofessional and unsettling.²⁵ The Committee considered that the totality of such conduct brought the industry into disrepute, breaching r 6.3 of the Rules.

²³ LIM report (15 February 2017) at 34 of the bundle.

²⁴ Notice of Appeal (25 August 2022), Appendix D "General Additional Narrative from Charlotte Wilson".

²⁵ Complaint C40820 (18 May 2022) at [1.5(e)].

[69] The Committee does not identify the email, but it is presumably a reference to Ms Wilson's email of 5 May 2021 to the purchaser. To the extent relevant, it stated:

Hi [purchaser's name], Can you please withdraw your REA complaint about my false advertising, I note the property is on the market again, clearly marketed as still being Income possible, please pay the \$3000 to my solicitor for what I had to pay to him to address your false accusations with your solicitor.

Also note I was marketing it as a business rental, not rental accommodation, as per the allowances by [the council] ... allowing people to run businesses from home.

Please put an end to this immediately. ...

[70] While Ms Wilson does not address this in her latest submissions to the Tribunal, she did contest this finding in her initial submissions to the Tribunal.²⁶

[71] The Committee found the email, together with Ms Wilson's conduct in denying and then admitting it, to be a breach of r 6.3 and to be unsatisfactory conduct under s 72(a) of the Act.

72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or
- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.

[72] There are two critical issues in relation to Ms Wilson's email overlooked by the Committee:

1. Whether it is "real estate agency work" in order to amount to unsatisfactory conduct.
2. The content and context of the email.

[73] To amount to unsatisfactory conduct under s 72, Ms Wilson had to be carrying out "real estate agency work". That phrase is defined in s 4(1):

²⁶ Addressing Subjects of the CAC Decision of Orders CN: C40820 (undated) at "Yellow".

real estate agency work or agency work—

- (a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and
- (b) includes any work done by a branch manager or salesperson under the direction of, or on behalf of an agent to enable the agent to do the work or provide the services described in paragraph (a); but
- (c) does not include—
 - (i) the provision of general advice or materials to assist owners to locate and negotiate with potential buyers; or
 - (ii) the publication of newspapers, journals, magazines, or websites that include advertisements for the sale or other disposal of any land or business; or
 - (iii) the broadcasting of television or radio programmes that include advertisements for the sale or other disposal of any land or business; or
 - (iv) the lending of money on mortgage or otherwise; or
 - (v) the provision of investment advice; or
 - (vi) the provision of conveyancing services within the meaning of the Lawyers and Conveyancers Act 2006

[74] The word “transaction” is itself defined:²⁷

transaction means any 1 or more of the following:

- (a) the sale, purchase, or other disposal or acquisition of a freehold estate or interest in land:
- (b) the grant, sale, purchase, or other disposal or acquisition of a leasehold estate or interest in land (other than a tenancy to which the Residential Tenancies Act 1986 applies):
- (c) the grant, sale, purchase, or other disposal or acquisition of a licence that is registrable under the Land Transfer Act 2017:
- (d) the grant, sale, purchase, or other disposal or acquisition of an occupation right agreement within the meaning of the Retirement Villages Act 2003:
- (e) the sale, purchase, or other disposal or acquisition of any business (either with or without any interest in land).

[75] As Mr Djurich acknowledges, the act of sending an email to the purchaser more than four years after the property was bought is not “in trade, on behalf of another person for the purpose of bringing about a transaction”. It would not meet any of the three elements of that phrase. Nor would any denial and admission during the interview or in correspondence with the Authority meet the statutory definition.

²⁷ Real Estate Agents Act, s 4(1) “transaction”. The modification in s 4(2) is not relevant.

[76] The other critical issue in relation to Ms Wilson's email, missed by the Committee, is the content and context of the email. Not only did the Committee not identify the email, it did not inform itself of the content. It also failed to have regard to the context of the email, namely that Ms Wilson had discovered that the purchaser had put the property back on the market and was advertising it as 'Home and Income', the very matter she was being accused of wrongly doing. Unlike Ms Wilson, the purchaser may have been entitled to market it in this way, having obtained various council consents. But that is not material. The point is that the content and context of the email should have been expressly considered by the Committee.

[77] As for the content, we do not regard the email as threatening or unsettling. It is innocuous.

[78] The Committee found that Ms Wilson sent the email, denied "it" in representations to the Authority and then admitted "it". The reference to "it" means the sending of an email after Ms Wilson had been informed of the referral to the Committee. In her undated written explanation to the Committee, Ms Wilson did deny sending an email after knowing of the referral.²⁸ However, that does not seem to us to be important, since Ms Wilson never denied sending the email. Her initial denial was only that it was sent after she knew of the referral to the Committee (a denial Ms Wilson resiled from before the Committee issued its decision).²⁹

[79] Even if Ms Wilson's email and her related communications were to be considered real estate agency work, which plainly they are not, they do not justify a disciplinary process. There is no breach of r 6.3 and no unsatisfactory conduct.

Penalty

[80] Ms Wilson's notice of appeal states that the appeal is against the decision on penalty orders made on 1 August 2022. The only submission from her concerning the orders is that "censure or reprimand" is unfair as there is no evidence the downstairs area is unconsented.

[81] In any event, given the Tribunal's conclusion that the Committee's finding of unsatisfactory conduct in relation to the email of 5 May 2021 cannot stand, the penalty imposed by the Committee will have to be revisited.

²⁸ Ms Wilson's response to the Committee (undated) at 194 of the bundle.

²⁹ Transcript of interview (28 October 2021) between Ms Wilson and the Authority's investigator at 230 of the bundle.

[82] The Committee decided to censure Ms Wilson and fine her \$5,000. These penalties were imposed due to the findings of unsatisfactory conduct for both the advertising and the contact with the purchaser after the complaint was lodged. There was no breakdown of the penalties for each item of wrongdoing. The Committee viewed the sending of the email as a serious matter and that this action, combined with failing to disclose the unconsented downstairs area, was mid-level unsatisfactory conduct. Since Ms Wilson had an unblemished record, accepted that she was wrong (according to the Committee) and had undertaken further training, the Committee arrived at a fine of \$5,000.

[83] Mr Djurich submits that “censure or reprimand” remains appropriate. Ms Wilson submits that is unfair as there is no evidence the downstairs area is unconsented, but she is plainly wrong about the downstairs area being unconsented.

[84] As for the fine, Mr Djurich submits it should be in the vicinity of \$3,000 for the advertising wrongdoing, relying on the Tribunal’s decision in *Vucich*.³⁰ While the circumstances in *Vucich* are not identical and nor was the package of penalties, we agree that the conduct of the licensee in *Vucich*, who was fined \$3,000, bears some comparability to that of Ms Wilson. In *Burn*, where the fine was \$2,000, the Tribunal saw the breach as at the lower end of unsatisfactory conduct.³¹ We do not agree that Ms Wilson’s wrongdoing was as low as that.

[85] It follows that we will modify the penalty orders of the Committee, retaining “censuring or reprimanding” and substituting a fine of \$3,000.

Conclusion

[86] Ms Wilson has failed to establish that the Committee was wrong to find breaches of the Rules and unsatisfactory conduct in relation to the advertising, both as to possible income and to whether the downstairs area was consented.

[87] Ms Wilson’s contact with the purchaser after she knew a complaint had been referred to the Committee, coupled with her inconsistent statements to the Committee or Authority, are not real estate agency work. Even if it was, it would not warrant any disciplinary action.

[88] The penalties are to be “censuring or reprimanding” and a fine of \$3,000.

³⁰ *Vucich*, above n 11.

³¹ *Burn*, above n 11.

OUTCOME

[89] The appeal is dismissed and the Committee's decision confirmed as to the breaches of rr 5.1, 6.2, 6.4 and 10.7 of the Rules and hence unsatisfactory conduct regarding the advertising and consent.

[90] The appeal is upheld and the Committee's decision is reversed as to the breach of r 6.3 and unsatisfactory conduct regarding contact with the purchaser.

[91] The penalty orders are modified. Ms Wilson is censured or reprimanded, and fined \$3,000.

[92] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116, setting out the right of appeal to the High Court.

PUBLICATION

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

[94] In light of the outcome of this appeal and having regard to the interests of the parties and the public, it is appropriate to order publication without identifying the purchaser, the property or any third party, but naming the licensee, her agency and the Authority.

D J Plunkett
Chair

P N O'Connor
Member

F J Mathieson
Member