

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2023] NZREADT 8

Reference No: READT 037/2021

IN THE MATTER OF

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

BETWEEN

HD
Appellant

AND

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

AND

LD
Second Respondent

Hearing in Auckland on 14 March 2023

Tribunal:

D J Plunkett (Chair)
G J Denley (Member)
F J Mathieson (Member)

Representation:

The appellant:	Self-represented
Counsel for the first respondent:	M Clement
Counsel for the second respondent:	S Lucas, S Harris

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 12 April 2023

INTRODUCTION

[1] HD, the purchaser of a bare lot (as the nominee of his son), is the appellant. He contends that LD, the licensee and second respondent, represented that a house could be built on a higher part of the lot he purchased through the licensee. The purchaser says he later learned that it would be difficult, if not impossible, to obtain consent from the local council to do so.

[2] The purchaser filed a complaint against the licensee with the Real Estate Agents Authority (the Authority), the first respondent. He alleged the licensee misled him and his son. The complaint was referred to Committee 2102 (the Committee). It decided to take no further action on the complaint. The purchaser has appealed the Committee's decision to the Tribunal.

BACKGROUND

[3] The licensee is a licensed salesperson and at the relevant time he was engaged by [Agency].

[4] In August 2020, the purchaser viewed various lots in a subdivision in a coastal village north of Auckland. At the time, he dealt with the licensee. He received written information concerning those lots from the licensee, including the title plan showing the building platforms for all the lots. As a result of the research he had done and talking to the licensee and the vendor, the purchaser acknowledges knowing of the existence of a building covenant requiring houses on each lot to be built only on the consented building platform. He also knew that resource consent from the council was required to change the location of any platform. The purchaser told the Tribunal that the licensee had told him he could move the platform for lot 2, but the vendor had said he could not. He ultimately did not purchase any of these lots. He had also looked at lot 6 (the lot relevant to this appeal) with his wife, but as with the others they decided not to buy it.

[5] On 16 September 2020, KD, the purchaser's son, viewed lot 6 of the subdivision (the property). The asking price was \$525,000. The purchaser and his son say they viewed it together that day without the licensee. The licensee says he was with the son and the purchaser was not there.

[6] According to the licensee, he provided the son with a Property Report on the subdivision while they viewed the site. The report contained the title to the whole subdivision, with an attached plan showing all the lots and their building platforms. The purchaser and his son deny that the report was handed to them that day.

[7] On viewing lot 6, the purchaser's son was interested in buying it. He was particularly impressed with the view from near the top of the property (at the top is a

covenanted native bush area which cannot be built upon). Both the purchaser and his son acknowledge being aware of the general location of the building platform consented by the council, which was down towards the bottom of the lot (as at 16 September 2020, the platform had not been pegged out).

[8] The son went to the agency's office. According to the purchaser and his son, they were both present at the licensee's office later on 16 September 2020 and met with the licensee. The licensee says only the son was present. The licensee's wife, who was present in the office but was not at the meeting, also says only the son was in their office and not the purchaser.

[9] It is the evidence of the purchaser and his son that the latter asked the licensee whether the building platform could be moved towards the top of the lot. The purchaser adds that he personally put to the licensee that he had been told the platforms could not be moved, but the licensee replied, "It has all changed now". They both say that the licensee said they could change the location, that it was "easy" and "a formality only" as it had been done on other lots. The licensee denies making this representation.

[10] The son therefore decided to make an offer. The licensee asked him if he wanted a due diligence clause, but he declined it. The son says he declined it because his only concern was moving the building platform and the licensee had reassured him it could be moved. He also wanted to present a clean offer as he was seeking a discount. The son signed an unconditional sale and purchase agreement in the early evening of 16 September 2020. As it was signed after hours, it was dated 17 September 2020. The price was \$500,000.

[11] Attached to the sale and purchase agreement was a record of title (issued 21 August 2019). It showed the lots on two plans of the subdivision, including lot 6, with an area marked "X" within the lot (the building platform) and another area marked "K" (the bush covenanted area). The licensee said he handed over a copy of record of title, including the plans, to the son at the meeting on 16 September 2020. The purchaser and his son deny receiving a copy at the meeting.

[12] The licensee took the offer to the vendor immediately after the meeting with the son. The vendor countersigned it.

[13] The licensee sent an email to the purchaser's son (copied to the purchaser) on 17 September 2020 asking him to pay the deposit of \$50,000. He attached the signed sale and purchase agreement, including the record of title and plans. The purchaser and his son say this was the first time they received the title and plans specifically in relation to lot 6 (though the purchaser accepts having seen the same plans earlier when he was interested in other lots).

[14] On 17 September 2020, the purchaser phoned the licensee. He told the licensee he had shown the property to the son, that he was a real estate agent and enquired about a referral fee.

[15] On 2 October 2020, the licensee emailed to the purchaser a "Platform diagram". It showed the building platform for each lot, including lot 6.

[16] Settlement occurred on 28 October 2020 in the name of the purchaser.

[17] On 19 April 2021, the landscape architect for the subdivision sent an email to the purchaser. He said the final plan included controls and restrictions that were secured through consent notices on the title of each lot. This defined the building area for each lot. The location of the building area was precise and precluded construction outside the area. The amending of the building area would require a "s221 application" to the council to vary the conditions of the consent. He was doubtful that any application to elevate the building site onto the ridge crest within lot 6 would be successful.

COMPLAINT

[18] On about 19 May 2021, the purchaser and his son made a complaint against the licensee to the Authority. It was alleged they had been misled. The licensee had told them that it would be easy to get the building platform on lot 6 changed, as this had happened for lots 3, 4 and 5. As a result, they made an offer of \$500,000 with no conditions. They declined the due diligence clause as their only condition would have been changing the building platform. After settlement, they realised that it would be almost impossible to build up the top.

[19] The purchaser sent an email to the Authority on 17 September 2021. He said that he and his son had inspected properties on "the 16th". They then went to see the licensee to see if they could build up the top part of lot 6 (the area in front of the covenanted trees). Once the licensee gave them that assurance, his son made an unconditional offer. The licensee did not meet with his son alone.

Explanation from the licensee

[20] The agency provided an explanation to the Authority on behalf of the licensee on 5 August 2021.

[21] It was noted that the purchaser and his wife had previously expressed an interest in lots 2 and 8. They had made a conditional offer on lot 2 and completed due diligence. They elected not to proceed. This background was important because it showed the purchaser's knowledge of the covenants, which applied to all the lots. In August 2020,

he had been provided with extensive materials on lots 2 and 5, including the title plan showing all the building platforms.

[22] The licensee met with the son for the first time on 16 September 2020 when they viewed lot 6. After the viewing, the licensee and the son travelled to the office and an offer was prepared. The licensee suggested a due diligence clause, but the son considered this would limit his ability to negotiate the best price. The offer was accepted on 17 September 2020.

[23] When the licensee met the son on 16 September 2020, the former provided a property report for lot 6 (including the title showing the location of the building platform) and showed him the general location of the building platform (it was to be marked out about a week later). The licensee said that if an owner wanted to change the building platform, resource consent from the council would be needed.

[24] The licensee then met the son and his family at the office on 19 September 2020 and they viewed lot 6 again.

[25] The licensee did tell the purchaser that the developer had worked with the council to adjust the shape of the building platforms on lots 3, 4 and 10 to match the building plans of the buyers of those lots, before the titles were issued.

Committee decides to take no further action

[26] On 6 December 2021, the Committee decided to take no further action. It found that the purchaser and his son believed the licensee had confirmed they could easily get the building platform changed, as had happened with lots 3, 4 and 5. They had asked the vendor, who advised them it might be possible, but they would need to follow the council's process. They were advised to include a due diligence clause, but they felt a clean offer would be more acceptable to the vendor and relied on their perceived assurances from the licensee.

[27] The Committee stated that the licensee denied telling the purchaser and his son they could easily change the platform. Other owners had done so only after a resource consent process with the council.

[28] The Committee found that there was no clear evidence that the licensee had misled the purchaser and/or his son with regard to easily moving the building platform.

APPEAL

[29] The purchaser appealed to the Tribunal against the Committee's decision to take no further action.

[30] In his notice of appeal, the purchaser said:

1. He accepted that in August 2020 he had been provided with extensive material on lots 2 and 5, including the title plan showing the building platforms for all the lots.
2. It was false that the licensee met his son only on 16 September 2020. It was the purchaser who took his son to look at lot 6 with no agent, and then they went to the agency's office.
3. It was not true that the licensee provided a property report (including the plan showing the location of the building platform) on 16 September 2020.
4. It was untrue that the licensee showed them where the building platform would be marked out. He never went to the site with them. However, it was plain to see, as it had been cut out by the digger.
5. It is correct the licensee told them they would need resource consent to change the building platform. At the same time, he said it would be a formality as the precedent had been set with other sections which had already changed their platforms.
6. If the licensee had said there would be any difficulty in changing the platform, they would not have made an offer.
7. It was true he had spoken to the vendor about the council's spatial plan and the possible effect on the subdivision. He said to the licensee that his understanding from the vendor was that he could only build on the building platform. The licensee's answer was emphatic. He said it had all changed as other lots had set the precedent. He failed to realise that other lots had only changed by a few metres and were essentially the same platforms.

[31] Both the purchaser and the licensee sought to produce evidence to the Tribunal that was not before the Committee. A Ruling was issued by the Tribunal on 18 May 2022 allowing certain new evidence to be produced and declining other new evidence.

[32] At the same time, the Tribunal directed that there would be an oral hearing.

[33] On 9 March 2023, the Tribunal confirmed the Ruling (18 May 2022) declining to hear the evidence of the purchaser's wife.

[34] The Tribunal has received from the purchaser:

1. Statement of the purchaser's son (3 February "81", actually 2022).

2. Submissions (9 February 2023).
3. Closing submissions (27 March 2023).

[35] The Tribunal has received from the Authority:

1. A paginated bundle of the documents before the Committee and the new evidence allowed by the Tribunal in its Ruling (18 May 2022).
2. Submissions (9 March 2023).
3. Closing submissions (28 March 2023).

[36] The Tribunal has received from the licensee:

1. Statement of the licensee's wife (6 February 2022), redacted in accordance with the Tribunal's Ruling (18 May 2022).
2. Submissions (23 February 2023).
3. Information on 7 March 2023 concerning certain entries in the licensee's retrospective record (Amended Bundle at 226).
4. Closing submissions (29 March 2023).

[37] At the hearing, we heard evidence from the purchaser, his son, the licensee and his wife.

JURISDICTION AND PRINCIPLES

[38] This is an appeal pursuant to s 111 of the Real Estate Agents Act 2008 (the Act).

[39] The appeal is by way of a rehearing.¹ It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.² After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.³ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.⁴

[40] A hearing may be in person or on the papers.⁵ A hearing in person may be conducted by telephone or audiovisual link.

¹ Real Estate Agents Act 2008, s 111(3).

² *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] & [83].

³ At s 111(4).

⁴ At s 111(5).

⁵ At ss 107, 107A.

[41] 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.⁶ 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.⁷

DISCUSSION

[42] The critical allegation in the complaint is that the licensee represented to the son (and also the purchaser according to their evidence) that the building platform, which they knew had been consented for a location near the bottom of the lot, could be moved towards the top of the lot, in order to take advantage of the impressive views from there.

[43] The licensee’s relevant professional obligations in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 are:

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

...

6.4 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.

[44] It is the evidence of the purchaser and his son that the licensee told them at the meeting in his office on 16 September 2020 that it would be easy to obtain the council’s approval to change the position of the lot, a mere formality, as it had been achieved for other lots in the subdivision. The purchaser has consistently given such evidence both to the Authority and the Tribunal.

[45] The licensee denies making any such representation. It was his evidence to the Tribunal that, while he showed the son broadly where the building platform was (adjacent to an excavated area where vehicle access to the lot was available), the son was not particularly interested in the platform. They did not discuss moving the platform to build at the top of the lot. He says he did not tell the son of the need to obtain resource consent from the council to change the location.

⁶ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] & [16] and *Edinburgh Realty Ltd v Scandrett* [2016] NZHC 2898 at [112].

⁷ *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22] and the higher court authorities cited therein at fn 9.

[46] This evidence to the Tribunal was contrary to what the agency had told the Authority in the licensee's response to the complaint on 5 August 2021 (information which plainly came from the licensee).⁸ The licensee said there that he and the son had walked over the lot on 16 September 2020. He had showed the son the general location of the platform and told him that if an owner wanted to change the platform, resource consent would be needed from the council.

[47] When the discrepancy in his evidence was pointed out to him, the licensee said he had not recollected correctly. Given that the entire focus of the complaint has been the building platform and what was said by the licensee at the site and the office about changing it, something the licensee must have thought about on numerous occasions since the complaint two years ago, it is not accepted that this discrepancy in his evidence can be explained by the faulty recollection of an event two and a half years ago. In his evidence to the Tribunal, the licensee sought to downplay what we have no hesitation in finding was the focus of the son that day, 16 September 2020, namely the ability to move the location of the platform to take advantage of the view.

[48] We do not accept the licensee's evidence that the son did not express to him a high interest in the location of the building platform. While the son was at times an uncooperative, argumentative and vague witness, his evidence about the importance of the view and hence the location of the platform was truthful. Moreover, we found the purchaser to be an impressive witness. Not only has his evidence been consistent on this critical aspect of the complaint, but he candidly made concessions against his interest as we shall shortly discuss.

[49] We accept the evidence of the purchaser and his son that the licensee made the alleged representation, namely that it was easy and/or merely a formality to obtain the consent of the council to change the location of the platform. That representation was made to the son at the office later.

[50] We are less clear as to whether any representation was made to the son at the site as we are not able to resolve the discrepancy in the evidence as to who was present at the site. Nor can we resolve the related discrepancy as to whether the purchaser was present at the office. The purchaser and his son have consistently said that only they were present at the site and that both of them were with the licensee when the offer was signed. The licensee and his wife have consistently said that it was the licensee and son who were at the site and the office, not the purchaser.

[51] Whether or not the purchaser was present at the site earlier and then at the meeting in the office, we accept his evidence that at some point he confronted the licensee with his understanding (from his knowledge of the covenants and talking to the vendor) that the platform positions could not be moved, to which the licensee responded

⁸ Amended Bundle at 103.

that the situation had changed as the platforms on other lots were being moved. The licensee made that representation direct to the purchaser. It may have occurred at the meeting on 16 September 2020, or before that meeting when the purchaser and his wife previously viewed other lots including lot 6, or after the meeting but before settlement.

[52] Hence, we find that the licensee made the misrepresentation that the platform for lot 6 could be moved, to both the son and the purchaser (conceivably on different occasions).

[53] The licensee made that representation in good faith. It was his understanding that the buyers of certain other lots (notably lot 5) were in the process of changing the location of the platforms or had already obtained consent to do so.⁹ In fact, the council did consent to changing the location of the platforms on some other lots, though it is not clear to us whether this had occurred before 16 September 2020. According to the purchaser, those changes involved only a shift of a few metres and not movement to a different part of the site, as they were seeking for lot 6.

[54] Having found that the licensee did make the alleged representation as to the ability to move the position of the platform, a representation which no party disputes was incorrect, it follows that the licensee has misled the purchaser and his son. It is not necessary to prove reliance on the representation, in order to establish that it was misleading. The issue for us is whether what was said was “capable” of materially affecting a decision on the part of the purchaser and not also whether there was any reliance by him and/or his son on the representation.¹⁰ Plainly, the representation was capable of affecting their decision.

[55] The licensee has therefore breached r 5.1 (failed to exercise skill and care) and r 6.4 (misled the purchaser) of the Rules.

[56] The next issue for us is whether this misrepresentation justifies a disciplinary response and amounts to unsatisfactory conduct within s 72 of the Act. It could not conceivably be misconduct because it was made in good faith and we would not regard it as a marked and serious departure from the standards.¹¹ There is a threshold for formal disciplinary findings and the stigma of a finding of unsatisfactory conduct.¹² We must have regard to all the circumstances of the case and decide whether any further action is unnecessary or inappropriate.

⁹ The purchaser produced in his closing submissions the minutes of a council “Pre-Application Meeting” on 11 August 2020 concerning lot 5. Putting to one side whether it is admissible evidence (as it was not produced to the Committee), it confirms the licensee’s evidence that the council were favourably disposed to changing the location on some lots prior to 16 September. It also appears to confirm the purchaser’s evidence that the changes were to the footprint of the existing platform and not a shift of the platform to a different part of the site.

¹⁰ *Vosper v Real Estate Agents Authority* [2017] NZHC 453 at [63].

¹¹ *Morton-Jones v Real Estate Agents Authority* [2016] NZHC 1804 at [29].

¹² *Vosper*, above n 10 at [72] & [74].

[57] The ultimate buyer here was the purchaser and not the son. On the purchaser's case, he was present at the office when the representation was made. It does not actually matter whether he heard the representation on that occasion or some other occasion prior to settlement when he was discussing lot 6 with the licensee, since we have found that the representation was made to the son at the office when the offer was signed.

[58] It is to be remembered that the purchaser was aware, on or before 16 September 2020, of the general location of the consented platform low on the site and that resource consent from the council would be required to change it. There is a dispute over what documents relating to lot 6 had been handed over to him and/or his son on 16 September, but the purchaser acknowledges he was aware of such details from his earlier interest in other lots. The purchaser accepts that the vendor had told him he could not move the platform. We accept the submission of Ms Lucas that it is common knowledge that obtaining resource consent can be challenging.¹³

[59] To this knowledge must be added the noteworthy circumstance that the purchaser is himself a real estate agent and has been for about 28 years. He will be familiar with council consenting processes. In addition to having built a house to live in, he has sold development land as an agent. When we asked him whether it was reasonable for him to rely on the licensee's representation, he candidly replied:

This is one of the most stupid things I have done. At the time, I relied on [the licensee]. I believed him when he said everything has changed concerning the building platform... I should have rung [the vendor]... I am a trusting person.

[60] In the circumstances, we agree with Ms Lucas' submission and find that no reasonable person with the purchaser's knowledge and experience would have relied on the licensee's misrepresentation. Nor would a reasonable person, knowing of the covenant and having received information from the vendor that the platform could not be moved, have rejected a due diligence clause because of the licensee's representation. On the purchaser's case, he was with his son when a due diligence clause was rejected. The licensee had offered that clause and it was unreasonable of the purchaser and his son, knowing what they did about the building platform, not to explore the ability to change the platform via a due diligence clause. Buyers must take some responsibility for their own conduct.

Conclusion

[61] We accordingly find that, while the licensee has breached rr 5.1 and 6.4, a finding of unsatisfactory conduct is not warranted in the circumstances. In so concluding, we take into account that the misrepresentation was made in good faith.

¹³ Closing submissions (29 March 2023) at [62].

OUTCOME

[62] We confirm the decision of the Committee to take no further action on this complaint. The appeal is dismissed.

[63] 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

[64] The Committee directed publication of its decision without disclosing the name of the purchaser, the licensee or any third party or identifying the address of the property.

[65] In light of the outcome of this appeal and having regard to the interests of the parties and of the public, it is appropriate to order publication without identifying the purchaser, the property, the licensee or the agency.

D J Plunkett
Chair

G J Denley
Member

F J Mathieson
Member