

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2023] NZREADT 17

Reference No: READT 017/2022

**IN THE MATTER OF**

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

**BETWEEN**

**UM**  
Appellant

**AND**

**THE REAL ESTATE AGENTS AUTHORITY  
(CAC 2103)**  
First Respondent

**AND**

**NED GOW**  
Second Respondent

**AND**

**SU**  
Third Respondent

Tribunal:

D J Plunkett (Chair)  
G J Denley (Member)  
P N O'Connor (Member)

Representation:

The appellant:	Self-represented
Counsel for the first respondent:	M Mortimer-Wang, A Stuart
Counsel for the second respondent:	R Stewart, H Piggitt
The third respondent:	No appearance

**SUBJECT TO NON-PUBLICATION ORDER**

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**DECISION**  
**Dated 26 July 2023**

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## INTRODUCTION

[1] UM, the appellant, was the purchaser of a retail property (the purchaser). She alleges the agent's advertising and representation of the property was misleading, particularly as to the rent paid and the identity of the tenant. Furthermore, she says the auctioneer pressured her to increase her bid and misled her as to the state of the market. The appellant appeals against the decision of Complaints Assessment Committee 2103 (the Committee) to take no further action on her complaint.

## BACKGROUND

[2] The purchaser bought a commercial property, a dairy/superette, in central Auckland (the property or the shop).

[3] The second respondent, Ned Gow, is a licensed salesperson under the Real Estate Agents Act 2008 (the Act). The third respondent, SU, is a licensed agent (the auctioneer). Both were engaged by Colliers International Ltd (the agency). In relation to the relevant property, Mr Gow was the listing agent and SU was the auctioneer.

[4] On 19 February 2019, a new tenant, SF, owned by CM was assigned the lease of the property with the consent of the property's owner. The previous tenant was XH.

[5] On 2 July 2020, the owner entered into a listing (agency) agreement with the agency to market and sell the property.

[6] The agency's online "Property details" (listing 24 July 2020) stated, "SECURE CBD RETAIL INVESTMENT". The tenant was described as one of many longstanding retail tenants in the building and the net annual return was \$49,062.<sup>1</sup> An auction notice at the shop stated that the premises returned \$49,062 net annually.

[7] On 11 August 2020, Mr Gow sent an email to the purchaser setting out the property highlights, including:

1. Returning \$49,062 net p.a.
2. Longstanding tenant.

[8] Mr Gow attached to his email an information memorandum which noted the tenant was SF, the net return was \$49,062, the council rates were \$10,821.94 and the body corporate levy was \$6,587.57.<sup>2</sup>

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<sup>1</sup> This figure excludes GST.

<sup>2</sup> The figures given in this decision for council rates and the body corporate levy are all annual.

[9] On 18 August 2020, the tenant sent an email to the owner requesting that he waive the rent for six weeks. The owner replied on the same day agreeing to the tenant's request. Mr Gow was not aware of this waiver until after the auction.

[10] On 31 August 2020 (at 9:59 am), Mr Gow sent an email to the purchaser stating that the property was returning net \$49,062 annually and had a longstanding tenant. An early version of the information memorandum sent to her at the same time stated that the net annual return was \$49,062. It wrongly named the tenant as XH and incorrectly gave the outgoings as \$5,539 for rates and \$5,642 for the body corporate levy.

[11] At about 2 pm on the same day, the purchaser viewed the property with Mr Gow. They talked to the tenant's wife who was operating the store. The purchaser says she did not know this person was the wife of the tenant. Mr Gow handed to the purchaser a hard copy of the early version of the information memorandum with the incorrect information concerning the rates and levy.

[12] Mr Gow advised the purchaser the IEP (earthquake) rating was 41% in an email to her that day (at 5:00 pm).

[13] On the same day, in an email at 7:52 pm, the purchaser asked Mr Gow to show her how much the tenant paid for the rent, council rates and body corporate levy.

[14] In an email to the purchaser later in the evening of 31 August 2020 (at 9:04 pm), Mr Gow said that banks will in most cases lend over the 33% earthquake threshold. He stated that the rates were \$10,821.94 and the body corporate levy was \$6,587.57. He attached the final correct version of the information memorandum stating that the tenant was SF, the net return was \$49,062, the rates were \$10,821.94 and the body corporate levy was \$6,587.57.

[15] The purchaser sent an email on 1 September 2020 to Mr Gow asking for the "rent documents". Later on the same day, he sent the "requested documents" (a dropbox which contained the lease assignment).

[16] Mr Gow said the body corporate fee was \$6,587.57 in an email to the purchaser on 2 September 2020 (at 8:56 am), shortly before the auction.

### *The auction*

[17] The purchaser bought the property at auction on 2 September 2020 (auction commenced 11:00 am) for \$940,000. It was a virtual auction with a live stream and telephone bidding. Three potential bidders, including the purchaser, were present. The

agency's "Reserve Price at Auction" document shows the owner's reserve was initially \$1,000,000. It records bids (crossed out) of \$980,000, \$960,000 and \$950,000 as the owner reduced the reserve, before agreement with the purchaser was reached at \$940,000.

*Purchaser raises concerns with Mr Gow*

[18] On 4 September 2020, the purchaser sent two similar emails to Mr Gow raising a number of complaints against him and the auctioneer, including:

1. She had asked for the bank transactions for rent before the auction, but he did not provide them.
2. The auctioneer told her during the auction that commercial property in the CBD could be rented out at any minute, and that he would buy the property himself if she did not. She had discovered from a website after the auction that many commercial properties in the CBD were empty.
3. She was the highest bidder at \$675,000, but the two of them had pushed her to \$940,000. It was her first auction. She felt trapped and cheated by them.
4. Her broker told her she might not be able to borrow commercially.

[19] Mr Gow replied by email to the purchaser on 8 September 2020. The dairy was well "patroned" and operating well as far as they knew. The tenant had two shops in the area and had taken the lease less than a year previously. The tenant knew the trade well. Mr Gow said he had not provided the bank transactions as she had not requested them, but he was happy to share them with her. They did not feel that she was trapped and believed that everything was clearly agreed and her requests answered.

[20] On 10 September 2020 (at 11:53 am), the purchaser informed Mr Gow that a named bank would not lend money on a building with an NBS (earthquake) rating of less than 67%.

*Disclosure that full rent not paid*

[21] In an email on 10 September 2020 (at 4:52 pm), Mr Gow sent the purchaser a "proof of payments" schedule. The attached schedule listed rent payments for the 12 months from 8 July 2019 until an unknown date in June 2020 and showed that the tenant had paid the contracted rent for all the months, except April and June 2020. The entry

for both those months was “?”. The schedule recorded the shortfall of rent in the 12 months as \$9,405.15. Mr Gow explained in his covering email that he thought the purchaser had meant leases when she previously asked for the “rent documents”.

[22] The proof of payments schedule led to an exchange of emails between the purchaser and Mr Gow concerning the rent paid and the return on the capital investment. In another email on 10 September 2020 (at 9:14 pm), the purchaser expressed shock on seeing the schedule. Furthermore, she had asked for it before the auction, but he did not give it to her.

[23] On 11 September 2020, Mr Gow sent the purchaser copies of the owner’s bank statements showing the payment by the tenant of the rent and outgoings. The Tribunal notes that there are two sets of overlapping bank statements in the Authority’s bundle produced to the Tribunal covering the period from 21 June 2019 until 20 August 2020.<sup>3</sup>

[24] On 14 September 2020, Mr Gow was notified of the rental rebate by the owner.

[25] The purchaser sent an email to Mr Gow on 14 September 2020 (at 12:09 pm) stating that the proof of payment schedule showed the rent payments did not add up to \$49,062 and the payments for outgoings did not add up to the advertised amounts. Mr Gow replied the same day (at 1:19 pm) stating that the monthly net rent payments added up to \$49,062. Furthermore, where the outgoings had not been paid for the month, it was because of an agreement between the owner and the tenant due to such issues as the lockdowns. The owner had confirmed that the tenant would be paying a full updated monthly outgoing amount that would be confirmed shortly.

#### *Complaint to agency*

[26] The purchaser made a complaint to the agency in an email to a manager on 24 September 2020. She said Mr Gow told her the tenant had been paying rent regularly. He gave her the payment documents after the auction and it showed the tenant had not paid rent up to date. The auctioneer told her the property could be leased out at any time, but she was shocked to later discover from a website that a large number of commercial properties in the CBD were empty. The auctioneer had urged her to increase the bidding by saying he would buy the property himself. The purchaser stated that she had told Mr Gow and the auctioneer she had no commercial investment experience. She wanted to cancel the sale and be refunded the deposit.

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<sup>3</sup> Bank statements at 105–115 and 463–468 of the bundle.

[27] On 30 September 2020, the owner sent an email to Mr Gow copying to him the email exchange with the tenant on 18 August.

[28] On 2 October 2020, the agency's chief operating officer sent an email to the purchaser responding to her complaint in some detail. He recorded having viewed the auction video and noting a lengthy negotiation of around 30 minutes during which time she increased her bid and the owner reduced the reserve until agreement was reached. During this negotiation, there was an opportunity for her to withdraw her bid or refuse to pay a higher price. There was no basis for her claim she was forced into agreeing a price. The owner had confirmed that rent relief was granted for April and June only. The rent for May, July, August and September had been paid. The operating expenses had been paid for every month, including April and June. The chief operating officer did not believe that the agency had acted illegally, unethically or in a deceptive manner.

[29] In support, the chief operating officer attached the owner's bank statements to his email to the purchaser.

[30] Settlement of the transaction was on 2 or 16 November 2020.

#### *Complaint to the Authority*

[31] Meanwhile, on 1 October 2020, the purchaser made a complaint to the Authority against Mr Gow and the auctioneer. The purchaser listed the items of complaint, including:

1. Mr Gow and the auctioneer realised she was a newcomer to the business and put a great deal of pressure on her.
2. False advertisement about the annual return.
3. False advertisement about outgoing costs.
4. False advertisement about the identity of the tenant and duration of the tenant's business.
5. Misleading information about bank lending.
6. The auctioneer assured her CBD property could be leased out at any minute. He said he would buy the property if she did not keep up the bidding.

[32] In November 2020, the owner, the purchaser and the agency entered into a confidential legal settlement, the terms of which are not known to the Tribunal.

[33] On 20 January 2021, the agency's chief operating officer informed the Authority that Mr Gow received the first batch of bank statements on 5 August. The owner had not informed Mr Gow of the rent rebates, so he did not undertake a detailed analysis of the statements.

[34] On 3 May 2021, the Authority sent a formal letter to Mr Gow and the auctioneer reminding them to meet their obligations as licensees. It was recommended they review their practices concerning contractual documents. As for the other issues raised by the purchaser, the Authority was unable to identify any breach of the Act or the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules). It would take no action on these issues.

[35] The purchaser expressed dissatisfaction with the Authority's compliance action, so the complaint was referred to a Committee.

[36] In an email to the Authority on 20 August 2021, the purchaser alleged:

1. Mr Gow and the auctioneer put her under undue pressure using phrases such as, "We're losing patience".
2. Mr Gow informed her that the tenant had been paying his rent and costs promptly every month, even during the lockdown. He said that the shop was an essential service, so it was open during the lockdown.
3. The auctioneer assured her during the auction that commercial property in the Auckland CBD could easily be leased at any minute and that if she did not keep up the bidding, he would buy the property.
4. Mr Gow assured her most banks were happy to lend at anything over the 33% earthquake threshold.

[37] On about 10 September 2021, Mr Gow provided an explanation to the Authority:

1. It was a virtual auction via livestream with the purchaser's telephone bids being relayed to the auctioneer by him.
2. He denied giving false information to the purchaser. The purchaser alleged the statement as to the store returning \$49,062 p.a. was false. This was because the owner gave the tenant a rental rebate during 2020 in light of

the COVID-19 lockdowns, reducing the total revenue for the tenancy during 2020 by \$9,405.15. However, the contractually required annual rent was \$49,062. The informal rental rebate was between those specific parties and applied only to 2020. It was a one-off loss already incurred by the owner. It was not a reduction in rent for the remainder of the lease. He was not aware of it until 14 September 2020 when the owner told him on the phone.

3. He was sent the bank statements by the owner before the auction but the owner had not noted the informal agreement.
4. Mr Gow said he did not tell the purchaser that the tenant had paid full rental and expenses during the lockdowns in 2020. During the inspection on 31 August 2020, she asked how the store had been trading during 2020 and he told her that he did not know. He advised her that the bank statements were available, but she did not request them during the inspection. On 1 September, she asked for the "rent documents", so he sent the lease documentation because he thought that was what she was seeking.
5. As for whether the tenant stayed open during the lockdowns, Mr Gow said he told the purchaser that as a convenience store, it was deemed an essential service and was permitted to trade during the lockdowns. He did not say that the business had been open and trading during all the 2020 lockdowns. The statement was made while they inspected the property in August 2020 during Level 3 and the store was open. During that visit, they met the tenant's wife who was operating the store. They discussed the tenant's other convenience store in the area which he had been operating for a number of years.
6. It was his honestly held opinion based on recent selling experience that banks would fund properties with an IEP between 33% and 67%. He was trying to be helpful and was not advising what a bank would do as he was not privy to the purchaser's financial position.
7. While he mistakenly emailed the incorrect rates and body corporate information to the purchaser on 31 August 2020, the correct information was sent to her later that day. He was not aware the incorrect version had previously been sent, so did not ask her to delete it. The correct information had earlier been sent to her on 11 August 2020.



8. Neither he nor the auctioneer put pressure on her to keep up the bidding. The sale was the result of genuine negotiation between her and the owner as they both adjusted their bids to meet an agreed price.

[38] In his email (undated) sent to the Authority, the auctioneer advised that he told the purchaser what he always said when the bidding stalled:

If there are any other auctioneers in the room then I might just get them to move to the podium and I'll quickly bid.

[39] The auctioneer said his version of what he said is backed by the auction video. He told the Authority the bidding was then well below the owner's reserve price and the message was used to encourage underbidders to bid higher. At no stage did he make the comment to the purchaser that if the bidding stopped, he would step in and buy the property.

[40] Nor, the auctioneer said, did he say to the purchaser that commercial properties in the CBD could be leased out "any minute". He had never made a comment about the ease of re-leasing residential or commercial property as it was not within his area of expertise. He was not in the room or on the telephone to the purchaser when she agreed to raise her bid to a level the owner was happy with.

[41] Mr Gow sent another email to the Authority on 13 April 2022. He said he had sent an outdated information memorandum to the purchaser which incorrectly recorded the tenant as XH rather than SF. The memorandum had stated that the tenant was a longstanding tenant. This was poorly expressed and should have said that dairy trading from the property was a longstanding and established business under the former tenant. During the inspection, he showed the purchaser the tenant's similar dairy business which had been trading nearby for over five years. The tenants were therefore longstanding operators in the area.

#### *Decision of the Committee*

[42] On 10 June 2022, the Committee decided to take no further action on the complaint, having considered rr 5.1, 6.3, 6.4, 9.2 and 9.4 of the Rules.

[43] In relation to the informal and temporary arrangement to reduce the rent, it noted Mr Gow's position that he was not aware of it until two weeks after the auction. It further noted the absence of a contractual document permitting the tenant to pay less rent than the legal obligation in the lease (\$49,062 annually). The purchaser was entitled to receive the full rent. Hence, Mr Gow had not provided false information about the rent return.

[44] The purchaser had sought rent documents, whereas she meant bank statements. The Committee considered this was a miscommunication.

[45] As for the outgoings, there was no contractual evidence suggesting the tenant was not liable for the outgoings and any agreed reduction was temporary to address COVID-19 trading issues.

[46] The Committee noted Mr Gow's acceptance that he accidentally sent an email attachment setting out the incorrect council rates and body corporate fees. It was found, however, that the purchaser had been sent the correct information, both before and after the email. While sloppy, it was a genuine mistake and the correct information had been provided prior to and after the incorrect information. It did not therefore amount to unsatisfactory conduct.

[47] The Committee noted that Mr Gow said he did not tell the purchaser all of the rent and expenses had been paid during the lockdown period. He said the property could stay open during the lockdowns as it was an essential service. The Committee's impression was that the purchaser may have interpreted that as saying that the tenant did trade throughout the lockdowns. This was a genuine misunderstanding and was not misleading behaviour by Mr Gow.

[48] The Committee found that Mr Gow had sent an email (11 August 2020) which stated that the tenant was a longstanding tenant. A website advertisement said the same. Mr Gow told the Committee this was poorly expressed and he should have stated that the dairy was a longstanding and established business. The Committee found Mr Gow's language to be poor, but noted that the nature of the business was longstanding (since 2007). In the Committee's view, this was the important issue. It did not consider Mr Gow's statement to be misleading.

[49] As for the statement concerning the bank lending, the Committee accepted this was Mr Gow's honestly held opinion. It was of the view that he should not have given advice concerning the ability to raise finance. While unwise, there was no evidence that banks did not provide finance for buildings with an IEP between 33% and 67%, so it did not find Mr Gow's behaviour to be misleading.

[50] The Committee considered that while Mr Gow could have been more careful as to how and what he advised the purchaser, it did not find that any of his communications were misleading. There was no breach by him of the Rules or the Act.

[51] The Committee recorded that it had viewed the auction video and seen no evidence of undue or unfair pressure being placed on the purchaser to increase her bid. Auctions were pressurised environments, so the purchaser may have felt pressured.

[52] As for the allegation that the auctioneer was on the phone to the purchaser during the auction to assure her that a CBD commercial property could be leased out any minute, the Committee noted the auctioneer's position that he was not in the room nor on the telephone to her. It considered she may have misheard something the auctioneer said. On balance, it was of the view that the auctioneer did not make the statement concerning leasing out.

[53] As for the allegation that the auctioneer told her he would buy the property, it accepted his evidence as to what he said and found it to be no more than "auctioneer patter".<sup>4</sup> It had no concerns with such a statement.

[54] The Committee found that the auctioneer had not breached any of the Rules or the Act.

## **APPEAL**

[55] In a Ruling issued on 1 May 2023, the Tribunal decided the appeal would be heard on the papers.

[56] The Tribunal has received submissions from the purchaser (1 June and 17 July 2023), Mr Gow (30 June and 17 July 2023) and the Authority (3 July 2023). They are discussed later. In his further submissions (21 July 2023), Mr Stewart points out that the purchaser has raised new complaints and referred to new evidence (not before the Committee) in her submissions (17 July 2023). The Tribunal agrees with counsel that it has no jurisdiction over the new complaints and confirms it will not consider the new evidence.

## **JURISDICTION AND PRINCIPLES**

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

[58] The appeal is by way of a rehearing.<sup>5</sup> It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.<sup>6</sup> After considering the appeal, the Tribunal may confirm, reverse, or modify the determination

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<sup>4</sup> Complaint No: C38913 (10 June 2022) at [3.35].

<sup>5</sup> Real Estate Agents Act 2008, s 111(3).

<sup>6</sup> *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] and [83].

of the Committee.<sup>7</sup> If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.<sup>8</sup>

[59] A hearing may be in person or on the papers.<sup>9</sup> A hearing in person may be conducted by telephone or audiovisual link.

[60] This appeal is against the determination of the Committee under s 89(2)(c) to take no further action. It is a “general appeal”. The Tribunal is required to make its own assessment of the merits in order to decide whether the Committee’s determination is wrong.<sup>10</sup> 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.<sup>11</sup>

## DISCUSSION

[61] The Committee considered the following rules in assessing the complaint:

### **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**

...

- 6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.

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

### **9 Client and customer care**

#### *General*

...

- 9.2 A licensee must not engage in any conduct that would put a prospective client, client, or customer under undue or unfair pressure.

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<sup>7</sup> Real Estate Agents Act, s 111(4).

<sup>8</sup> Section 111(5).

<sup>9</sup> Sections 107 and 107A.

<sup>10</sup> *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].

<sup>11</sup> *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22], citing *Stichting Lodestar*, above n 10, at [4]–[5]; and *Scandrett*, above n 10, at [112].

...

- 9.4 A licensee must not mislead customers as to the price expectations of the client.

...

[62] The Tribunal will deal with the issues raised by the purchaser on appeal in the order in which they appear in her submissions to the Tribunal of 1 June 2023 (at [60]–[100]). The Tribunal has read the balance of her submissions and considered them where relevant to the issues on appeal.

### *Rental Income*

[63] The assignment of the lease to the tenant on 19 February 2019 specified annual rent of \$49,062. The agency's online marketing recorded a net return of \$49,062 annually. On 11 August 2020, Mr Gow sent an email to the purchaser stating that the property returned \$49,062 annually. Then on 31 August, Mr Gow sent another email to the purchaser repeating that the property was returning \$49,062. Both versions of the memorandum emailed or handed to the purchaser stated that the net annual rental was \$49,062.

[64] The purchaser bought the property at auction on 2 September 2020. Subsequently, on 10 September, Mr Gow emailed to the purchaser the proof of payments schedule which showed a shortfall of \$9,405.15 in rent paid in the 12 months between July 2019 and June 2020, since there were no payments for April and June 2020. The schedule was presumably compiled by Mr Gow from the bank statements which the owner had sent him.

[65] The Committee accepted Mr Gow's explanation that he was unaware of the rent waiver of six weeks until after the auction.<sup>12</sup> It accordingly found that he did not provide false information about the rent because the tenant remained legally obliged to pay the full contractual rent of \$49,062 annually. It noted that the informal rent reduction agreed by the owner was only temporary to address COVID-19 trading issues at the time.

[66] It seems to us that the Committee has missed the purchaser's point. It is not just the contractual rent that is important to the prospective owner of a commercial property, but also the actual rent paid in the recent past. Mr Gow accepts the purchaser asked him during the visit on 31 August 2020 about how the store had traded, a question plainly related to the tenant's ability to pay rent as shown by Mr Gow's answer (that he did not

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<sup>12</sup> The shortfall of \$9,405.15 appears to represent the non-payment of rent for two months, not six weeks. The discrepancy has not been explained to the Tribunal and is not material to our assessment.

know but the bank statements were available). Her email later that evening (at 7:52 pm) requesting information about how much the tenant paid for rent is further evidence of the purchaser's interest in the actual rent paid.

[67] It should have been clear to Mr Gow that the purchaser was interested in knowing the actual rent paid. Her interest was understandable, given the COVID-19 lockdowns of 2020, which even continued through the auction (which had to be online for that reason). It would have been highly relevant to the purchaser, in assessing whether the tenant could meet future rent obligations, to know whether he had met the contractual payments in the recent past. Rental 'holidays' were not uncommon at the time.<sup>13</sup> Any rent relief affects the financial viability of the investment. We accept the purchaser's evidence that the claim of a net income of \$49,062 was significant in increasing her bid to \$940,000.<sup>14</sup>

[68] In other words, information as to the actual rent paid in the recent past was not only objectively significant, but the purchaser had made it clear it was important to her. Mr Mortimer-Wang correctly submits that a licensee can be liable for misstating important information, even if done innocently.<sup>15</sup> At the very least, the representation of the net annual rent being \$49,062 was capable of materially affecting the purchaser's decision. Mr Gow would have known that.

[69] Mr Gow repeatedly and unequivocally informed the purchaser in writing that the net rent was \$49,062. This representation in his advertising and emails was a positive statement as to not just the contractual rent, but the actual rent paid in the recent past.

[70] It is submitted by Mr Stewart that it was not false or misleading to say that the rental return was the amount which the tenant was contractually obliged to pay. Mr Gow did not, however, qualify his representation of the annual rent being \$49,062 by stating that it was the contractual rent. He stated it was the net rent, implying it was the actual rent being paid. In the 12 months prior to the auction, the net annual rent paid was not the advertised \$49,062, but was \$39,656.85 (\$49,062 – \$9,405.15). It is further submitted that Mr Gow's statement as to the "annual rent payable" was true.<sup>16</sup> However, Mr Gow did not say \$49,062 was the rent "payable". He said it was the net annual rent, implying it was the rent being paid.

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<sup>13</sup> As confirmed by the agency's chief operating officer in his reply to the purchaser of 2 October 2020 at [2(2)], see 461 of the bundle.

<sup>14</sup> Submissions from purchaser (1 June 2023) at [18].

<sup>15</sup> *Vosper v Real Estate Agents Authority* [2017] NZHC 453 at [62]–[63]; *Tesar v Real Estate Agents Authority* [2014] NZREADT 18 at [38]–[39]; and *McCarthy v Real Estate Agents Authority* [2014] NZREADT 94 at [27].

<sup>16</sup> Submissions of Mr Stewart (17 July 2023) at [25].

[71] Mr Gow's statement as to \$49,062 being the net annual return or rent was incorrect. We further find that the provision of this information was innocent. It is accepted that he was not aware of the temporary informal reduction and we reject any suggestion of deliberate deceit.

[72] Furthermore, we accept Mr Gow's evidence that he did not tell the purchaser during the visit on 31 August 2020 that the tenant had traded throughout the lockdowns and paid all the rent and expenses. It is accepted he said he did not know whether the tenant had traded throughout and paid everything, that as an essential service the shop could have remained open and that the bank statements were available to her to check the payments. His version of what he said is more probable. We agree with the Committee that it is likely there was a genuine misunderstanding between the purchaser and Mr Gow.<sup>17</sup>

[73] Mr Stewart points out that *Vosper* states that a breach of r 6.4 requires something more than an erroneous statement based on a genuine belief that a state of affairs exists. There is more here. Mr Gow would have known that information as to the actual rent paid in the recent past would be material (if not important) to any prospective buyer and should have realised the purchaser was making it clear it was important to her.

[74] It is found that Mr Gow misled the purchaser, breaching r 6.4 of the Rules. His statement as to the net annual rent amounts to a statement as to the actual rent paid in the recent past, a statement which was incorrect and therefore misleading. He made no attempt to ascertain that the statement was accurate by asking the owner whether all the rent had been paid. He did not have good grounds to make the representation as to the actual rent.<sup>18</sup>

[75] There is another reason why Mr Gow's conduct was unsatisfactory in relation to the representation as to the annual rent being \$49,062. He had had in his possession since 5 August 2020 information which showed that was not correct. Mr Gow did not deliberately withhold the bank statements, but carelessly sat on them without assessing them. He had available to him, for almost a month prior to the auction, the information which showed that the tenant had not paid rent of \$49,062 in the 12 months immediately prior to marketing the property. It is not apparent to us why Mr Gow obtained the bank statements if it was not to check whether the rent and outgoings had actually been paid.

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<sup>17</sup> Complaint No: C38913, above n 4, at [3.15].

<sup>18</sup> *Tesar*, above n 15 at [38].

[76] The chief operating officer, in his email of 20 January 2021, says Mr Gow received the first batch of bank statements on 5 August. Mr Gow does not say that the April and June 2020 statements were not sent in the first batch, but if they were missing, he should have asked the owner for them before the auction.

[77] It is not a sufficient explanation for the failure to analyse them that the owner had not informed him of any non-payment. Presumably, Mr Gow did not ask the owner whether all the rent had been paid. Whether or not he did, he should have checked the bank statements. That is particularly so in the circumstances at the time, given the lockdowns and the rental holidays.

[78] Mr Gow's failure to analyse the bank statements in his possession and hence inform the purchaser of the non-payment of rent amounts to a failure to exercise skill and diligence in regard to a significant feature of the property, being the actual rent paid in the recent past. This was a breach of r 5.1 of the Rules.

[79] The breaches of rr 6.4 and 5.1 amount to unsatisfactory conduct under both s 72(a) and s 72(b) of the Act.

#### *Whether secure investment*

[80] The purchaser notes the agency's online advertising was captioned, "SECURE CBD RETAIL INVESTMENT". She contends that the reality of the tenant's business situation significantly deviated from this representation. The adverse effects of COVID-19 culminated in six weeks of rent relief. Further, the tenant had shared with Mr Gow during the early stage of marketing the hardships caused by the pandemic.

[81] Mr Stewart submits the Tribunal has no jurisdiction over this head of complaint. It was not raised by the purchaser as part of her complaint and was not considered by the Committee. We agree. Nonetheless, like Mr Stewart, we will briefly deal with it.

[82] The purchaser's allegation as to what the tenant said to Mr Gow is presumably based on a statement from two named people given to the Authority.<sup>19</sup> It contained information purportedly from the tenant, CM. Mr Gow denies being told such information by the tenant. Mr Stewart submits the statement has no credibility or reliability. We note that it was not signed by the tenant, but by two people whose relationship to the tenant and the purchaser is unknown. We dismiss the statement as unreliable.

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<sup>19</sup> Statement dated 4 November 2020 signed by the two people (at 538 of the bundle). An email from one of the authors to the purchaser on 1 October 2020 was given to the Authority (at 536 of the bundle).



[83] In any event, the property came with a lease to the tenant due to expire on 31 October 2021 and with rights of renewal until 30 October 2024. The purchaser has presented no evidence of any adverse effect that the tenant's business had on rent payments, apart from the six weeks of relief before the auction. There is no evidence of default by the tenant while the purchaser has owned it. There is no evidence of his premature exit from the property. There is no evidence of any tenant vacancy once the purchaser entered possession.

[84] In other words, there is no evidence the investment was not secure, to the extent any retail investment in that location could be considered secure. The use of the captioned phrase in the marketing was neither false nor misleading.

#### *Tenant's identity*

[85] The information memorandum sent to the purchaser on 31 August 2020 (at 9:59 am) states that the tenant was XH, being a Chinese name. However, on 19 February 2019, XH had assigned the lease to CM, an Indian name. The purchaser accuses Mr Gow of exploiting cultural preferences to attract potential buyers, the purchaser herself being Chinese. In her submissions to the Tribunal, she expresses a preference for a tenant of a similar cultural background and states that this significantly influenced her decision. Mr Gow's explanation to the Authority on 13 April 2022 was that an outdated information memorandum sent to the purchaser had incorrect information.

[86] Mr Stewart says the Tribunal has no jurisdiction. While the Committee decided the complaint about the tenant's identity was inconsequential and not to inquire into it, it was part of the purchaser's original complaint.<sup>20</sup> We will briefly deal with it.

[87] There is not an iota of supporting evidence for the purchaser's allegation that Mr Gow was exploiting what he might have speculated was her preference, the Tribunal observing that she did not tell him of her now expressed tenant requirement.

[88] Moreover, the information memorandum would have been prepared for all potential buyers, not just those of Chinese ethnicity. We also note that the final version of the memorandum with the correct identity was sent to the purchaser on 11 and 31 August 2020 (at 9:04 pm). It is highly improbable Mr Gow was seeking to deliberately mislead bidders, or the purchaser specifically, as to the ethnicity of the tenant. Mr Gow's mistake as to the identity of the tenant in one version of the information memorandum given to the purchaser is immaterial.

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<sup>20</sup> Complaint No. C38913 (22 July 2021) at [2.2].

### *Tenant's tenure*

[89] The agency's online marketing stated that the tenant was "one of many longstanding retail tenants" in the building. Mr Gow said the same to the purchaser in emails on 11 and 31 August 2020. It was not until 8 September 2020, after the auction and after the purchaser had first raised concerns with him, that he corrected this in an email to her where he advised that the tenant took the lease less than one year previously (though in fact it was just over 18 months previously).

[90] In his explanation to the Committee, Mr Gow said his statement was poorly expressed and should have stated that the dairy/superette was a longstanding and established business under the previous tenant. He added that the actual tenant was a longstanding operator in the area, having operated another such business in a nearby street for over five years.

[91] The Committee noted that the previous tenant had operated a dairy/superette from the property since 2007. It agreed with Mr Gow that his language was poor, as the tenant was not longstanding. However, it found to be important that the nature of the business was longstanding. It decided to take no further action on this item of complaint.

[92] While the nature of the business operating from that shop was longstanding and the actual tenant might be described as a reasonably longstanding tenant in the area, Mr Gow's representation was plainly that the then current tenant was longstanding in that particular shop. We accept the purchaser's submission that the length of the tenant's occupation is an indicator of lease stability and hence a material consideration for a prospective buyer. We find Mr Gow's representation to be misleading, as she alleges.

[93] However, we reject the purchaser's contention that it showcases ethical irregularities in Mr Gow's conduct. There is no evidence of deceit. What it shows, along with a number of other mistakes in advertising, is that Mr Gow can be careless about accuracy in portraying a property. Nonetheless, this mistake was of no moment in this transaction. There is no evidence of lease instability, as we have noted above in relation to whether this was a secure investment. Even if there was a breach of r 6.4, it is marginal and in the circumstances we would not find unsatisfactory conduct. Any breach does not warrant a disciplinary response.

### *Loan conditions*

[94] An IEP (initial evaluation procedure) shows the building has an earthquake or seismic capacity rating of 41% NBS (new building standard).<sup>21</sup> In an email to the purchaser on 31 August 2020 (at 9:04 pm), Mr Gow said, amongst other things:

Yes the building is under 67% but over 33% which means it is not earthquake prone. In most cases banks are happy to lend at anything over the 33% threshold.

[95] The purchaser contends that Mr Gow's assurance regarding the ability to obtain finance for a building carrying an earthquake risk, is a clear case of misrepresentation. She says that after the auction she was informed by her broker that acquiring a commercial loan might be problematic due to the property's earthquake rating being below 67%. One bank had refused her finance. The purchaser alleges her understanding of financing was falsely shaped by Mr Gow's misleading claim. He is not a financial advice provider under the Financial Markets Conduct Act 2013 (the FMCA) and overstepped his professional boundaries by providing regulated financial advice.

[96] Mr Gow says it was his honestly held opinion based on his recent selling experience at the time that buyers of properties below a rating of 67% were able to secure funding. He was trying to be helpful and was not advising what a bank would do. He made a general statement and was not giving specific advice as to whether the purchaser would get finance. Mr Stewart notes that the FMCA excludes financial advice given by real estate agents in the ordinary course of carrying out their work.<sup>22</sup> He points out that there is no evidence the purchaser was not able to get finance, or that banks do not provide financing for buildings with an earthquake rating between 33% and 67%. Mr Gow's statement was neither false nor misleading.

[97] The Committee accepted that Mr Gow's statement was an honestly held opinion. It noted the lack of evidence that banks do not provide financing for such buildings and hence found Mr Gow's conduct was not misleading.

[98] We agree with Mr Gow that the comment in the email was a general statement which was not specific to this particular transaction and that it was not regulated financial advice within the FMCA. Moreover, there is no evidence it was false or misleading. The purchaser presents no evidence corroborating her allegation that banks generally, rather than just one bank, would not lend on an Auckland property with an earthquake rating of 41%. Indeed, the purchaser was not ultimately refused finance for this reason. She

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<sup>21</sup> Babbage Consultants (5 July 2013) at 402 of the bundle.

<sup>22</sup> Financial Markets Conduct Act 2013, sch 5 cl 8(2)(a)(vi).

advised the Authority she secured a loan before settlement.<sup>23</sup> It is also our view that no reasonable person contemplating an investment in the vicinity of \$1M would rely on such a general statement from a real estate salesperson who is not an expert in banking or finance.

*Whether bank statements withheld*

[99] The owner's bank statements for the 14 months from 21 June 2019 to 20 August 2020 show 10 payments of full monthly rent by the tenant and various partial payments, with no payments made in April and June 2020. These statements accord with Mr Gow's proof of payments schedule (concerning the period from July 2019 to June 2020) sent to the purchaser on 10 September 2020. These bank statements were sent to Mr Gow on 5 August 2020, about a month before the auction (though plainly, the August 2020 statement at least must have been sent later).

[100] When the purchaser visited the shop on 31 August 2020, accompanied by Mr Gow, there was a conversation about whether the tenant was paying the rent and operating expenses, notwithstanding the lockdowns. While the precise details are disputed, it is common ground that Mr Gow offered to send her the bank statements but the purchaser did not immediately ask for them. She subsequently asked Mr Gow that evening (at 7:52 pm) to show her how much the tenant paid in rent, rates and body corporate fees. He replied by sending her the information memorandum. Then on 1 September 2020, she asked him for the "rent documents". Mr Gow interpreted this as the lease documents which he sent her.

[101] It is contended by the purchaser that it was clear she was requesting documents reflecting the actual rent (bank statements, receipts, ledger) and Mr Gow did not provide the requested documents. The Committee considered, particularly in relation to the specific request for rent documents, that there had been miscommunication and a genuine misunderstanding between the purchaser and Mr Gow, and therefore no misleading behaviour by him.

[102] Contrary to the purchaser's allegation, it is not at all clear from the language of her requests that it was the bank statements or like documents she was seeking. We accept that is what she intended, but it is not what she sought in clear terms. Surprisingly, on receipt of the information memorandum and later the lease, the purchaser did not immediately correct Mr Gow and unambiguously seek the bank statements and/or the receipts and ledger.

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<sup>23</sup> Email purchaser to Authority (25 October 2021) at 484 of the bundle.

[103] The purchaser says English is not her first language, she is inexperienced in commercial property investments and she avoided pressing further in order not to insinuate a lack of trust in Mr Gow. According to her, he exploited her vulnerability.

[104] It is our view that the purchaser's communications (her contemporary emails and her submissions in support of the complaint) exhibit a high standard of English. None of these factors justify not expressly seeking the bank statements, which she knew he had. The purchaser is responsible for her failure to obtain the bank statements before the auction. It was a simple enough request for her to unambiguously make. Mr Gow did not deliberately withhold them.

### *Outgoings*

[105] The council's rates were \$10,821.94 and the body corporate levy was \$6,587.57, both annual.

[106] Attached to Mr Gow's email of 11 August 2020 to the purchaser was an information memorandum setting out the correct amounts as to the expenses. Then on 31 August (9:59 am), Mr Gow attached to his email an early draft of the memorandum which stated that the council's rates were \$5,539 and the body corporate levy was \$5,642. At the visit later that day, he handed to the purchaser a hard copy of the same early draft memorandum with the wrong information. That evening, the purchaser asked him how much the tenant was paying for the rates and the body corporate fee. He replied by email that evening (at 9:04 pm) with the correct amounts, attaching the final version of the information memorandum which also had the correct information.

[107] On 1 September 2020, the purchaser asked Mr Gow for the body corporate document and he sent her the body corporate's Pre-Contract Disclosure Statement which stated that the levy was \$6,587.57. He sent her another email on 2 September 2020 with the correct amount for the body corporate levy, in reply to her request for certain body corporate information.

[108] According to the purchaser, the misrepresentation of these costs had an impact on her financial planning since the actual operating expenses turned out to be considerably higher than initially advertised. Even if Mr Gow did update the outgoings, the incorrect statements still qualify as misrepresentations. It is submitted he should have clearly drawn to her attention the changes made when he sent the updated material to her.

[109] Mr Gow told the Committee, and repeats to the Tribunal, that he accidentally sent the incorrect information to the purchaser. However, he sent the correct information both before and after sending the incorrect amounts.

[110] The Committee found Mr Gow's conduct to be sloppy, but not to amount to unsatisfactory conduct. There had been a genuine mistake and the correct information was provided both before and after the incorrect information was sent.

[111] We agree with the Committee. While Mr Gow was again sloppy, the mistaken provision of an early draft of the memorandum twice (once by email and once in hard copy) cannot be considered in isolation from giving the purchaser the correct information five times. His emails always recorded the correct amounts. Mr Gow did not draw to the purchaser's attention the correction made in the evening of 31 August because he did not realise he had earlier given her the wrong amounts.

[112] There was no breach of any rule and no unsatisfactory conduct on Mr Gow's part. Giving the purchaser a document with the wrong information twice cannot be considered in isolation from the five occasions on which he gave her the correct information, four of which were after providing the wrong information. We dismiss the purchaser's accusation that sending her the wrong information had an impact on her financial planning. That is improbable. The effect on the purchaser of the wrong amounts, if any, would have been transitory given the later provision of the correct amounts multiple times.

#### *Response to complaints inquiry*

[113] On Friday 4 September 2020 (at 1:41 pm) in an email, the purchaser sent her first communication to Mr Gow advancing a complaint. This included asking where she could complain about his behaviour and that of the auctioneer. Mr Gow immediately replied by email (at 2:34 pm). He said he had tried to call her. He acknowledged what she said and would chat with his manager. He asked her if she was available to catch up in the following week. Mr Gow replied substantively on Tuesday 8 September 2020 (at 4:33 pm) with the information concerning how to complain.

[114] The purchaser submits that the time taken to respond was questionable and could be interpreted as an attempt to prevent or delay a formal complaint.

[115] It is not clear to us whether this head of complaint was made to the Authority, but we do note that it was not dealt with by the Committee. The Tribunal therefore arguably has no jurisdiction. Nonetheless, we record our view that it is trivial. We note that the period included a weekend and Mr Gow was being asked for other information, not just

about where to complain, and compiled that information in his substantive reply. The purchaser's allegation that Mr Gow sought to prevent or delay a formal complaint is unfounded.

*Meeting the tenant's wife*

[116] On 31 August 2020, prior to the auction, the purchaser visited the shop, accompanied by Mr Gow. She met a woman in the shop. Mr Gow told the Authority this was the tenant's wife. The purchaser says she thought the person was an employee, as Mr Gow did not introduce her as the tenant's wife. They merely exchanged greetings. The purchaser contends there is a significant discrepancy by Mr Gow, as his claim that she had a meaningful interaction with the person is deceptive.

[117] This is another head of complaint not made to the Authority and therefore not dealt with in the Committee's decision. It follows that the Tribunal has no jurisdiction. In any event, the interaction with the person and what Mr Gow has said about it to the Authority are immaterial.

*Undue pressure at the auction and auctioneer's statements*

[118] The purchaser alleges there was undue pressure at the auction. This complaint is largely, but not exclusively, directed at the auctioneer. Specifically, it is contended that he misrepresented the state of the market for retail properties in Auckland's CBD in September 2020 in the midst of the COVID-19 pandemic. She identifies various comments he allegedly made to her at the auction. We will consider only the two statements made in her complaint and dealt with by the Committee:

1. Commercial properties in the CBD could be rented out instantly.
2. If she stopped bidding, he would buy the property himself.

[119] The Committee noted that auctions are pressurised environments and accepted that the purchaser may have felt pressured, but it had seen no evidence of undue or unfair pressure.<sup>24</sup>

[120] We record that we have viewed the auction video and listened to the accompanying audio. As the purchaser observes, the period of negotiation is not captured by the video/audio.

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<sup>24</sup> Complaint No: C38913, above n 4, at [3.32]–[3.33].

[121] The mechanics of the bidding was that the purchaser initially bid \$600,000, then another bidder raised it to \$650,000, followed by the purchaser who bid \$675,000. There followed an extended period of negotiation (about 30 minutes) involving the auctioneer and Mr Gow moving between the owner and the purchaser and possibly other bidders or potential bidders. While the negotiations were conducted, the screen in the auction room displayed “Under Negotiation” and “\$675,000”. Agreement was reached when the owner reduced the initial reserve of \$1M in steps to \$940,000. At the conclusion of the negotiations, the auctioneer returned to the lectern. The screen showed \$940,000 and there being no other bidders, the hammer fell at \$940,000. The purchaser blames undue pressure exerted on her for the jump in her bid from \$675,000 to \$940,000.

[122] We will analyse the auctioneer’s statements in the context of rr 6.4 (false or misleading statements) and 9.2 (prohibition against undue or unfair pressure) of the Rules. As to the latter, real estate transactions are often stressful and customers will often feel under pressure. Such stress and pressure will not generally lead to a disciplinary response. The threshold for demonstrating undue or unfair pressure is a high one, as Mr Mortimer-Wang submits.<sup>25</sup>

#### Auctioneer’s first statement – lease out instantly

[123] It is alleged the auctioneer said that commercial properties in the CBD could be rented out instantly. The purchaser says he has not refuted the allegation. This is not correct. While the auctioneer has not engaged with the Tribunal, he did provide an explanation to the Authority (undated, but apparently sent on 2 September 2021). He said he did not make any such comment.

[124] In any event, even if the auctioneer said such properties in the CBD could be instantly leased, we would dismiss this item of complaint, as the purchaser has not proven the statement is false or misleading. No evidence was presented to the Committee, or to us, of abnormal vacancy rates for shops in Auckland’s CBD in September 2020, lockdowns notwithstanding.

[125] The purchaser refers in her submissions to a report from the agency covering the second half of 2020 which, according to her, shows a notable surge in vacancy rates.<sup>26</sup> In her complaint to the Authority, she states the report says the vacancy rate increased from 2.1% to 2.8%.<sup>27</sup> This report is not before the Tribunal. We would say, however,

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<sup>25</sup> *Davidson v Real Estate Agents Authority* [2021] NZREADT 16 at [88].

<sup>26</sup> Submissions from purchaser (1 June 2023) at [20] and [57].

<sup>27</sup> Complaint to Authority (1 October 2020) at 20 of the bundle.



that such an increase goes nowhere to proving the alleged falsity of the auctioneer's statement.

[126] Not only is there no evidence of abnormally high retail vacancy rates in the CBD in September 2020, but there is no evidence that the property itself was vacant following possession by the purchaser. In the absence of such evidence, the Tribunal could not find the auctioneer's statement was false or misleading or that he had breached any rule or was otherwise guilty of misconduct or unsatisfactory conduct for any such alleged statement.

Auctioneer's second statement – buying the property himself

[127] It is alleged the auctioneer said to the purchaser that if she stopped bidding, he would buy the property himself. According to the purchaser, there was a significant power imbalance between the experienced auctioneer and her with limited knowledge of commercial property, so this false statement amounted to undue pressure.

[128] The purchaser alleges the auctioneer has not refuted the allegation. Again, she is not correct. In his explanation to the Authority, the auctioneer denied telling the purchaser that he would step in and buy the property if the bidding stopped. He acknowledged saying to the bidders, as he always does when bidding stalls well below the reserve:

If there are any other auctioneers in the room then I might just get them to move to the podium and I'll quickly bid.

[129] The Committee accepted the auctioneer's evidence as to what he said and found it to be no more than "auctioneer patter", in respect of which it had no concerns.

[130] We agree with the Committee. We find that the auctioneer made the statement he claims to have made and did not precisely say he would buy the property himself if the bidding stopped. The Committee appropriately categorises this as auctioneer's patter. Mr Mortimer-Wang correctly submits that one of the goals of auctions is to generate excitement in the property. No reasonable person would construe the auctioneer's statement literally. It was certainly designed to encourage the purchaser and the other potential bidders present to increase their bids, as the auctioneer says, but it cannot be said to have created or contributed to undue pressure on the purchaser.

[131] In her submissions to the Tribunal, the purchaser raises more generally the auctioneer's "extended off-camera" phone discussions with her and his denial of any conversation directly with her. However, the only other complaint she made about the auctioneer to the Authority concerned whether he fulfilled certain conditions in the sale

and purchase agreement, a matter she has not raised before the Tribunal. We have no jurisdiction over other allegations now made against the auctioneer and decline to inquire into them.

[132] In the context of her allegations against the auctioneer, the purchaser draws in Mr Gow as she says the auctioneer's "assurances" were conveyed using Mr Gow's phone during the auction.<sup>28</sup> Furthermore, she asserts, in his first email to her replying to the initial complaint (which included an allegation she had been pushed and trapped by both of them at the auction), Mr Gow acknowledged everything that she said.<sup>29</sup> The purchaser asserts this lack of denial could be interpreted as tacit agreement with her claims. As Mr Stewart submits, Mr Gow's acknowledgment of the complaint as set out by the purchaser cannot be construed as an admission of liability.

[133] We have already dealt with (or are about to deal with) the specific items of complaint against Mr Gow and the auctioneer made to the Authority about the auction and decline to inquire more generally as to their alleged undue pressure, there being no evidence beyond the purchaser's allegation. The extended period of negotiation indicates the purchaser had sufficient opportunity (in the context of an auction where quick decisions have to be made) to consider her bids and to withdraw if she felt she was under too much pressure.

#### *Property yield*

[134] According to the purchaser, Mr Gow told her at the auction that a yield over 5% is a very good buy.<sup>30</sup> She refers to a report from the agency which apparently confirms that average yields for commercial properties range from 5% to 6%. The purchaser also refers to Mr Gow's email of 11 September 2020 to her after the auction, where he said the yield of 5.219% was calculated on the purchase price of \$940,000 and the net income of \$49,062. The purchaser says this was false as there was a rent reduction of \$9,405.15. According to her, the yield is 4.218% based on income of \$39,656.15.

[135] First, this item of complaint was not made to the Authority, so the Tribunal has no jurisdiction. The agency's report was not produced to the Committee and leave to produce it to the Tribunal was not sought. It does not even appear to have been sent to the Tribunal. We will not consider its alleged content.

[136] While having no jurisdiction, we will briefly consider the complaint. In his written submissions to the Tribunal, Mr Stewart does not deny that Mr Gow made such a

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<sup>28</sup> Submissions from purchaser (1 June 2023) at [69(3)–(5)].

<sup>29</sup> Email Mr Gow to the purchaser (4 September 2020) at 91 of the bundle.

<sup>30</sup> Email from the purchaser to Mr Gow (4 September 2020) at 92 of the bundle.

statement at the auction. We find that it is likely that he did. If so, it would be misleading in the same way that the representation of actual rent paid in the recent past of \$49,062 was misleading. It would be a breach of r 6.4 of the Rules. It is a statement capable of materially affecting a decision.

[137] However, unlike the representation concerning the actual rent paid, which was made on numerous occasions in writing, this statement by Mr Gow at the auction does not warrant a finding of unsatisfactory conduct in the circumstances here. It does not meet the disciplinary threshold. We take into account that there is no evidence the tenant required a further rent waiver from the purchaser or defaulted on the rent, so Mr Gow's yield calculation is correct looking forward. Certainly, his email of 11 September 2020 is accurate, as he gives the basis of the calculation (the purchaser knew at the time of the email of the past non-payment of rent).

[138] We dismiss this item of complaint.

## OUTCOME

[139] The appeal is upheld in respect of Mr Gow's misleading statement as to the actual rent paid and as to his failure to review the bank statements and inform the purchaser of the reduced rent paid shortly before the auction. This is a breach of rr 5.1 and 6.4 of the Rules and is unsatisfactory conduct under s 72(a) and (b) of the Act. The appeal is otherwise dismissed. The Committee's decision is therefore modified.

[140] The Tribunal can accordingly exercise any of the powers of the Committee to make orders pursuant to s 93 of the Act.

### *Directions*

1. The penalty orders will be heard and determined on the papers.
2. The appellant may file and serve submissions by **16 August 2023**. Any claim for compensation can be made at this time. The Tribunal will later determine whether it has jurisdiction to award compensation. At the same time, it will assess whether it needs to see the settlement agreement.
3. The Authority may file and serve submissions by **6 September 2023**.
4. The second respondent may file and serve submissions by **27 September 2023**.

[141] 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**

[142] The Tribunal can restrict publication of its decision in accordance with s 108(1) of the Act. 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 naming the second respondent licensee, the agency and the Authority, but prohibiting publication of the name of the purchaser, the auctioneer and any third party.

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D J Plunkett  
Chair

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G J Denley  
Member

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P N O'Connor  
Member