

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 2

Reference No: READT 016/2022

IN THE MATTER OF

An application for review under s 112 of the
Real Estate Agents Act 2008

BETWEEN

GINA WILSON and CRAIG WILSON
Applicants

AND

**THE REGISTRAR OF THE REAL ESTATE
AGENTS AUTHORITY**
Respondent

Hearing on the papers

Tribunal:

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

Representation:

The applicants:

Self-represented

Counsel for the respondent:

S A Bishop, T G Bain

DECISION
Dated 26 January 2023

INTRODUCTION

[1] Gina Wilson and Craig Wilson, the applicants, have filed an application under s 112 of the Real Estate Agents Act 2008 (the Act), for review of the Registrar's determination on 2 June 2022 not to pursue a complaint the applicants made to the Real Estate Agents Authority (the Authority) on the ground that it was inconsequential.

[2] The complaint is against Esmae Farrington (the licensee) and her manager, Thomas Charles Rutherford (the manager). It is alleged they breached the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules). The principal complaint is that, as prospective purchasers who had expressed an interest in a particular property, the applicants were not informed of an offer by another prospective purchaser.

BACKGROUND

[3] The applicants were interested in purchasing a property in Northland listed for sale by the licensee, a salesperson under the Act. The manager has an agent's licence under the Act. They are both engaged by Bay of Islands Realty Ltd, trading as Harcourts Kerikeri (the agency).

[4] In an email to the applicants on 1 December 2021, the licensee noted their enquiry about the property and sent them certain information. As for the water supply, the licensee advised that the vendors had a gentleman's agreement with a neighbour concerning a spring. This was not an ongoing guaranteed source. Rainwater was not being captured by tanks. She added that the vendors were moving overseas and would negotiate for the chattels/furniture to be included.

[5] On 4 December 2021, the applicants visited the property. Because of the ongoing COVID-19 pandemic, the licensee enquired as to their vaccine status and requested they wore face masks.

[6] On the same day (at 4:33 pm), the applicants sent an email to the licensee stating they were "very interested" in the property and posing questions, the most important being about the "water issue" (an easement from the neighbour supplying spring water).

[7] In the applicants' email, the licensee was accused of wrongfully asking for personal information of their vaccine status. The licensee had said it was company policy to require masks on the property. The licensee was asked why she had not required two women who arrived in a Mercedes to wear masks. The applicants added as a postscript in relation to the COVID-19 vaccination that it was:

...unfortunate that so many trusting kiwis fall for the propaganda the government has endlessly spewed out for almost two years now on the controlled and corrupted mainstream media.

[8] The licensee sent an email to the vendors that evening (at 6:26 pm), copying to them the applicants' questions and requesting clarification.

[9] The vendors replied to the licensee in an email on 5 December 2021 (at 9:51 am) providing certain information, including as to the water supply. It was immediately copied to the applicants (at 9:57). The licensee added in her email that other buyers were visiting the property.

[10] On the same day (at 1:40 pm), the applicants replied noting that the licensee had not answered the question about the two women in the Mercedes nor advised the firm's mask policy. Additionally, the specific question about water had not been answered. The applicants concluded by stating they would be interested in purchasing the property inclusive of chattels. Any offer would be cash. They would not be ready to discuss a price until deciding what was involved in obtaining a more secure water supply.

[11] In an email on 6 December 2021 (at 9:08 am), the licensee informed the applicants that Harcourts followed the COVID-19 policy laid down by the government and the Real Estate Institute of New Zealand (the Institute). Under the traffic light system, vendors could elect not to permit viewing by anyone who could not provide reasonable evidence of being vaccinated. She personally used safe methods to minimise close contact with unvaccinated persons. The two women in the Mercedes had been requested to wear masks and did so. Unfortunately, they removed them when inside as they raised questions, despite being asked to put them back on. According to the licensee, the vendors were away in Whangarei and would not be able to clarify their answers until they returned.

[12] On the same day (at 9:27 am), the licensee sent to the vendors the applicants' reply to the answers provided by the vendors, including the applicants' repetition of the original water question.

[13] At 10:22 am, the vendors sent an email to the licensee stating that they were in no hurry to reply, especially as they had already answered the question about the neighbour's willingness (to continue the water supply).

[14] Then at 5:02 pm, the applicants sent an email to the licensee asking whether the vendors were not reachable by email or phone, or did not want to be reached. They asked when the vendors were expected to return.

[15] The applicants went on to say that they could not see a COVID-19 policy on the Institute's website. They quoted government policy, stating that the choice appeared to be up to the licensee. It was alleged that the licensee was disingenuously trying to lead them to believe she had no choice but to treat them as rudely as she did because it was the firm's policy. That was deceptive. It was the licensee's own policy. The applicants then set out a lengthy commentary on the New Zealand government's COVID-19 guidelines and requested to know the vendors' stance on the:

...experimental jab, ... so that means YOU are the guinea pig in a medical experiment that skipped the usual animal trials and longitudinal studies, and for which we have growing evidence of the jab's severe adverse reactions...

[16] The applicants stated that the licensee obviously did not know that those taking the Pfizer jabs were shedding the toxic spike protein which was a danger to others. They wanted to know whether the two women were asked to leave. The applicants stated it had been made clear to them they would not be shown the house unless they adhered to what turned out to be the licensee's own personal COVID-19 policy. They wanted to know why they had been discriminated against regarding face masks but the two women had not been held to the same stricture.

[17] The licensee advised the applicants on 7 December 2021 that the vendors were attending medical appointments in Whangarei and were not in a position to address questions.

[18] On 8 December 2021, the applicants asked for a link to the Institute's policy.

[19] On 9 December 2021 (at 3:31 am), the applicants sent an email to the licensee noting that the property had been removed from Harcourts' website. They asked whether information had not been conveyed to them as prospective buyers who had advised their serious interest. The licensee was asked why a professional agent would not encourage multiple offers in the best interests of the vendors.

[20] At 10:50 that day, the manager sent an email to the applicants notifying them that the licensee had passed the correspondence on to him to address. The property was no longer available as the vendors decided to work with another party and a successful sale had been concluded. They had been trying to comprehend the requirements of the new traffic light system and if there was any confusion, he was sorry. They were working to get an understanding of the continuous updates sent by the industry bodies, the Authority and the Institute.

[21] The applicants sent another email to the licensee at 11:09 am noting that the property had been marked as "sold". They asked why they had not been informed of an

offer, so they had an opportunity to make an unconditional cash offer. The licensee was asked whether her obvious antagonism from the beginning caused her non-compliance with the professional rules. Her failure to inform them of the offer, as a serious prospective buyer, was wilful misconduct. They had been led to believe the licensee was still waiting for the vendors to reply to their questions. The licensee was asked why she had not acted in good faith and had misled them.

[22] The applicants replied to the manager at 11:53, stating that the apology should be coming from the licensee. She treated them like vermin. She used angry, definitive, untrue statements on 4 December about Harcourts' COVID-19 policies.

[23] In a further email to the manager on 10 December 2021 (at 1:26 pm), the applicants complained about the licensee's failure in good faith to deal fairly with them and to notify them that an offer had been made. The licensee had misled them. As late as 7 December, they were still waiting for the vendors to be in touch after their medical appointments. This led them to reasonably believe that the vendors were not able to answer questions because of medical issues.

[24] The applicants' next step was to send an email to the vendors on 10 December 2021 (at 5:19 pm). They introduced themselves as prospective buyers. The licensee had not informed them of the other offer, so they were not able to make an all-cash, unconditional counter-offer. They believed there had been a serious breach by the licensee of her fiduciary duty to the vendors. If the vendors had been thwarted by the licensee from a multi-offer situation, they might be in a position to be reimbursed the commission paid.

[25] The vendors forwarded the applicants' email to the licensee.

[26] The manager sent an email to the applicants on 13 December 2021 (at 9:29) expressing sorrow that they had felt disadvantaged. He said that the firm had been appointed agents on behalf of the vendors. The firm did not decide what party the vendors worked with. The vendors were happy with the outcome.

[27] The applicants replied to the manager on the same day (at 13:38). He had shockingly in bad faith failed to respond to the substance of their complaint. He was unreasonably withholding information that should in fairness be provided. He did not answer the question as to what day the successful offer had been made by the buyer, nor what day it went unconditional. The applicants also wanted to know whether the vendors were informed of a prospective buyer who wished to make a cash, unconditional counter-offer.

Complaint to Authority

[28] On 14 December 2021, the applicants made a complaint to the Authority against the licensee, the manager and the agency.

[29] In summary, the applicants set out the following items of complaint against the licensee:

1. The licensee failed to inform them, as serious prospective buyers, of an offer made on the property and thus they had no opportunity to make an all-cash, unconditional counter-offer.
2. The licensee treated them with contempt. She demanded to know their vaccine status and when informed, she acted as if they were vermin. She said that Harcourts' policy was that customers had to wear face masks when on a property, so the applicants obliged. After they arrived, two women arrived in a Mercedes and visited the property without face masks inside the house. It was obvious that the licensee disliked the applicants.
3. The licensee misled them to believe in her emails of 6 and 7 December that the vendors were too busy with medical issues in Whangarei. Furthermore, she withheld information that an offer had been received.
4. The licensee failed to respond to both of their 9 December emails complaining of her failure to notify them of an offer.

[30] As for the manager, it was contended that he had refused to answer their questions as to when an offer had been made and if and when the sale had gone unconditional. He acted in bad faith by withholding information that should in fairness have been provided to them as serious prospective buyers. He abrogated the agency's fiduciary duty to the vendors, who reasonably would have wanted multiple offers.

[31] According to the complaint, the manager's conduct was more disgraceful as he held a supervisory position over the licensee. He chose to downplay and cover up the licensee's wrongdoing.

[32] There are no particulars of the complaint against the agency, apart from those against the manager.

[33] The vendors sent an email to the Authority on 3 April 2022. They confirmed having responded to the licensee, answering the questions raised by the applicants. They had asked the licensee to enquire about the applicants' interest in the chattels. The

vendors said they received an answer indicating an interest in purchasing the property inclusive of the chattels, but the applicants were not ready to discuss a price until they had determined what would be involved in obtaining a more secure water source. The vendors were aware that any offer would be cash. The vendors thanked the licensee, but they were not in a hurry to answer the secondary questions that they felt had already been answered.

[34] The vendors told the Authority they did not respond to the questions as a third party was very happy to purchase the property, inclusive of the chattels and the existing gentleman's agreement for the water. They were aware that the licensee had later advised the applicants that they were away attending to appointments and were not able to address further questions that day. The vendors expressed being extremely happy with the level and terms of the offer the licensee achieved for them. They had been kept fully abreast of the applicants' interest in the property.

[35] On 11 April 2022, the Authority's facilitator (an officer who attempts early resolution of a complaint) sent an email to the applicants advising that he had spoken to the manager and the licensee. The applicants were informed that with the information from the vendors, it looked like the Authority would not be able to help them. They were given a number of options, one of which was that if they did not accept the evidence of the vendors and wished to take the matter further, the Registrar would review the complaint. The likely outcome of such a review would be a letter explaining why the Authority could not help them further.

[36] The vendors' email (3 April 2022) had been forwarded to the applicants. They replied to the Authority on 14 April 2022 with a list of questions relating to such matters as the communications between the agents and the vendors and what information the vendors had received.

[37] The applicants replied to the Authority's email of 11 April on 20 April 2022. They said, amongst other things, that an all-cash, unconditional offer would mean the water issue would go away, as they would purchase the property 'as is' regarding the water. It was up to the vendors to reject offers and it was patently unethical for the agents to discourage or prevent them.

Registrar decides not to pursue complaint

[38] On 2 June 2022, the Registrar wrote to the applicants notifying them of the decision not to pursue the complaint under s 74(3)(a) of the Act. The complaint did not

raise any issues warranting the intervention of the Authority's disciplinary process because:

1. The licensee had met her obligation to ensure the vendors were aware of the applicants' interest in the property. Fully informed about their situation, the vendors chose to work with another buyer.
2. The licensee complied with the Authority's guidance around the use of face coverings and vaccination status. The COVID-19 Public Health Response (Protection Framework) Order 2021 had come into force on 2 December 2021. It introduced new requirements around face coverings. Under that order and industry guidelines, the licensee was able to ask open home attendees to wear a face covering. The licensee's recollection was that all people visiting the property were asked to wear a face mask. As the licensee was driving the applicants in her car, she asked if they were vaccinated, as she did not allow unvaccinated people in her car.
3. The manager's response was not inconsistent with any part of the Act or the Rules.

[39] The Registrar added that as a small Crown entity with limited resources, it was required to focus its time and resources on conduct issues justifying regulatory intervention.

REVIEW APPLICATION

[40] On about 27 June 2022, the applicants sought review by the Tribunal of the Registrar's decision of 2 June 2022.

[41] The Registrar has provided two paginated bundles of documents.

Submissions of the applicants

[42] In submissions (26 June 2022) attached to the application for review, the applicants allege the Registrar erred by:

1. Failing to assess the crux of the complaint, including very serious allegations that the licensee intentionally failed to notify them of an offer and wilfully misled them in her emails. No findings of fact were made regarding the specific allegations of the complaint.

2. Failing to acknowledge that licensees have ethical obligations to prospective buyers, not only to vendors.
3. Assessing as the 'be-all, end-all' of the dispute being whether the vendors were aware of the applicants' interest in the property when that was not in dispute.
4. Treating the vendors' 3 April 2022 email as if it was dispositive. It did not mention the licensee's failure to inform them of the offer, nor did it disclose the specific date of the offer or when it was accepted or went unconditional.

Furthermore, it supported the complaint in that it contained evidence from the vendors of the licensee's misleading information, which she knew to be false, in her emails to the applicants on 6 and 7 December 2021. She said that the vendors were too busy with medical appointments when in fact they had received and accepted an offer. She was actually concluding a secret sale.

As a result of the emails, the applicants reasonably continued to conduct due diligence while awaiting the LIM report, before making a written offer. The licensee would know that prospective buyers, once informed of an offer and thus of an imminent multi-offer situation and that time was of the essence, would make an unconditional offer. The licensee was wrong to assume they would require a condition regarding the water source in their offer.

5. Failing to ascertain the evidentiary facts, being the exact dates of any offers and when the successful offer became unconditional.
6. Determining that the licensee's acts and omissions were so inconsequential that they did not need to be addressed, including her wilful and deceptive emails. The Registrar pointedly avoided addressing the crux of the complaint.

[43] According to the applicants, the manager's email of 13 December failed to answer the specific questions of when an offer had been received and when it went unconditional. Indeed, it failed to address any of the issues in the complaint. As the manager and the Registrar should have known, whether or not the vendors were happy being deprived of a multi-offer situation, the licensee breached her duty to act in the best interests of the vendors and to deal fairly with the applicants.

[44] The applicants explained why they mentioned in their complaint the licensee's demand they wear face masks. It was "merely and specifically" to document that from the day they met her, she was antagonistic towards them. She treated them with anger and contempt starting from the minute they met. This was mentioned to establish a very possible motive for why an experienced licensee would go out of her way to disadvantage and deceive an all-cash prospective buyer, by failing to inform them of an offer.

[45] The applicants say they were not asked to wear face masks, the licensee demanded it. They complied, but two women who later arrived did not. Under the Authority's guidelines, the issue was up to the vendors and obviously the licensee failed to follow the guidelines to ascertain the vendors' requirements. The licensee angrily declared that it was Harcourts' policy to require face masks, but they later found out Harcourts had no specific policy.

[46] The applicants' email of 10 December to the manager should have triggered Harcourts' complaint process. In his response of 13 December, the manager failed to address the complaint (that the licensee had failed to inform them of an offer). He failed to answer their questions as to when the offer was made and went unconditional. Hence, he withheld information that in fairness should have been provided to them. The Registrar should have known that the manager contravened r 12.1 of the Rules by failing to inform them of Harcourts' complaints procedure. The Harcourts group might have taken the complaint a little more seriously than the licensee or the manager.

[47] The complaint should have been referred to a committee as there is a broader public interest here. The Registrar's failure to hold the licensee and manager accountable does not promote the interests of consumers or public confidence in the industry or the Authority itself. Nor does it improve industry standards nor act as a deterrent. Instead, the Registrar's decision sends a message to the licensee and the manager that it is acceptable for them to wilfully mislead a customer and provide false information if their vendor happens to be pleased with the outcome. The licensee's behaviour clearly contravenes r 6.4.

[48] In their further submissions to the Tribunal (11 August 2022), the applicants make the following points:

1. The licensee failed to notify all prospective buyers of an offer made or about to be made, so the applicants could make their best written offer. It was as simple as that. If she had done so, the entire complaint would have been unnecessary.

2. The facilitator failed to identify the most egregious conduct, being the licensee's wilful misleading conduct following her failure to notify them that an offer had been made.
3. The Registrar did not grapple with the gravamen of the complaint (the failure to notify them of the offer), but rather dodged it. They had legitimate procedural expectations their complaint would be addressed by the Authority and it was unreasonable that it was not. The Registrar had a duty to afford procedural fairness.
4. If a complaint makes allegations of a serious nature regarding serious breaches of the Rules and has supporting email evidence from the complainants and the licensee, the Registrar should explain why the complaint does not meet the threshold for sending it to a committee. Their very serious allegations were treated without due regard and were left entirely out of consideration.
5. The Authority's handling of the complaint was not in keeping with what it had published online regarding its complaints procedure (stating that complaints raising serious conduct concerns would not be offered the early resolution process). Their complaint raised serious conduct concerns and should not have been referred to the resolution process. There was predetermination. When their complaint was received, the Authority apparently made the crucial and mistaken decision that it raised only low level conduct issues and thus it got assigned to the resolution process.
6. The Authority's key issue appeared to be whether or not the vendors were made aware of the interest of the applicants. The focus on this "nascent non-issue" was to the exclusion of the actual substantive issues.
7. The vendors' email of 3 April 2022 is incongruent with the chronology.
8. The Authority exhibited procedural unfairness in respect of the facilitator's "cherry picking" of documents from the licensee that he allowed the applicants to see. He did not provide the emails between the licensee and the vendors that supported the complaint.

[49] There are additional submissions (22 September 2022) from the applicants:

1. The applicants' primary argument in their application for review is that it was procedurally unfair of the Registrar to fail to address and decide issues

central to the complaint. The “elephant in the room” is that the Registrar entirely failed to address the crux of the complaint and give reasons for that decision.

2. The licensee withheld from them that an offer had been made and that the vendors felt they had already answered their questions and would not answer any more.
3. It is said that the applicants were not ready to make an offer. They did not say this. They said they were not ready to discuss a price. It was not in their best interests to name a price if there were no offers on the table and they were waiting for the LIM report. If the licensee had been open and forthright about an offer being made, they would have understood that time was of the essence and would have been ready to make an offer. They would have obliged the vendors by entering into a multi-offer scenario, but the licensee’s manoeuvring prevented that.
4. All of the facts point to the licensee taking consistent, deliberate steps to make sure that her preferred buyers were able to purchase the property without any bidding competition from the applicants, the only other serious prospective buyers. There is a case to answer.
5. Counsel for the Registrar provide no case law for the proposition that the duty to disclose information to prospective purchasers does not require they be informed an offer has come in. The applicants refer to the committee’s decision in *Smith* where it found unsatisfactory conduct on the part of an agent for failing to advise prospective purchasers of an offer.¹ The licensee departed from accepted professional standards concerning multi-offer situations. An agent has a duty to be completely frank and honest with prospective purchasers.
6. The licensee wilfully misled them about the vendors being precluded from dealing with property matters due to medical appointments in Whangarei, thus allowing the purchasers’ offer to go unconditional before the applicants knew about it.
7. The manager failed to address the substantive issue of their complaint. They were seeking an explanation as to why the licensee had failed to inform them of the offer. The manager refused to inform them whether or

¹ *Brett Phillip Smith* (Complaint No. C31322), 26 November 2019 at [3.57].

not the sale had gone unconditional and whether they were still able to make a counter-offer.

8. The Authority did not ascertain the date the offer was made and when it was accepted. It did not ascertain the date the property went unconditional.
9. The manager did not tell the truth in his discussion with the Authority. He said that he and the licensee had told the vendors they should go for a multi-offer scenario, but the vendors were happy with the purchasers' offer and were scared of losing it. The manager did not provide any texts or emails to substantiate the claim and the facilitator surprisingly did not ask for them. This statement conflicts with the email record showing that on 5 December 2021 (the day the vendors knew an offer was going to come in) they asked the licensee whether the applicants were interested in the chattels and whether they had discussed an offer.
10. The submission of the Registrar that an effective disciplinary system requires the efficient use of scarce regulatory resources, is irrelevant. This is because s 75(1) of the Act requires the Authority to appoint as many committees as are required to deal "effectively" with complaints. The word "effective" means "achieving the results desired" and does not normally equate to the term "cost effective". The purpose of the Act is not to promote the rationing of justice or to empower the Registrar to implement cost saving measures. The Registrar must be fair to complainants and keep foremost in mind the purpose of the Act.
11. It is too much of a stretch for counsel to seek guidance from *Vosper*, as that appeal was against an evaluative decision, not a discretionary one.² In *Vosper*, the committee, the Tribunal and the High Court properly addressed the substantive issues and gave reasons. In the current case, the Registrar's decision failed to address the serious issues raised in the complaint.
12. It is submitted by counsel that the Registrar may determine a complaint to be inconsequential if it is one which any reasonable committee would inevitably decide required no further action under s 80. The applicants submit that any reasonable committee would not countenance the Registrar predicting what it would inevitably decide about any particular case.

² *Vosper v Real Estate Agents Authority* [2017] NZHC 453 (see the argument in the submissions of counsel for the Registrar set out later).

13. The Registrar's decision precisely mirrored the points that the facilitator stated in his email to the applicants, indicating that the Registrar had a closed mind and a fixed position and was not willing to fairly consider all the arguments.
14. The facilitator did not provide all the information received from the licensee, including information about the telephone conversations with them and the emails between the licensee and the vendors. The facilitator was procedurally unfair by withholding most of the information given to the facilitator by the licensee and the manager.
15. The Authority's Process Manual for handling complaints shows that its handling of their complaint was not according to the published process.

Submissions of the Registrar

[50] In their submissions (2 September 2022) on behalf of the Registrar, counsel contend that none of the challenges raised to the Registrar's decision are sustainable. In any event, even if the Registrar erred, the ultimate decision is unassailable: the applicants' complaint is inconsequential and does not raise anything justifying further investigation.

[51] The Registrar made the decision under s 74(3)(a) of the Act. The meaning of "inconsequential" is normally "not important or significant". It is an objective standard. Complaints will always be subjectively important to the person laying the complaint. It is submitted that a complaint made under the Act is "inconsequential" unless it is conduct that could, if proved, meet the definition of "unsatisfactory conduct" (s 72) or "misconduct" (s 73) and justify a disciplinary response.

[52] The Act seeks to achieve its consumer protection purpose through a disciplinary process that is independent, transparent and effective.³ An effective disciplinary system requires the efficient use of scarce regulatory resources, as the Immigration Advisers Complaints and Disciplinary Tribunal (IACDT) has acknowledged.⁴

[53] The interpretation of s 74(3)(a) should be consistent with s 80 which gives a committee the discretion to take no further action in certain circumstances. The discretion to take no further action exists even if one of the threshold tests in ss 72 or 73 is met.⁵

³ Real Estate Agents Act, s 3(2)(c).

⁴ *BL v SFK* [2013] NZIACDT 57.

⁵ *Vosper*, above n 2, at [76].

[54] The Registrar's power in s 74 was added to the Act precisely to achieve greater efficiency and effectiveness. Prior to the various amendments in November 2018, a high proportion of complaints referred to committees resulted in no further action being taken.

[55] It is therefore submitted that a complaint should be determined by the Registrar under s 74(3)(a) if it:

- (1) does not disclose conduct meeting the definitions of unsatisfactory conduct or misconduct; or
- (2) discloses a matter meeting those tests, but which any committee would inevitably decide to take no further action under s 80.

[56] As this review is against the exercise of the Registrar's discretion, the grounds are limited to:⁶

- (1) an error of law or principle;
- (2) taking account of irrelevant considerations;
- (3) failure to take into account relevant considerations; or
- (4) a decision which is plainly wrong.

[57] The Tribunal has emphasised the narrow grounds of its enquiry under s 112:⁷

[42] It is relevant to have regard to the nature of the Registrar's decision. It is not about the merits of the complaint, except at a low threshold level. The review before the Tribunal will not involve debate about the merits, beyond whether the threshold to send the complaint to a Committee is met. We agree with Mr Hodge that hearing from the licensees risks dragging the Tribunal into a debate about the merits of a complaint and an investigation into those merits before the Committee does so (if it is found to be an appropriate case to send to a Committee). The statutory process is for the Committee to conduct the investigation, if so warranted, not the Tribunal.

[58] Turning then to the contentions of the applicants:

1. It cannot be right that all allegations of misconduct must be referred to a committee. This is for the Registrar to determine. Section 74 provides the Registrar with the ability to effectively and appropriately triage complaints and decide not to pursue certain complaints. The Registrar is empowered

⁶ *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

⁷ *Lawrence v Registrar of the Real Estate Authority* [2022] NZREADT 6 at [42] (incorrect citation given by counsel).

to decide that a complaint need not be pursued even if it alleges serious misconduct.

2. Employees in the early resolution team are also responsible for carrying out initial inquiries to assist the Registrar in making a determination under s 74. The facilitator naturally explores whether a facilitated resolution is appropriate or possible. However, the matter is always referred to the Registrar for determination.
3. The applicants assert procedural unfairness on the basis they were not provided with copies of all correspondence between the Authority and the licensee. In particular, the applicants say they should have been provided with the emails between the licensee and the vendors. It is submitted by the Registrar that the applicants' natural justice rights must be weighed against the countervailing privacy interests of other parties, such as the licensee and vendors. It would also be contrary to the purpose of the Act to require broad disclosure of private and confidential communications in response to complaints such as those which are inconsequential. The applicants were given a fair opportunity to respond to the key contentions by the licensee, including being sent the vendors' reply to the Authority.
4. The Registrar accepts that the wording of the facilitator's email of 11 April 2022 (not 4 April as counsel states) was unfortunate and could give rise to a reasonable concern about bias or predetermination. However, the facilitator is not the Registrar. The Registrar carefully considered the issues raised in the complaint and came to an independent decision. The courts have consistently held there is a high threshold for intervention on the basis of alleged predetermination. The fact the decision-maker has expressed tentative or preliminary views does not mean the outcome has been predetermined.
5. The applicants say the Registrar did not address the entirety of their complaint, which appears to be a reference to the alleged wilful misleading by the licensee (leading the applicants to believe the vendors were too busy with their medical issues and failing to notify them that an offer had been made). This aspect of the complaint is without foundation. It rests on two incorrect premises:
 - (1) The applicants, who had stated they were not ready to make an offer, were entitled to be notified when an offer was made.

- (2) They had an entitlement to review confidential information about the transaction, so they might be in a position to make a counter-offer.
6. The duty to disclose information to prospective purchasers in r 6.4 does not require that those who have expressed interest in the property be informed that an offer has come in. The evidence shows the vendors were not interested in progressing matters with the applicants.
7. There is no evidence to suggest that the licensee's answers on 6–8 December 2021 were misleading.
8. Ultimately, it is submitted that the Registrar's conclusion (that the complaint is inconsequential) is unassailable. The licensee was under no obligation to invite the applicants to a bidding war. Moreover, the applicants were not ready to make an offer. The licensee took appropriate COVID-19 precautions. While it is the applicants' right to hold a different view, that does not make the licensee's conduct inappropriate. The licensee's communications were polite, professional and not misleading.

JURISDICTION AND PRINCIPLES

[59] The Registrar's options in determining complaints, other than to refer them to a committee, are set out in s 74(3):

74 Complaints about licensees

...

- (3) The Registrar may determine that—
- (a) the complaint discloses only an inconsequential matter, and for that reason need not be pursued:
 - (b) the complaint is frivolous or vexatious or not made in good faith, and for that reason need not be pursued:
 - (c) the complaint should be referred to another agency, and refer it accordingly:
 - (d) the complaint has been resolved to the complainant's satisfaction and no further action is needed.

[60] A person adversely affected by the Registrar's determination may apply to the Tribunal for review under s 112. The review must be conducted on the papers unless the applicant for review requests to be heard.⁸ After conducting the review, the Tribunal

⁸ Real Estate Agents Act 2008, s 112(3).

may confirm, reverse or modify a decision.⁹ If the Tribunal reverses or modifies a decision, it may exercise any of the powers that the Registrar could have exercised.¹⁰

[61] The Tribunal issued Minute 1 on 12 July 2022 directing a hearing on the papers and setting out a timetable for submissions.

DISCUSSION

The nature of the Tribunal's review

[62] The first issue is the nature of a review by the Tribunal under s 112 of the Act, of a determination of the Registrar under s 74(3)(a) not to pursue a complaint as it discloses only an inconsequential matter.

[63] Counsel for the Registrar submit that this is a review against the exercise of a discretion by the Registrar, so the grounds for review are limited to those identified by the Supreme Court in *Kacem*, being whether the decision:

- (1) was based on an error of law or principle;
- (2) took account of irrelevant considerations;
- (3) failed to take account of a relevant consideration; or
- (4) was plainly wrong.

[64] It is submitted that, subject to these limitations, the Registrar's decision must be confirmed, even if the Tribunal might come to a different decision on the merits if it was a general appeal.

[65] We accept counsel's submission as to the nature of this review. Of course, in deciding whether these limited grounds of review have been made out, we will need to make some assessment of the merits, without reaching any conclusion on the merits.

The nature of the Registrar's discretion

[66] In the case of the applicants' complaint, the Registrar determined not to pursue it under s 74(3)(a) of the Act. While not expressly saying so in the decision, the Registrar impliedly found it to have been an inconsequential matter.

⁹ At 112(4).

¹⁰ At 112(5).

[67] Counsel for the Registrar contend that a complaint is inconsequential unless it discloses conduct which could, if proved, meet the definition of “unsatisfactory conduct” (s 72 of the Act) or “misconduct” (s 73) and justify a disciplinary response.

[68] We agree.

[69] We would add that the Registrar is entitled to consider such evidence as is before him or her, in determining whether unsatisfactory conduct or misconduct could be proved. The Registrar is not bound to send a complaint making serious allegations to a committee merely because such allegations are made. It is incumbent on a complainant to put before the Registrar some credible evidence supporting the allegations made.

[70] The Registrar is not required to conduct an investigation, which would be for a committee to undertake if the Registrar refers it to a committee. The Registrar is not bound to make any enquiries at all and may simply rely on what has been provided with the complaint. It is understood that a facilitator usually contacts the complainant and the agent in order to better understand the complaint and obtain the agent’s explanation. This further information will also be put before the Registrar.¹¹

[71] It is a matter for the Registrar to decide whether there is enough information before him or her to make the decision under s 74(3).

[72] Even if the information before the Registrar could establish unsatisfactory conduct or misconduct, the Registrar is not bound to refer the complaint to a committee. As counsel submit, a complaint must justify a disciplinary response.

[73] Counsel contend that the Registrar can use s 74(3)(a) even when the conduct meets the definition of unsatisfactory conduct and/or misconduct, in circumstances where the Registrar determines that any reasonable committee would inevitably decide to take no further action under s 80.

[74] However, as the applicants submit, the use of s 80 is a matter for a committee, not the Registrar and the latter should not pre-empt what a committee might decide. While we accept that the Registrar is not bound to send to a committee a complaint containing evidence of unsatisfactory conduct or misconduct, this is because decision-makers engaged in a disciplinary process have a discretion as to whether to proceed with a complaint. It is not necessary for the Registrar to speculate what a committee might do. The Registrar has his or her own discretion as to whether a complaint justifies disciplinary action.

¹¹ According to the website of the Real Estate Agents Authority (accessed 16 January 2023), engagement in the early resolution process is voluntary.

[75] A breach of the Rules or the Act must be of sufficient significance to merit a finding of professional wrongdoing against a practitioner.¹² Mere inadvertence or oversight or even carelessness will not in every context constitute conduct falling seriously short of acceptable practice.¹³ There is a balance to be struck between the competing goals of promoting an effective disciplinary process and the avoidance of stigma of a finding of unsatisfactory conduct, where the conduct is relatively minor and all the circumstances point to the absence of a need to mark the conduct in that way.¹⁴

[76] While the Registrar possesses such a discretion, caution needs to be exercised in not referring to a committee a complaint supported by credible evidence (which might amount to unsatisfactory conduct or misconduct), given that a committee will be in a better position to make such a determination following its investigation. That must be particularly so if there is evidence of misconduct, the more serious wrongdoing of an agent.

The relevance of the Authority's resources

[77] The Registrar took into account in the decision of 2 June 2022 that the Authority was a small Crown entity with limited resources and was required to focus its time and resources on conduct issues justifying regulatory intervention. Counsel submit that an effective disciplinary system (s 3(2)(c)) requires the efficient use of scarce regulatory resources. Counsel rely on a decision of the IACDT which held this to be a relevant factor.¹⁵

[78] The applicants disagree, pointing to s 75(1) of the Act which states that the Authority “must” appoint as many committees as are required to deal effectively with complaints. The applicants are, in effect, contending that the Registrar has taken into account an irrelevant factor.

[79] We agree with the Registrar that the resourcing of the Authority has some relevance, though we would not have thought it would be a primary factor in any decision not to pursue a complaint, especially not one making serious allegations. It was not a primary factor in the instant case, as it appears in the Registrar’s decision near the end after proper reasoning and after the Registrar had determined not to pursue the complaint. The applicants’ reliance on s 75(1) is misplaced. That section mandates the Registrar to appoint as many committees as are required to deal with such complaints

¹² *Liston v Director of Proceedings* [2018] NZHC 2981 at [44].

¹³ At [45].

¹⁴ *Vosper*, above n 2 at [74].

¹⁵ *BL v SFK*, above n 4 at [6]–[7].

as are properly referred to committees. It says nothing about whether a complaint should be referred to a committee.

[80] We will now comment on the merits of the applicants' complaint.

Failure to notify offer/mislead applicants

[81] The crux of the complaint, as identified by the applicants, is that the licensee intentionally failed to notify them of an offer. Had they known, they say they would have realised time was of the essence and made an unconditional cash offer. In conjunction with this failure, the licensee is alleged to have wilfully misled them by stating in her emails of 6 and 7 December 2021 to them that the vendors could not answer their query about the water supply as they were attending medical appointments in Whangarei.

[82] It is true that the licensee did not tell them of the offer.

[83] There are two relevant professional obligations:

6 Standards of professional conduct

...

6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

...

6.4 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.

[84] Counsel for the Registrar submit that the applicants were not entitled to know about the offer. It is said that the duty to provide information to a customer (r 6.4) does not require a licensee to inform those who have expressed interest in a property of offers tabled by others.

[85] The applicants say counsel has provided no authority for this proposition. They cite the decision of a committee in *Smith*, where it found to be unsatisfactory conduct that the agent there did not tell other prospective purchasers of an offer on the property. He had thereby deprived the vendor of an opportunity to create a multi-offer situation. The agent was found to be in breach of rr 6.1 (comply with fiduciary duties), 6.2 (act in good faith and deal fairly with parties) and 9.1 (act in best interests of client and in accordance with client's instructions).

[86] However, the complainant in the *Smith* case was the vendor and the agent had told the vendor that he would tell anyone who viewed the property of any offer made. In

respect of the applicants, the circumstances are very different. The vendors, who have made no complaint, were made aware of the applicants and of their interest. It is self-evident they could have required the licensee to inform the applicants of the offer and invite their best offer. They chose not to because they were happy to deal exclusively with the offeror. In effect, it was the vendors who chose not to inform the applicants of the offer, not the licensee.

[87] The *Smith* decision is not material. We agree with the Registrar's counsel that the licensee, having informed the vendors of the applicants' interest, had no duty to inform the applicants of the offer by other prospective purchasers. The licensee was not instructed to do so. The applicants were not entitled to know about the other offer, when it was made or when it was accepted or went unconditional. They were not even entitled to know of its existence.

[88] It is unsurprising that the vendors chose to work with the offeror, given that the applicants had advised on 5 December that they were not ready to discuss a price due to the water issue.

[89] It is not for us to decide whether the Registrar's finding concerning the duty to inform (that the licensee had met her obligations) was correct, but the applicants have not shown that the finding was wrong (in the sense of an error of law or principle, an irrelevant consideration, a failure to take into account a relevant consideration or a decision that was plainly wrong). Contrary to the applicants' contention, the key issue in their complaint was whether the vendors were aware of their interest. This was not a "nascent non-issue". The Registrar addressed this key issue and reached an available decision.

[90] In conjunction with the duty to inform, the applicants allege that the licensee wilfully lied in the emails to them on 6 and 7 December 2021 about the vendors being precluded from dealing with property matters due to medical appointments in Whangarei. The applicants present no evidence that the vendors did not have such appointments.

[91] Be that as it may, these medical appointments are unlikely to have been the real reason the vendors were not answering the applicants' questions since the vendors informed the licensee on 6 December, they were in no hurry to reply as they had already answered the question. Furthermore, the vendors were aware of an offer which had been received or was imminent, as their email of 3 April 2022 makes clear. The applicants' suspicion that they were not being given the true reason for the failure to respond is likely well founded.

[92] We can only speculate, but the licensee may not have wanted to antagonise the applicants (in case a backup offer was needed) by informing them of the reason given by the vendors (that they did not want to reply again to their questions). As for the likely main reason for not answering (the offer), the licensee could not disclose it to the applicants without instructions from the vendors.

[93] To that extent the licensee's emails of 6–7 December are arguably misleading. The Registrar did not expressly deal with this aspect of the complaint in the decision of 2 June, which is a failure to take into account a relevant consideration. However, the licensee's emails would not justify a disciplinary response in the circumstances. While not presenting the full picture, there is no evidence that the information that was given (medical appointments in Whangarei) was false.

Applicants' vaccination status and their treatment

[94] The other principal complaint against the licensee was the alleged treatment of them with contempt and as "vermin", given their vaccination status. The licensee is said to have demanded to know their vaccine status and when informed (that they are unvaccinated), she treated them as vermin. Furthermore, she told them that it was the policy of Harcourts for customers to wear masks. However, the applicants say Harcourts had no such policy and two other women visited the property without masks.

[95] It is to be borne in mind that the applicants advanced this aspect of their complaint "merely and specifically" to document the licensee's antagonism towards them which they allege was her motive for failing to inform them of the offer.¹⁶ In other words, it was not intended as a standalone head of complaint. They even describe the issue as inconsequential themselves.¹⁷ Nonetheless, we will briefly comment on the merits of this head of complaint as the applicants deal with it at some length.

[96] The Registrar records in the decision that on 2 December 2021, only two days before the property inspection on 4 December, the COVID-19 Public Health Response (Protection Framework) Order 2021 came into effect.¹⁸ The provisions are detailed. The parties have not addressed them in their submissions to us. Nor have we been sent the industry guidelines or Harcourts' policy (if any).

[97] The Registrar found that the licensee was able to ask open home attendees, let alone those in her own car, to wear a face mask. The applicants have not shown that

¹⁶ Application for review (26 June 2022).

¹⁷ At 10 (Registrar's Point No. 2).

¹⁸ It was revoked with effect from 12 September 2022.

the Registrar's finding was wrong (in terms of the grounds available to challenge the Registrar's decision).

[98] Even if the licensee had misunderstood the law and/or industry guidelines and/or any Harcourts' policy and there was no legal right to insist on a mask and/or she did not ask the vendors for their stance, her request or even demand in good faith that the applicants wore a mask would not justify a disciplinary response. This was only two days after the Order and while COVID-19 was still circulating and restrictions remained. We accept the manager's statement (in his email of 9 December 2021 to the applicants) that they were trying to comprehend the requirements of the new traffic light system in the face of continuous updates.

[99] The licensee explained the situation involving the two women who arrived in a Mercedes in her email of 6 December 2021 (9:08 am) to the applicants.

[100] Aside from the masks, the Registrar did not expressly deal in the decision with the allegation as to how the applicants were treated. Beyond the demand to use face masks and alleged anger, no details are given by them as to how they were treated like vermin. The Registrar was not bound to accept the applicants' allegation at face value. The licensee's written communications do not portray any antagonism. The Registrar was not required to send such an allegation to a committee.

The manager

[101] In respect of the manager, the Registrar concluded (2 June 2022) that his response was not inconsistent with the Act or the Rules. The Registrar should have said why. The primary complaint against him was his failure to provide to the applicants certain information concerning the offer. They were not, however, entitled to that information.

[102] According to the applicants, the manager was untruthful in his discussion with the Authority about the vendors rejecting a multi-offer situation and being scared of losing the offer. Whether or not a formal multi-offer scenario was explained to the vendors we do not know, but clearly the vendors rejected a competing bid from the applicants whose interest in the property was known to them.

The role of the facilitator

[103] It is said that the facilitator failed to identify the most egregious conduct of the licensee, being her failure to notify them of an offer and misleading emails. We have already commented on the merits of this aspect of the complainant.

[104] Furthermore, the facilitator is not the decision-maker. One of the options open to the Registrar is to determine that a complaint has been resolved to the complainant's satisfaction and no further action is needed.¹⁹ The Authority therefore provides an early resolution service. The process is explained on the Authority's website but we do not intend to review it in detail. A facilitator is tasked at an early stage of most complaints to discuss the complaint with the complainant and obtain a response from the agents involved. The facilitator is not an investigator but may receive or even seek certain information from the parties. It can lead to a facilitated teleconference between the complainant and the agents or a mediation process, though such processes are voluntary. The full resolution process was not conducted here.

[105] Whether the complaint is resolved or not, a decision is ultimately made by the Registrar under s 74(2) or (3).

[106] The applicants' complaints about the referral of their complaint to a facilitator and the extent of disclosure to them of documents or information lack substance. They are not entitled to any discovery procedure. They are not entitled to see the Authority's communications with the agents or the latter's communications with the vendors arising from the complaint. We agree with the Registrar's counsel that their right to natural justice requires only a fair right of reply to the agents' responses. In this case, the applicants were entitled to any new information as to the substance of the agents' responses, notably the vendors' email of 3 April 2022. They were provided with this document.

[107] The applicants rightly criticise the facilitator's email to them of 11 April 2022. He should not have asserted that the likely outcome of a review by the Registrar would be the dismissal of their complaint. However, as counsel observe, the facilitator is not the Registrar. The latter is an independent decision-maker. The applicants accuse the Registrar of a closed mind because it is said the decision precisely mirrors the facilitator's points. The applicants do not particularise what points were mirrored, but it is unsurprising that the Registrar would draw on the work of the facilitator. This does not establish a closed mind.

[108] We decline to assess whether the handling of the complaint was according to the Authority's Process Manual (which we have not reviewed). We find that the handling was consistent with the Act and the right to natural justice.

¹⁹ Real Estate Agents Act 2008, s 74(3)(d).

Conclusion

[109] The applicants have not shown that the decision of the Registrar not to pursue the applicants' complaint because it discloses only inconsequential matters, was wrong. They have not established an error of law or principle, that irrelevant considerations were taken into account, any failure to take into account relevant (that is material) considerations or that the decision was plainly wrong. In particular, they have not shown that any breach of the Rules justifies disciplinary action.

OUTCOME

[110] The application is dismissed and the Registrar's decision is confirmed.

D J Plunkett
Chair

G J Denley
Member

P N O'Connor
Member