

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2024] NZREADT 10

Reference No: READT 023/2023

IN THE MATTER OF

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

BETWEEN

IH
Appellant

AND

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

AND

**KRISTOFOR HARRY BENJAMIN
CHAPPEL**
Second Respondent

Hearing on the papers

Tribunal:

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

Representation:

The appellant:

Self-represented

Counsel for the first respondent:

F F Nizam, A S Bagchi, G Maslin

Counsel for the second respondent:

R Hargreaves, A Kokje

SUBJECT TO NON-PUBLICATION ORDER

DECISION
Dated 12 April 2024

INTRODUCTION

[1] The appellant, IH, was one of two co-purchasers (the purchaser) of a property with a non-compliant spa pool and a textured ceiling which the purchasers did not know contained asbestos. The second respondent licensee (the licensee), Kristofor Harry Benjamin Chappel, informed them the spa lacked consent (but did not explain why). Nor did he advise them a textured ceiling meant there was a risk of asbestos.

[2] The purchasers made a complaint to the Real Estate Agents Authority (the Authority), which referred it to Complaints Assessment Committee 2102 (the Committee). It upheld the complaint about the spa, but it did not refer the purchasers' claim for compensation to the Tribunal. As for the possible presence of asbestos, it decided to take no further action against the licensee. The purchaser appeals to the Tribunal against the Committee's decisions.

BACKGROUND

[3] The licensee is a licensed salesperson under the Real Estate Agents Act 2008 (the Act) and at the relevant time was engaged by Bulsara Ltd, trading as Tall Poppy Real Estate (the agency).

[4] The property, which is residential, is situated in Wellington. It was advertised as having an inbuilt spa pool. It sits on an outdoor enclosed deck accessed by two doors from the house.

[5] On 20 September 2020, the purchasers attended an open home. The spa was full and running.

[6] On the same day, the licensee emailed to the purchasers the "Seller and Salesperson Disclosure (to potential purchasers)" form (the disclosure form), which had been signed by the vendors on 4 September 2020 and was signed by the purchasers on 22 September:

1. The "Yes" box had been ticked in answer to "**Specific faults and/or issues known to the vendor**". There followed a manuscript note (*verbatim*), "When purchased we were advised that the deck and spa areas do not have concent".¹

¹ Seller and Salesperson Disclosure (to potential purchasers) form at item 6; Authority's bundle of documents at 160.

2. The “No” box was ticked in answer to the question, “Are you aware of any ... Asbestos inside or outside the property?”²
3. At the foot of the form, immediately above the purchasers’ signatures and in bold, there is a message “strongly” recommending that buyers seek professional advice.

[7] The purchaser signed a Buyer Approval form on 22 September 2020. It recommended that buyers obtain professional reports on all aspects of the property.

[8] The purchasers visited the property on 26 September 2020 with a builder to seek his opinion on the unconsented deck.

[9] A pool compliance officer from the local council sent an email to the licensee on 26 September 2020 attaching the council’s information sheets on pool fencing. The licensee sent an email to the officer one day later asking if a lockable lid for the spa would change things. The officer briefly replied setting out in his email the requirements for the spa to become compliant with the barrier rules (in the event the spa was not 760mm high, which would only require a lockable lid).³

[10] An offer (subject to finance) was made by the purchasers on 29 September 2020. It was made on the sale and purchase agreement (the purchase agreement) form. The standard building report condition (under “Conditions”) was crossed out, as were other standard conditions. The conditions box was initialled by the purchasers. Under “Purchaser’s Special Conditions”, the condition requiring a building inspection report was also crossed out and initialled by the purchasers. An increased offer (\$640,000) was accepted the following day.

[11] The purchasers secured finance and the offer became unconditional on 13 October 2020.

[12] On a visit to the property on 8 November 2020, one of the parents of the purchasers questioned whether the ceiling contained asbestos. There followed an exchange of texts between the purchaser and the licensee from 8 to 10 November 2020:

[from the purchaser] ... just had the parents ask about the textured ceiling ... and they were wondering if there were any worries about asbestos...

[the licensee] ... the vendor has not done anything to the ceiling ... or had it tested ... there was never any mention of asbestos to the current owners when they

² At item 9; Authority’s bundle at 161.

³ The Tribunal understands the spa is not 760mm high.

bought the house. There possibly could be but would not know for sure as it has not been tested. ...

[the purchaser] So does it have asbestos or not? Would be good to know yes or no. ...

[the licensee] As per the disclosure document we are unaware of any asbestos.

[13] Settlement occurred on about 11 December 2020.

[14] The purchasers obtained a property inspection report on 17 March 2021. In respect of the ceilings, it stated:

Stipple ceilings were noted throughout the dwelling (Possible asbestos) there is no issue with this product so long as it is kept well sealed, painted, and it is not damaged, cut or drilled into. The only real way to know for sure this is asbestos is to take a sample and get it tested.

[15] On 19 May 2021, the council's pool officer advised the purchasers that the spa did not comply with the council's fencing (barrier) rules. He said he had told the licensee. The officer sent an email to the purchasers on 21 May 2021 advising the spa was exempt provided the height of the water never exceeded 400mm.

[16] The purchasers received a laboratory report on 28 May 2021 confirming the presence of asbestos in the lounge room. It noted the presence of the textured coating throughout the house.

Complaint to Authority

[17] On 18 August 2021, the purchasers made a complaint against the licensee to the Authority. It was alleged they had been misled regarding the condition of the property. It was advertised as having a functioning spa. Additionally, the licensee should have been aware of the asbestos and disclosed it. These failures had caused them considerable stress and were likely to cost considerable amounts to correct. They wanted to be compensated for costs incurred to date, the cost of identifying the extent of the asbestos and the cost of correcting the problems.

[18] On 2 November 2021, the other co-purchaser told the Authority by phone that while they were aware the "spa room" was unconsented, they were not aware it did not comply with the council's regulations. The council had sent emails to the licensee, but he did not disclose them. The council's officer had told them he visited the property and informed the licensee that the spa was not legal.

[19] In an email to the Authority on 17 February 2022, the purchaser stated that the existence of asbestos within the house detrimentally affected the value of the house

which should have been recognised by any agent and communicated to all buyers. Together with the non-compliant spa, it would likely have lowered all offers. It was important to note that the ceiling showed clear signs of being affected by renovations and had been patched and resealed.

[20] On 5 July 2022, the purchaser informed the Authority that the builder who went to the property with him on 26 September 2020 inspected the deck only and did not go inside the house.

Explanation from licensee

[21] A director of the agency sent an email to the Authority on 23 November 2021. He noted that the relevant professional rule required a customer to be informed of “any *significant* risk”, but there was no such risk in this case. According to him, it was common knowledge that asbestos presented no risk if it was well-maintained and constrained by an effective paint covering. The ceiling in question was well painted, had no cracks and offered no risk. In another email sent the same day, the director attached a Ministry of Health guideline which he said showed there was an “extremely low risk” where the ceiling material was intact, and only a “very low risk” where the material was crumbling.

[22] The licensee said in an email to the Authority on 21 February 2022 that he and the vendors were unaware of any asbestos. Regardless, the Ministry of Health guideline made it abundantly clear that any risk was minimal, even if the areas containing asbestos were not in perfect condition. The ceiling in question was in good order, even though some repairs had been made in the past.

[23] The licensee provided a full explanation to the Authority on 22 March 2022:

1. The spa was functioning and in working order, so it was included in the advertising. The issue here was about pool barriers or access to the spa. It required compliance, but the non-compliance was clearly disclosed. He was told a spa lid would not change anything, so the area would still be unconsented. He did not therefore believe the disclosure form needed updating.
2. Neither the licensee nor the vendors were aware of the presence of asbestos in the ceiling. The licensee said he could not determine its presence and therefore made no claim. Although it might be common knowledge that textured ceilings could contain asbestos, this was often nearly impossible to tell from observing the material with an untrained eye.

The purchasers were advised to include a building report in their offer, but they did not do so. This was pointed out to them in the disclosure form, the buyer approval form, the multiple offer form and the purchase agreement (sent to them as a draft on 21 September 2020). They disregarded this advice and deleted the condition concerning such a report.

[24] On 13 April 2022, the licensee advised the Authority that he did discuss asbestos with the vendors who were not aware of any. This was disclosed to the purchasers.

[25] On 2 June 2022, the licensee informed the Authority that the textured ceiling was in reasonably good condition for its age. In answer to the question as to whether he ever considered the possibility of asbestos, he stated (*verbatim*):

Textured ceilings always have the possibility of containing asbestos, this is why it is a question in the disclosure document, so we can ask the vendors and advice buyers what we know about the property.

Decisions of the Committee

[26] The Committee considered the following professional rules from the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 (the Rules):

5 Standards of professional competence

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

...

6 Standards of professional conduct

...

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

...

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

10 Client and customer care for sellers' agents

...

Disclosure of defects

10.7 A licensee is not required to discover hidden or underlying defects in land but must disclose known defects to a customer. Where it would appear

likely to a reasonably competent licensee that land may be subject to hidden or underlying defects⁴, a licensee must either—

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

...

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

[27] It is also useful to set out at this juncture the Committee's statutory jurisdiction on compensation and rectification/relief where unsatisfactory conduct is found, though neither provision was referred to in the decisions:

93 Power of Committee to make orders

- (1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:

...

- (f) order the licensee—
 - (i) to rectify, at his or her or its own expense, any error or omission; or
 - (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission:

...

- (ha) if the Committee is satisfied that the unsatisfactory conduct involves more than a minor or technical breach of this Act or of any regulations or rules made under this Act, make an order referring the matter to the Disciplinary Tribunal for the Tribunal to consider whether to make a compensation order under section 110(5):

...

[28] The Committee issued its liability decision on 16 December 2022.⁴ It noted that the council's pool officer had sent an email to the licensee on 27 September 2020 with information as to the barrier requirements for the spa. It found that the licensee knew, or ought to have known, that the spa was non-compliant and although it was functioning,

⁴ Complaint No: C42328 (16 December 2022).

it could not be used until the issue of non-compliance was rectified. The licensee had advised the purchasers that the spa was unconsented. What is relevant, though, is that he knew what was needed to ensure compliance, but he did not pass that on. He did not disclose that the spa was not compliant and could not be used. This information was capable of materially affecting the decision of the purchasers because it affected whether the spa could be used. It should have been provided.

[29] It was found that the licensee did not take steps to fully understand the council's information and its effect on the use of the spa. This was a breach of r 5.1. In failing to pass the information on, the licensee breached r 6.2. His omission to do so was misleading and therefore a breach of r 6.4. He also failed to disclose relevant information on an underlying defect, a breach of r 10.7. The Committee further found that it was not proper practice to use the spa in advertising and open homes without the caveat as to its operation. This was a breach of r 6.4.

[30] The breaches of the Rules were held to amount to unsatisfactory conduct.

[31] As for the asbestos issue, the Committee noted the exchange of texts between the licensee and the purchasers from 8 to 10 November 2020. The licensee had acknowledged the potential for asbestos, but said the vendors were unaware of any. He had referred to the disclosure form. The Committee found that the licensee was unaware of any asbestos on the property and did not consider that he was required to take any further steps. It decided to take no further action on the issue.

[32] In the penalty decision on 19 September 2023,⁵ the Committee noted that the purchasers sought substantial compensation for the cost of replacing the non-compliant spa with a comparable spa, supported by quotes. This required building work as well as a new spa. The total cost was estimated at about \$38,000 to \$45,000. The licensee had also provided quotes to enable compliance of the existing spa, at a cost of up to \$3,000. The Committee noted the wide discrepancy between the possible solutions and held that it was up to the purchasers to decide how they would address the issue.

[33] The Committee found the conduct to be at the lower end of the unsatisfactory conduct spectrum. As it was the first time the licensee had appeared before a committee and he had offered an apology and a solution, he was fined \$2,000 and ordered to send a written apology to the purchasers.

⁵ Complaint No: C42328 Decision on Orders (19 September 2023).

THE APPEAL

[34] The purchaser appealed to the Tribunal against the Committee's decisions on about 14 October 2023.

Submissions of the purchaser

[35] There are submissions (undated) attached to the notice of appeal (14 October 2023). The purchaser submits it is fundamentally unjust that the licensee was found to have engaged in unsatisfactory conduct, which left them in possession of a property not matching what was advertised, but they have received no compensation. They would expect the licensee to be ordered to make some meaningful contribution to the restoration of the property as advertised. They need to either spend significant money to restore the property to match the advertising or put in place intrusive measures to make the spa compliant.

[36] It is contended that it is clear the licensee was aware of the significant potential risk of asbestos in the ceiling. At no point prior to the offer becoming unconditional did he disclose this risk. He failed to either obtain confirmation that the land was not subject to the defect, supported by evidence, or inform them of the risk. The Committee misunderstood the timeframes. It refers to the text exchange between 8 and 10 November 2020, but this occurred after the sale had been confirmed as unconditional. It would have been impossible or extremely difficult for them to have got out of the purchase then.

[37] The failure to disclose suspected asbestos until after the offer is unconditional is a breach of r 10.7 of the Rules. They are prevented from renovating their home without undergoing expensive asbestos removal, or they must disclose its presence to future buyers. They expect, as a minimum, to be compensated for the costs of removing asbestos from their property.

[38] In his further submissions (undated), the purchaser repeats the points made with the appeal. As for the spa, they would not expect the licensee to cover the full worst-case scenario cost (\$9,000 – \$16,000 for a new spa and \$29,000 for a builder), instead they seek \$25,000. Section 93(1)(ha) of the Act would not appear relevant, as the breaches were described by the Committee as concerning, rather than minor or technical. The most relevant option would be s 93(1)(f)(ii) to make the pool compliant (by restricting the usage of doors or installing an intrusive alarm), but these actions do not restore the property to the advertised condition. Hence the only suitable relief is for the licensee to make a contribution toward the cost of restoring access to a compliant

spa area, including the cost of a compliant spa, the removal of the uncompliant spa and installation.

[39] The purchaser has replied (1 March 2024) to the submissions of the respondents. As for the spa, the focus has been the consent of the pool area, but this is not in dispute. While the pool area is not consented, this was disclosed. Furthermore, it is not required to be consented because it was an addition to the house prior to the Building Act 1991. The issue at hand is compliance of the spa itself with the pool provisions under the Building Act 2004.

[40] The purchaser does not agree that the unsatisfactory conduct is considered at the lower end of the spectrum. The licensee breached four obligations and failed to pass on information from the council.

[41] It is the purchaser's view that the licensee's suggestions concerning the spa are unsuitable as they alter the nature of the space. The door, where an audible alarm is proposed, is left open for airflow in summer. It is not an option for the second door to remain permanently shut (with a spring and latch) as the dogs use it during the day. The licensee's solution would make the spa compliant but would impact their enjoyment of the property.

[42] The Committee could have referred the issue to the Tribunal so suitable compensation could be awarded to address the loss of function suffered over the past three years. Unless they carry out significant remedial work, the property will not have the advertised features, which affects its resale value. It would be possible to award compensation of an amount between what they are asking and what the licensee offered. For example, the sum of \$8,990 would cover the cost of a compliant spa which could be placed at a different location. This would remove any element of betterment. It appears to be unjust to offer no relief, even at a lower amount, when they have suffered a loss due to the licensee's unsatisfactory conduct.

[43] The purchaser agrees with the Authority that asbestos is a defect even without an imminent health risk, that the licensee was obliged to disclose the possibility of asbestos and that the Committee incorrectly dismissed this part of the complaint. The licensee breached r 10.7. As a result, they seek compensation to cover the costs of removal and restoring the ceilings to a suitable standard.

*Submissions of the Authority*Spa

[44] In her submissions (16 February 2024), Ms Bagchi submits that the Committee has a residual discretion to decline referring a breach that is more than “minor or technical”, noting that s 93(1) uses the word “may”. In the present case, the Committee did not refer expressly to s 93(1)(ha) so it is not possible to see the Committee’s reasoning in not referring the matter. However, it is submitted that the decision was not in error. The Committee correctly considered the unsatisfactory conduct to be at the lower end of the spectrum. It also mentioned other factors. It was open to the Committee to consider that a referral was not appropriate because a fine and an apology achieved the principles of the Act.

[45] Should the Tribunal find that the Committee erred in not referring compensation to it, the question of quantum arises. Any compensation awarded should be based on a causal connection between the unsatisfactory conduct and any loss. The Authority seeks leave to file further submissions on the legal principles relevant to quantum.

[46] As for rectification or relief under s 93(1)(f), the Committee did not expressly consider it, but it did not err in not ordering it. The purchaser says that the spa issue caused them to buy the property at a higher price than otherwise. However, this kind of pure economic loss can only be addressed with monetary compensation, which is not available under s 93(1)(f). Rectification – making the spa capable of being operated in a compliant manner (while still being on a deck that does not have consent) – does not appear to be feasible.

[47] Nor can the purchasers be forced to implement the licensee’s proposed solution, if they do not agree with it. The purchasers want a replacement spa, but that would not be rectification since it would leave them in a better position compared to what would have been the case without the unsatisfactory conduct.

[48] As for ordering relief – with the licensee contributing towards a new spa – that would not fall within the ambit of providing relief from the consequences of the error or omission. Nor would it be appropriate in circumstances where the purchasers do not agree to implement the measures proposed by the licensee. Finally, the fact the spa sits on a deck that is itself unconsented, which the purchasers knew about, is a further consideration against rectification or relief.

Asbestos

[49] The Authority understands that the level of risk according to the Ministry of Health guidelines is “extremely low”, rather than negligible. It could be argued that to be a defect, there would need to be more than a negligible or extremely low risk. However, it is submitted that the mere presence of asbestos, even without an imminent health risk being present, is nonetheless a defect, so r 10.7 is engaged. This is because of the potential for a health risk to develop in the future (for example, if a previously well-maintained ceiling is damaged) and because the presence of asbestos is likely to have implications for the resale value of the property.

[50] It is acknowledged by the Authority that the licensee appears not to have known of the presence of asbestos, since the evidence shows only testing could confirm its presence.

[51] The licensee accepted that the presence of a textured ceiling is enough to suggest the possibility that asbestos is present. Hence, in the absence of evidence that asbestos was not present, the Authority submits the licensee could not rely on r 10.7(a), but was obliged under r 10.7(b) to disclose the possibility of asbestos to the purchasers. The licensee only did so after the purchase was unconditional when it would have been difficult for the purchasers to cancel the agreement. The Committee did not engage with the timing of the text messages. It may therefore have erred in declining to take any further action on the asbestos issue.

Submissions of the licensee

Spa

[52] In her submissions (25 January 2024), Ms Kokje submits that the licensee has met his obligations in relation to the spa. The spa itself is not the issue. It functions normally. It is in-ground. As the height is low, there must be barriers preventing access. It is accessible from the house using a swing door and a sliding door, which must be latched and either self-closing or have an audible alarm.

[53] The purchasers bought the property knowing there were issues with the legal consent of the spa area. The purchasers cannot therefore have had the expectation, as claimed, that the spa was a legal and usable feature of the house. It is not clear what steps, if any, were taken by the purchasers on reading the disclosure about the spa, to ascertain what it meant and what would be required to remedy it. They did not ask the licensee. The Tribunal also notes that counsel further states, inconsistently, that the

licensee advised the purchasers to seek the council's records and to obtain advice on the issue.⁶

[54] It is contended that all reasonable buyers would know there were issues, even though the spa was functional. The purchasers did not take sufficient steps to satisfy themselves as to the condition of the property.

[55] Furthermore, the working functionality of the spa was a feature of the property, notwithstanding the legal consent status. Prospective buyers would want to know if the spa worked. It was not therefore unsatisfactory conduct to have the pool running even though it was unconsented.

Compensation for spa

[56] Counsel submits that, if the Tribunal is minded to make a finding of unsatisfactory conduct, no compensation should be awarded. The local council has confirmed that the issue can be resolved by work to the doors which open to the spa area (making them self-closing or fitting an alarm). The licensee obtained quotes of about \$1,500 or \$3,000 for this work. The purchasers do not accept that such a remedy is suitable, but their reasons are not valid. Instead, they seek a new spa and extensive building work. There is a significant element of betterment in their claim. Additionally, the licensee has paid a fine of \$2,000, which is more than adequate. To award compensation would be unduly punitive when the legal issue was disclosed in writing to the purchasers.

[57] It is submitted that the Committee has a real discretion as to whether to refer the issue of compensation to the Tribunal, even where the unsatisfactory conduct is more than minor or technical. The word "minor" denotes conduct that is low in the range. The Committee's enquiry must be on the conduct itself, not the consequences of that conduct. In this case, the Committee found that the licensee's conduct was at the lower end of the spectrum. The Committee was correct not to refer compensation to the Tribunal. The unsatisfactory conduct did not pass the threshold of more than minor or technical.

[58] The Committee was also correct not to order the licensee to rectify any error at his own expense. Such relief is not akin to compensatory damages and must flow directly from the cost to rectify an issue. Such relief or rectification is concerned with a tangible step or action taken by a licensee. The purchasers' request is for compensation, rather than for the licensee to take action to rectify an error or omission.

⁶ The Tribunal is not aware of any evidence supporting the contention that the licensee did give advice to the purchasers about the unconsented spa.

Asbestos

[59] The purchasers' case is centred on a message from the licensee to the Authority where he said that textured ceilings always have the "possibility" of containing asbestos. It is not correct that the licensee was aware of the significant risk of asbestos. Instead, he was aware of the possibility, but he had asked the vendors who answered "no".

[60] The presence of textured ceilings does not of itself mean that asbestos is "likely" under r 10.7. The purchasers' own building inspector merely says it is possible. Licensees are not such inspectors. It is not their role to warrant that there are no issues with a property. There is no requirement in r 10.7 or otherwise to disclose or to make recommendations concerning any possible defect. That would be unrealistic. A buyer always assumes risk when a property is bought. The purchasers in this case assumed a greater risk by choosing not to get a building report before purchasing. The licensee met his obligation in respect to any risk of asbestos at the property.

[61] If the Tribunal does not agree with the primary submission that there is no breach of any rule in relation to asbestos, no compensation should be awarded. The licensee did not underwrite the condition of the house. Nor is there any need to remove the asbestos as claimed. As the purchasers' building inspector says, there is no issue with the product so long as it is kept well sealed and is not damaged, cut or drilled into. While the presence of asbestos is not desirable, it is usually left in place provided it is secure. The building report says the ceilings are in reasonable condition. Additionally, the purchasers have not provided any quote for the cost of removal.

JURISDICTION AND PRINCIPLES

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

[63] The appeal is by way of a rehearing.⁷ It proceeds on the basis of the evidence before the Committee, though leave can be granted to admit fresh evidence.⁸ After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.⁹ If the Tribunal reverses or modifies a determination, it may exercise any of the powers that the Committee could have exercised.¹⁰

⁷ Real Estate Agents Act 2008, s 111(3).

⁸ *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81] and [83].

⁹ Real Estate Agents Act, s 111(4).

¹⁰ Section 111(5).

[64] A hearing may be in person or on the papers.¹¹ A hearing in person may be conducted by telephone or audiovisual link.

[65] The appeal against the Committee's decision not to refer compensation for the spa to the Tribunal or make a decision on rectification/relief, concerns a penalty. It is therefore an appeal against the Committee's exercise of a discretion.¹² This requires an appellant to establish that the Committee made an error of law or principle, took into account irrelevant matters or failed to take into account relevant matters, or that the Committee's decision is plainly wrong.¹³

[66] The appeal against the Committee's decision to take no further action regarding asbestos 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.¹⁴ 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.¹⁵

[67] The Tribunal issued a procedural Minute on 29 November 2023 as to the conduct of the appeal. It states that the issue of any compensation (or rectification/relief) in relation to asbestos would be dealt with later, if it decided the Committee erred in taking no further action.¹⁶ The Authority filed in the Tribunal on 8 December 2023 a bundle of the documents that were before the Committee.

DISCUSSION

[68] There are two issues for the Tribunal to address:

1. Whether the Committee was correct not to refer the issue of compensation to the Tribunal (or to order rectification or relief) for the unsatisfactory conduct concerning the spa and, if not correct, what compensation (or rectification/relief), if any, should be awarded by the Tribunal?

¹¹ Sections 107 and 107A.

¹² The Tribunal acknowledges that there are conflicting High Court authorities on the nature of an appeal against a penalty, as Ms Bagchi points out. The Tribunal generally treats such appeals as if against the exercise of a discretion. Even if considered a general appeal, the outcome would be the same in this case.

¹³ *WM v Real Estate Agents Authority (CAC 1906)* [2022] NZREADT 7 at [56].

¹⁴ *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].

¹⁵ *Watson v Real Estate Agents Authority (CAC 1906)* [2021] NZREADT 37 at [22], citing *Stichting Lodestar*, above n 14, at [4]–[5]; and *Scandrett*, above n 14, at [112].

¹⁶ Minute No.1 (29 November 2023) at [13].

2. Whether the Committee was correct to take no further action concerning the possible presence of asbestos?

The spa pool

[69] There is a preliminary issue and that is the licensee's apparent challenge, in the submissions to the Tribunal, to the Committee's finding of unsatisfactory conduct concerning the spa.¹⁷ However, since there is no appeal from the licensee against either of the Committee's decisions, the licensee cannot challenge the Committee's finding of unsatisfactory conduct. The only issue before the Tribunal on appeal in relation to the spa is whether compensation (or rectification/relief) should be ordered.

[70] While we are not called upon to assess the Committee's finding, we record our agreement to it. The licensee failed to pass onto the purchasers specific information he had from the council as to the spa's non-compliance with the barrier rules. This is a breach of rr 5.1, 6.2, 6.4 and 10.7 and hence unsatisfactory conduct. We note also that the Committee found that the licensee did not fully understand the council's information. Whether that was the reason for the failure to pass it on, we do not know. It does not seem to us to be important whether the licensee understood the information or appreciated its significance. He should have passed it on.

[71] There is another preliminary issue, being the nature of the consent referred to by the licensee when he wrote the warning on the disclosure form that "the deck and spa areas do not have con[s]ent". This might be a reference to a lack of building or planning/resource management consent, as the Authority suggests,¹⁸ or to the pool fencing/barrier requirements or both. The purchaser has explained that the deck did not need building (or presumably any other planning) consent at the time it was built. The Tribunal understands, however, that if there was to be any change to the deck or the inbuilt spa, the new deck/spa would need building consent under the current rules. The existing deck complies with the old rules but not the current rules. We will proceed on the basis that there is no problem with the deck itself (provided the inbuilt spa is not changed).

[72] It is apparent from the licensee's explanation to the Authority (22 March 2022) that he intended the reference to a lack of consent to be a reference to the lack of barrier access. However, it seems to us that the purchasers did not realise this. The co-purchaser said in a telephone discussion with the Authority (2 November 2021) that while they knew the "spa room" was unconsented, they did not know the "spa itself did not

¹⁷ Submissions of licensee (25 January 2024) at [26](a), [39]–[40] and [49].

¹⁸ Submissions of Authority (16 February 2024) at [82](c)(ii) and (e).

comply with the council's regulations". It is not clear what the purchasers thought was unconsented, but we find they did not know about the non-compliance with the pool barrier requirements and may not have even realised that spas are subject to such requirements.

[73] Our starting point in relation to the spa is the Committee's finding of unsatisfactory conduct. But does such a finding mean compensation or the like should be awarded?

[74] The purchaser says they have been left with a loss arising from the licensee's unsatisfactory conduct and it is unjust that there is no compensation, even at a lower amount. They seek the substantial cost of a new compliant spa and hence a new consented deck for the spa. In his last submissions to the Tribunal, the purchaser offers a compromise, namely a new spa which could be placed in a different location avoiding the need for building work. In his submissions to the Committee, the licensee offered the minimal cost of access barriers (latches and both a self-closing door mechanism and an audible alarm), though this offer has not been renewed in the Tribunal. However, the purchaser rejects it, since it would affect the amenity value of those rooms and compromise the features of the house they purchased.

[75] The Committee declined compensation for the spurious reason that there was a wide discrepancy between the parties and it was up to the purchasers as owners of the property to decide how to proceed. It did not consider the possibility of rectification or relief.

[76] It is submitted by Ms Kokje that the Committee was correct not to refer compensation to the Tribunal in circumstances where the unsatisfactory conduct was characterised as at the lower end of the spectrum. It did not therefore satisfy the statutory threshold of more than "minor or technical".¹⁹ It is further submitted that the enquiry must be on the conduct itself and not its consequences.

[77] We do not accept either submission. Conduct at the lower end of the unsatisfactory conduct spectrum may be graver than the minimal threshold of minor or technical. Furthermore, it is relevant to look at the consequences of the conduct.

[78] In this case, we do not see the licensee's conduct as minor or technical, but even though we find the Committee should have referred compensation to the Tribunal, we would not have awarded it. This is because the licensee's failure to pass on the council's information was not the operative or real cause of the purchasers' loss.

¹⁹ Real Estate Agents Act, s 93(1)(ha).

[79] We note our jurisdiction to award compensation to a person who “has suffered loss by reason of the licensee’s unsatisfactory conduct”.²⁰ The loss for which compensation could be awarded must bear a “causal connection” to the unsatisfactory conduct.²¹ In other words, the loss must have been primarily or substantially caused by the licensee’s unsatisfactory conduct.

[80] Even though the licensee should have disclosed to the purchasers the particular information from the council and they probably did not know the lack of consent concerned spa access, they should have asked either the licensee or the council what the licensee’s warning meant.

[81] We agree with the submission of Ms Kokje that the purchasers failed to take sufficient steps to satisfy themselves of the condition of the property. They failed to undertake common sense due diligence. We further agree with counsel that the purchasers cannot have had the expectation that the spa was a legal and useable feature of the property, as they claim. If they did have that expectation, it was unreasonable as it was not based on the information provided to them as to the state of the spa area. They had been expressly warned it did not have consent.

[82] Even if the licensee’s failure to pass on the council’s specific information about access contributed to their loss, we find that it would be unjust to require the licensee to pay all or any part of the remedial cost, given his written warning about a lack of consent to the area. With respect to the purchasers, it is our finding that they are responsible for their own predicament. Accordingly, despite the Committee giving no sound reason for declining to refer compensation to the Tribunal, its decision was correct.

[83] For the same reason, we will not award rectification or relief. The purchasers’ loss (the remedial cost) was not caused by the licensee.

[84] We would add that, if we thought it appropriate to award compensation or any rectification/relief, we would have considered only the cost-effective solution offered earlier by the licensee, not the purchasers’ extravagant claim. Even the purchaser’s latest proposal, the cost of a new spa, amounts to betterment. Furthermore, the purchasers bear an obligation to mitigate their loss. The licensee’s proposal would ensure compliance with the barrier rules and the loss of amenity raised by the purchasers seems to us to be minor.

²⁰ Section 110(4)(b).

²¹ *UM v Real Estate Agents Authority (CAC 2103)* [2023] NZREADT 32 at [72]. This was the causation principle adopted in *Edwards v Bridge* [2019] NZHC 2286 at [66] and [70] in relation to s 93(1)(f). It is equally applicable to s 93(1)(ha).

[85] In conclusion, the purchaser has not established that the Committee made any material error of law or principle, took into account irrelevant matters or failed to take into account relevant matters, or made a decision that was plainly wrong.

Asbestos

[86] The Committee decided to take no further action on the matter of asbestos, because the licensee was not aware of its presence (though acknowledged the potential) and had pointed out to the purchasers in an exchange of texts between 8 and 10 November 2020 that the vendors were unaware of asbestos and had not had the ceilings tested. However, that reasoning was faulty as the texts were exchanged after the purchase had become unconditional, so in reality it was too late for the purchasers to extract themselves from the transaction. The Committee did not recognise the irrelevance of the timing of the texts.

[87] As we have seen above, the Committee's error does not necessarily mean its outcome was wrong.

[88] The critical issue here has been correctly identified by Ms Kokje. Was the possible presence of asbestos a "defect" required to be disclosed by the licensee under r 10.7?

[89] First, we must be clear about what the licensee omitted to do. He did not fail to disclose the presence of asbestos. He did not know it was present. What he failed to do was disclose the possibility or risk of its presence. He knew of the possibility because he knew (as would any competent licensee) that a stippled ceiling of a certain era may contain asbestos.

[90] A licensee is required by r 10.7 of the Rules to disclose known defects, but has a further obligation concerning defects:

... Where it would appear likely to a reasonably competent licensee that land may be subject to hidden or underlying defects [footnote set out earlier], a licensee must either—

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

[91] This is self-evidently an objective standard. A licensee's subjective lack of knowledge of a defect is no defence if the hypothetical reasonably competent licensee would know or believe there existed a defect.

[92] The text of the further obligation gives rise to the question as to precisely what has to be “likely”. It could be:

1. That a licensee would appreciate there existed one or more hidden or underlying defects (it is the licensee’s appreciation or belief that must be likely); or
2. That the land was subject to one or more hidden or underlying defects (it is the defect which must be likely).

[93] In the Tribunal’s decision in *Feschiev*,²² it opted for the second interpretation:²³

... If a reasonably competent licensee believed that a defect was likely to be present, then it will not help the licensee to say that she did not subjectively know about the defect.

... All that is required is that there is a belief that the defect is likely to exist.

[94] We will follow the principle in *Feschiev*. It makes sense. A licensee is not a builder or building inspector. He or she cannot be expected to identify every possible defect. We agree with Ms Kokje that such an interpretation would be unrealistic.

[95] In practical terms, it may not matter what the authors of the Rules intended “likely” to operate on. After all, a possible event or presence of something will appear likely to a reasonably competent licensee, if that event or presence is itself likely. We note also that the obligation in sub-rule (b) of r 10.7 is to inform a customer of any “significant potential risk”. We do not see any real difference between “likely” (as in more probable than not or more than a 50/50 probability) and “significant potential risk” (which points to a probability approaching 50 per cent or higher).

[96] Turning now to the instant case, Ms Kokje submits that the presence of textured ceilings does not mean that asbestos is “likely”. It is only “possible”. If so, it is contended that the licensee was not obliged to ask further questions of the vendors, nor to disclose the risk to the purchasers.

[97] There were three pieces of relevant evidence before the Committee (and us) as to the level of risk (or chance of asbestos) arising from the observance of a stippled ceiling:

1. In the disclosure form, the vendors had denied knowledge of asbestos.

²² *Feschiev v Real Estate Agents Authority (CAC 1901)* [2020] NZREADT 12.

²³ At [88]–[89].

2. The licensee acknowledges in his explanation to the Authority (2 June 2022) that there is always the possibility that textured ceilings contain asbestos.
3. The property inspection report (17 March 2021) commissioned by the purchasers, which stated that the stippled ceilings meant “([p]ossible asbestos)”, with the only real way to know being testing.

[98] In other words, there was no evidence before the Committee (nor before us) that the chance of asbestos was anything more than a mere possibility. There was no evidence that asbestos can be considered likely or a significant potential risk from the presence of a textured ceiling.

[99] Ms Bagchi submits that the mere presence of asbestos, even without an imminent health risk, is nonetheless a defect, so r 10.7 is engaged.

[100] This is not correct given two factors:

1. Neither the licensee nor anyone else knew that asbestos was present, at the time of the purchase.
2. The mere possibility of asbestos, unless more probable than not or a significant potential risk, is not a defect engaging r 10.7.

[101] We find that there was no hidden or underlying defect triggering the obligations in r 10.7.

[102] It seems to us that if there is no defect requiring disclosure, it cannot be said the licensee breached any other rule in relation to asbestos. There was no lack of skill or diligence on his part, no failure to act in good faith or fairly and no withholding of information which should have been disclosed. Accordingly, there is no breach of rr 5.1, 6.2 or 6.4 of the Rules.

[103] The Committee correctly decided to take no further action on the asbestos complaint. The issue of compensation (or rectification/relief) does not therefore arise.

OUTCOME

[104] The appeal is dismissed. The Committee’s decisions are confirmed.

[105] 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

[106] The Committee directed publication of its decisions without the names of the purchasers and third parties, but stating the names of the licensee and the agency.

[107] Having regard to the interests of the public in the transparency of the Tribunal's jurisprudence and in knowing of wrongdoing by licensees, as well as the privacy of the people involved, it is appropriate to order publication without identifying the appellant (purchaser), but naming the licensee and the agency.

D J Plunkett
Chair

P N O'Connor
Member

F J Mathieson
Member