Before the Complaints Assessment Committee

Complaint No: C41618

In the matter of	**Part 4 of the Real Estate Agents Act 2008**
and	
Licensee 1:	**Licensee 1 (XXXXXXXX)**
Licensee 2:	**Licensee 2 (XXXXXXXX)**

Decision to take no further action

11 March 2022

Members of Complaints Assessment Committee: CAC2103

Chairperson:	**Paul Biddington**
Deputy Chairperson:	**Bill Acton**
Panel Member:	**Belinda Moss**

Complaints Assessment Committee

Decision to take no further action

1. The Complaint

1.1. On 3 May 2021 the Real Estate Agents Authority (the Authority) received a complaint against Licensee 1 and Licensee 2 (together, the Licensees) from Complainant 1 and Complainant 2 (together, the Complainants).

1.2. Licensee 1 is a licensed Salesperson, and Licensee 2 is an Agent, under the Real Estate Agents Act 2008 (the Act). The Licensees worked for the Agency at the time of the alleged conduct.

1.3. The complaint relates to a property situated at the Property, and part of the "Property Development" new property development.

1.4. The Committee notes that the Complainants and the Licensees have provided comprehensive comments, documents and information about the matters raised including post disclosure comments and information. The Committee thanks the parties for the comprehensive information and wishes to record that it has focused itself on the information that it considers is relevant to the overall complaint, and these are set out below.

1.5. Where it has not referred to any specific information this does not mean that the Committee does not recognise that they relate to important issues to the parties, rather that they are not necessary directly relevant to the complaint.

1.6. The details of the complaint are that:

(a) Issue 1 - Licensee 1 misled the Complainants as to the completion date and progress of the Property.

(b) Issue 2 - The advertising was misleading as to the landscaping of the Property.

(c) Issue 3 - The advertising was misleading as to the school zoning of the Property.

(d) Issue 4 - Communication was lacking by the Licensees.

(e) Issue 5 - Licensee 1 and a third party[1] (the Assistant) failed to communicate to the Complainants on several occasions, regarding the status of remedial work and pre-settlement inspections.

(f) Issue 6 - Licensee 1 misled them when he told the Complainants the Property would be professionally cleaned.

(g) Issue 7 - Licensee 1 sent an email requesting the Complainants sign a waiver.

(h) Issue 8 – Licensee 2 offered to cover the Complainants' costs due to acknowledged ongoing difficulties with communication both by the developers and his Agency, and Licensee 2 has not made good on the offer.

(i) In particular, the Complainants said:

[1] The third party was an assistant employed by the Agency who assisted with various administrative tasks and contacted parties on behalf of the Licensees from time to time. The third party is not a party to this Complaint.

i) Issue 1 – They were not told proactively as to the status of the property development which they needed for logistical reasons. They considered responses to queries were vague. They were advised that the Local Council processing was the cause of delays, however when the Complainants contacted the Council it advised that it was the property developer of the property development (the Developer) and its agents holding up the process. The Complainants accept that Covid-19 caused unavoidable delays however much of the conduct complained about happened outside of lockdowns and was in the Licensees control.

ii) Issue 2 – The Property (and other properties in the same street) were advertised as "featuring landscaped streets and houses with front gardens, this will be a lush residential development fitting of its name". However, the relevant street does not look like the picturesque suburbia as advertised. The Complainants accept that this issue may be attributable to the Developer however the Property should not be advertised by the Agency as something it is not.

iii) Issue 3 – The Property was advertised as being "Zoned for [Primary School A] and Secondary Schools (Decile 10)". However, Primary School A's website provides that its zone from Term 1 2021 will exclude the property development, of which the Property is a part. The Complainants consider that this will have an adverse affect on the Property's value. The reason for this being that the school is a well established and renowned school compared to the alternative school that the Property is now zoned for.

iv) Issue 4 – Licensee 1 and the Assistant failed to communicate on several occasions, and this wasted a lot of the Complainants' time, with examples being:

   a. Having to request on several occasions to be added to the Developer's newsletter mailing list.

   b. Sending emails to the Assistant to request an inspection, and either the Assistant would not respond or arranged an inspection at a time, when he had previously been told that the Complainants would not be able to make.

   c. Not being informed as to the status of Council consents.

v) Issue 5 – When the Assistant contacted the Complainants to arrange the second final inspection they asked for confirmation that the remedial works had been completed. The Assistant stated, "I have been passed on that the remedial work has been completed". However, when the Complainants undertook this inspection the majority of the remedial works had not been addressed. The Complainants were told that a final inspection would be arranged once "all the defects have been fixed". The Complainants upon undertaking the final inspection again found that several of the defects had not been addressed.

vi) Issue 6 – Licensee 1 told the Complainants that the Property would be professionally cleaned on the day of settlement. However, the Property was not cleaned as stated.

vii) Issue 7 – Licensee 1 by email sent a "waiver"[2] to the Complainants. The

[2] Undated "waiver" from the Property Development, headed, "Confirmation of surface marks prior to move in".

Complainants were not advised that they could or should obtain legal advice prior to signing the waiver. They Complainants are also concerned that the waiver, constitutes a waiver of their rights under the Agreement for Sale and Purchase (ASP), and there was no inspection to verify the condition.

viii) Issue 8 – Licensee 2 had advised the Complainants that he would cover some of the additional legal costs and has said, "we'll definitely cover that", and "the buck stops with us". Licensee 2 however, has not provided any money to cover any additional costs.

1.7. The Complainant requested a remedy, being:

(a) Compensation for the financial costs the Complainants incurred, distress, anxiety and inconvenience, and prejudice to the Property's value.

(b) Licensee 1 to be sanctioned.

(c) The Agency to be sanctioned (in respect of this remedy the Committee notes that no complaint was made against the Agency and it is not a party to the complaint).

(d) A written apology.

1.8. The Licensees responded to the complaint against them.

1.9. In particular, Licensee 1 said:

(a) Issue 1 – That on 18 March 2020 he emailed the Complainants advising them that the target date for completion for construction was June 2020, and this was based on information that Licensee 1 had received from the property developer. The ASP was executed on 19 March 2020. Then on 23 March 2020, New Zealand, due to Covid-19, went into the level 4 lockdown, and then level 3 on 27 April 2020. Delays are also not uncommon with new build developments and hence the reason why clause 45 is included in the ASP[3].

(b) On 27 July 2020 Licensee 1 advised the Complainants that settlement was estimated to be between 14-28 August 2020, noting general uncertainty related to providing such an estimate. Then on 12 August 2020 City A was again placed into Covid-19 level 3 restrictions until 30 August 2020, retuning to level 1 on 7 October 2020.

(c) On 7 September 2020, or shortly thereafter (it appears that this happed on 9 September 2020 as there is a planned phone conversation on that day) the Complainants were advised that settlement should be ready by the end of October 2020, which was amended on 28 September 2020 to mid/end of October 2020.

(d) On 16 November 2020 the Developer advised Licensee 1 that title should issue before the end of November 2020, Licensee 1 advised the Complainants of this on the same day. Title did issue on 30 November 2020, with settlement occurring on 4 December 2020.

(e) Licensee 1 also advises that there were monthly newsletters, of which the content was compiled by the Developer, that were sent to purchasers which among other matters gave purchasers an update on the progress of the construction of the development.

[3] This clause among other issues notes that the vendor gives no warranty as to, "when settlement will be achieved (but subject to clause 21.2)".

Though it is recognised that during April – June 2020 there were no newsletters as the underlying newsletters from the Developer were lacking during the Covid lockdown.

(f) Licensee 1's overall position is that the date when the property development would be ready for possession changed over the course of construction. This was partly due to delays arising from Covid-19 lockdowns, and additional delays with the Local Council and LINZ and other general delays by the developer, which were outside of the Agency's and Licensee 1's control.

(g) Issue 2 – Licensee 1 was advised (by the Developer the Committee has assumed) that the landscaping would be designed in accordance with the plans and specifications to the best ability of the Developer but was subject to change. That the landscaping work can be completed after the residential aspect of the properties is completed and this is made clear in both the ASP (this appears to refer to clauses 30 and 36 (which specifically refers to landscaping)) and the Kiwibuild pamphlet disclaimers.

(h) The Complainants (and other purchasers) were advised by newsletters that the landscaping was complete. That neither Licensee 1 nor his assistant had any involvement with undertaking the landscaping work and shared any information they received from the developer with the purchasers, including the Complainants.

(i) Issue 3 – On 27 May 2020 the Ministry of Education officially amended the zone for Primary School A, and this was a month after satisfaction of the due diligence condition fell due on 9 April 2020. That the Agency and Licensee 1 were not aware of any publicity relating to the change, they relied on information provided by the vendor and/or Developer, and the Developer did not provide any information regarding this change.

(j) That as the school zone remained unchanged until 27 May 2020, the advertising that the Complainants refer to was correct.

(k) Issue 4 – On 9 September 2020 the Complainants advised that they had not been receiving the newsletter updates. This appeared to relate to an administrative slip, and Licensee 1 understands that the Complainants, unsubscribed themselves as neither Licensee 1 nor the Agency unsubscribed the Complainants. That even though the Complainants did not receive two or three newsletters, Licensee 1 was constantly in contact to answer any questions.

(l) Licensee 1 does not appear to have specifically addressed this issue, but Licensee 1 has noted that there were two pre-settlement inspections undertaken by the Complainants.

(m) Licensee 1's response is that any information that was provided to Licensee 1 was passed on to the purchasers, including to the Complainants, with this information at times being included in the newsletters that were sent to purchasers.

(n) Issue 5 – On 28 October 2020 Licensee 1 advised the Complainants that the Developer had advised that touch ups would be completed, as per the pre-settlement feedback sheet provided by the Complainants, by the end of 1 November 2020. On 8 November 2020 and 11 November 2020, the Assistant sent an update to the Complainants advising that all items on the feedback sheet were fixed except for the sliding door.

(o) On 28 November 2020 after a second pre-settlement inspection the Complainants sent a further feedback sheet noting issues needing addressing, or still not addressed. All

the various issues were addressed to the Complainants' satisfaction after the 2021 New Year, and after the Complainants had moved into the Property.

(p) Licensee 1 also notes that the "maintenance period" clause (clause 28) allows for any defects to be touched up and addressed throughout the first 12 months after settlement. Licensee 1 also notes that any repairs are the responsibility of the contractors that undertook the building work. Licensee 1 considers that the Developer let him down, generally by the Developer advising that work had been completed on the repairs when they had not.

(q) Issue 6 – Licensee 1 accepts that the Complainants were advised that the Property would be professionally cleaned. This was what they were advised by the Developer and this was passed on to the Complainants.

(r) Issue 7 - Licensee 1 accepts that the Complainants were asked to sign a waiver. Licensee 1 received the waiver at the last minute and then passed it on to the purchasers, including the Complainants.

1.10. In particular, Licensee 2 said:

a) Issue 8 – Licensee 2's position is that neither he nor Licensee 1 ever offered to cover the Complainants' costs, nor were such cost ever quantified by the Complainants.

2. What we decided

2.1. On 7 July 2021 the Complaints Assessment Committee (the Committee) considered the complaint and decided to inquire into it under section 79(2)(e) of the Act.

2.2. On 22 December 2021 the Committee held a hearing on the papers and considered all the information gathered during the inquiry.

2.3. The Committee has decided to take no further action on the complaint.

2.4. This decision was made under section 89(2)(c) of the Act. The decision was also made with reference to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, namely:

(a) Rule 5.1 (a licensee must exercise skill, care, competence, and due diligence at all time);

(b) Rule 6.3 (a licensee must not engage in any conduct likely to bring the industry into disrepute);

(c) Rule 6.4 (a licensee must not mislead a customer or client, not provide false information, not withhold information that should by law or in fairness be provided to a customer or client);

(d) Rule 9.3 (a licensee must communicate regularly and in a timely fashion and keep a client well informed of matters relevant to the client's interest, unless otherwise instructed by the client); and

(e) Rule 9.7(a) (before a prospective client, client, or customer signs an agency agreement, a sale and purchase agreement, or other contractual document, a licensee must— (a) recommend that the person seek legal advice).

3. Our reasons for the decision

3.1. The Committee's view is that a number of the issues raised by the Complainants relate to representations made by Licensee 1 where Licensee 1 was in effect passing on information provided to him by the Developer of the Property Development that the Property was part of. The Complainants have provided an "Information sheet" issued by the Authority headed, "Unsubstantiated Representations".

3.2. The Committee accepts that that sheet reflects good practice and that Licensees can be held to account under the Act and the Rules for unsubstantiated representations. The sheet states, and the Committee agrees that:

> "Licensees will not be able to make representations in trade without having reasonable grounds at the time for making them."

3.3. At a general level the Committee is of the view that where a Licensee relies on a property developer and/or vendor's representations, unless they are on notice that those representations may not be correct then they are entitled to rely on them. When the Committee is considering the relevant issues as part of this decision, it will, where relevant, refer to whether it considers there was a reasonable basis or ground for Licensee 1 to rely on what the Property Developer had advised him.

3.4. Related to this issue is Rule 10.9 which states, "A licensee must not advertise any land or business on terms that are different from those authorised by the client". This aligns with the Committee's view that a Licensee must when marketing the sale of a property, advertise it based on the terms as provided by and authorised by the client, though subject to Rule 10.8 (a Licensee must not act for a client who directs that known defects must be withheld).

3.5. The Committee has therefore concluded:

Did Licensee 1 mislead the Complainants as to the completion date and progress of the Property

3.6. A key issue from the Committee's view is that 4 days after the ASP was executed, being 23 March 2020, New Zealand was placed into level 4 lockdown, as part of the Government's response to Covid-19. It was inevitable that this sole issue alone would make any predicted building completion date, being June 2020, not achievable.

3.7. Licensee 1 has also referred to general uncertainty about unexpected delays not being uncommon with new builds and this is the reason for clause 45 of the ASP which provides that there is no warranty as to when settlement will be achieved.

3.8. There is evidence that information was passed on to the Complainants as to the progress of the Property either through newsletters or direct communications with the Complainants. There is no doubt that the ultimate completion date was later than the date first advised to the Complainants with settlement on 4 December 2020.

3.9. The target construction completion date of June 2020 was based on information provided by the Developer. The Committee's view is that Licensee 1 may have been somewhat optimistic to still rely on the Developer's aimed for completion date, particularly as the threat of Covid-19 was making its presence known as Licensee 1 accepts.

3.10. There is no evidence that Licensee 1 actively misled the Complainants. To the extent the Complainants were misled it was due to passing on information provided by the Developer and due to changing circumstances notably Covid-19 lockdowns.

3.11. Covid-19 circumstances were out of the control of Licensee 1 and cannot, in the Committee's view, result in an outcome where Licensee 1 has misled the Complainants due to timeframes not being able to be met due to various lockdowns.

3.12. The Committee also accepts that there can be delays and uncertainty with new builds and to the extent any delays, outside of Covid-19, led to the completion date that Licensee 1 referred not being correct, the Committee does not view this as misleading behavior.

3.13. As to the information that Licensee 1 passed on to the Complainants as provided to it by the Developer, from the Committee's perspective there was a reasonable basis for Licensee 1 to pass on that information. There was no evidence that Licensee 1 should be on notice that the information the Developer was providing was not accurate.

3.14. The Committee's view is that Licensee 1 has not misled the Complainants. The Committee therefore finds that Licensee 1 has not breached any of the Rules or the Act, and in particular has not breached Rule 6.4 (must not mislead), and no further action will be taken on this part of the complaint.

Was the advertising misleading as to the landscaping of the Property

3.15. Licensee 1's position is that the landscaping would be designed in accordance with the various plans and specifications and to the best ability of the Developer. While not explicit Licensee 1's position is that the advertising of the landscaping was a result of information provided to him by the Developer.

3.16. The Complainants accept that to the extent the actual landscaping does not reflect the advertised landscaping may be attributable to the Developer. However, the Complainants' view is that the Agency and Licensee 1 should not be adverting properties as something that they are not.

3.17. From the Committee's perspective this is an issue which relates to whether the advertising of the Property was based on reasonable grounds, i.e. information provided by the Developer. The Committee is of the view that the advertising was based on reasonable grounds. Licensee 1 would not have known exactly how the landscaping would in reality eventuate as at the time of the advertising of the Property Development the landscaping would not have been completed, and some or all of the landscaping in respect of the specific Property not even started. The only information that Licensee 1 had about the landscaping was as provided by the Developer.

3.18. There is no evidence that Licensee 1 should have been on notice that the landscaping would not be completed in the way that the Developer had advised that it would be.

3.19. Licensee 1 had a reasonable basis to market the Property the way he did and to rely on information provided by the Developer and for that reason the Committee is of the view that Licensee 1 did not mislead the Complainants. The Committee therefore finds that the Licensee has not breached any of the Rules or the Act, and in particular has not breached Rule 6.4 (must not mislead), and no further action will be taken on this part of the complaint.

Was the advertising misleading as to the school zoning of the Property.

3.20. The Complainants' concern is that the Property was advertised as "Zoned for [Primary School A] and Secondary Schools (Decile 10)", and the Property is not zoned for the Primary School A. Licensee 1 does not deny that the Property was advertised as stated, however Licensee 1's position is that at the time that the Complainants saw the advertising the Property was zoned

for the relevant school. That the school zone changed on 27 May 2020, which was more than a month after satisfaction of the due diligence condition fell due (9 April 2020).

3.21. The Complainants do not disagree with Licensee 1's position but have referred to media articles including articles dated before the ASP was executed which refer to the possibility of the zoning for Primary School A changing and that Licensee 1 should have been aware of this and advised them of the potential zoning change. Licensee 1's position is that he was not aware of the media publicity and the vendor/Developer had not advised him of any such potential change.

3.22. There is no doubt that at the time that the ASP was executed the Property was zoned for Primary School A. The issue for the Committee is whether a competent and diligent licensee should have been aware of the potential for school zoning changes for a property that it is marketing, including marketing that proactively advised that the Property was zoned for Primary School A.

3.23. To some degree the Committee is surprised that Licensee 1 was not aware of any potential school zoning changes, as this is a relatively large property development, and there appears to have been reasonable media coverage of the potential school zoning changes. The Committee has accepted that Licensee 1 had no direct knowledge of these potential changes.

3.24. The Committee on balance has taken the view that there has been no breach of the Rules. There was no actual incorrect and therefore misleading advertising. Ideally, Licensee 1 should have ensured that he was aware of changes that could mean that any representations that were made in the marketing material that could later change were made known to any potential purchasers, i.e., school zoning changes. While the Licensee's conduct is considered to not be at a level that warrants a finding of a breach of the Rules, skill and competence must be upper most in a licensee's mind at all times when carrying out real estate agency work.

3.25. The Committee does not consider this lapse as resulting in "Unsatisfactory Conduct" under the Act. The Committee therefore finds that the Licensee has not breached any of the Rules or the Act, and in particular has not breached Rule 5.1 (skill, competence), and no further action will be taken on this part of the complaint.

Was communication lacking by the Licensees, including as to the status of remedial work and pre-settlement inspections

3.26. In relation to these issues (being issues 4 and 5) the Complainants have raised the following concerns:

(a) Having to request on several occasions to be added to the Developer's newsletter mailing list.

(b) Sending emails to the Assistant to request an inspection, and either the Assistant would not respond or arranged an inspection at a time when he had previously been told that the Complainants would not be able to make.

(c) Not being informed as to the status of Council consents.

(d) That representations had been made by the Assistant that touch ups and other remedial work had been completed by the Developer when it had not.

3.27. Mailing list – Licensee 1 accepts that for period of time the Complainants were unsubscribed

from the newsletter mailing list. This appears to have been an administrative error which may have been caused by the Complainants accidentally unsubscribing themselves. The Committee accepts that the Complainants did request that they be added back to the mailing list, and it appears that this took longer than necessary. The Committee's overall view is that any delay was a genuine administrative error or oversight and in itself does not breach any of the Rules.

3.28. Inspections – There does appear to have been some miscommunication between the Assistant and the Complainants as to when inspections could be scheduled for. Licensee 1 does not appear to have specifically addressed this concern. However, upon reviewing the emails provided to the Committee this appears to be at worst a miscommunication where the Assistant either did not reply in a timely manner and had forgotten about or not appreciated earlier communications. While this issue could have been dealt with in a more timely and accurate way, the Committee is of the view that any lapses do not result in a breach of the Rules.

3.29. Status of Council consents – Licensee 1's position is that any advice passed to him by the Developer in relation to Council consents were passed on to the Complainants. The context of this development was during the ongoing Covid-19 lockdowns, and Licensee 1's view is that new builds can be uncertain as to timing. The Committee has seen no evidence that Licensee 1 did not pass on information that was passed on to him in a timely fashion, and the Committee is of the view that there has been no breach of the Rules.

3.30. Representations as to remedial work - Licensee 1's position is that the Assistant had been passing on information provided by the Developer, and that the Assistant had advised the Complainants that he was merely passing on information received from the developer. Licensee 1 accepts that some of the remedial work that the Complainants had been advised had been completed had in fact not been. The Complainants do not disagree with Licensee 1's position. The Committee has inferred that the Complainants' issue is that the Assistant and Licensee 1 should have independently checked to make sure any remedial work had been completed and they should not just have relied on the information provided to them by the developer.

3.31. The Committee is of the view that ideally Licensee 1 would have personally checked to ensure that the remedial work had been completed. However, the representations made by the Assistant were not unsubstantiated and were based on information provided to him by the Developer. The Committee's view is that this is a reasonable ground on which to make the said representations to the Complainants.

3.32. The Committee therefore finds in relation to the various communication issues raised by the Complainants that Licensee 1 has not breached any of the Rules or the Act, and in particular has not breached Rule 6.4 (must not mislead), or Rule 9.3 (communicate regularly and in a timely manner), and no further action will be taken on this part of the complaint.

Did Licensee 1 mislead the Complainants in relation to whether the Property would be professionally cleaned

3.33. Licensee 1 accepts that he advised the Complainants that the Property would be professionally cleaned and does not deny that it was not. Licensee 1's position is that this is what he was advised by the Developer and he passed on this information to the Complainants.

3.34. This issue is a further issue where the complaint relates to a representation made by Licensee

1, where he was passing on information provided to him. The Committee in relation to this issue is of the view that the representation made Licensee 1 was not unsubstantiated and was based on information provided to him by the Developer. The Committee's view is that this is a reasonable ground on which to make the representation to the Complainants. The Committee therefore finds that the Licensee has not breached any of the Rules or the Act, and in particular has not breached Rule 6.4 (must not mislead), and no further action will be taken on this part of the complaint.

Did Licensee 1 send an email requesting the Complainants sign a waiver

3.35. Licensee 1 accepts that he asked the Complainants to sign a waiver, with the aim of that waiver to distinguish between marks caused by fair wear and tear by the Complainants from marks caused by builders during construction. Licensee 1 also notes that these types of waivers are not uncommon in new developments.

3.36. The Complainants have specifically referred to Rule 9.7, which requires a licensee to recommend a person seek legal advice before signing a contractual document. The Complainants say that they were never advised to obtain their own legal advice.

3.37. The waiver was sent as an attachment to an email dated 4 December 2020, neither the email nor the attachment recommended that legal advice can or should be sought. Licensee 1 has stated that he did make such a recommendation verbally.

3.38. There are two issues for the Committee to consider in relation to this issue:

(a) Is the waiver a contractual document under Rule 9.7, and if so,

(b) Did Licensee 1 recommend that legal advice could or should be sought.

3.39. The Committee notes that Licensee 1 has referred to clause 46 of the ASP, which requires a purchaser to execute and deliver any documents, and it appears to include the waiver as a relevant document. While not explicitly stated in clause 46, the Committee agrees that clause 46 may well encompass the waiver. The Committee's view is that it is strongly arguable that the waiver is a contractual document.

3.40. Concerning the legal advice, the Committee's view is that a recommendation to obtain legal advice is best made in writing. Licensee 1 has provided no details as to when the Complainants were verbally given a recommendation to obtain legal advice. The Committee on balance is of the view, probably through some oversight, this recommendation was not given to the Complainants.

3.41. The Committee's view is that this is a breach of Rule 9.7. The Committee recognises that Rule 9.7 specifically refers to agency agreements and ASPs, which are key or cornerstone documents. While contractual in nature the waiver was on its face a straightforward, short and easy to read document, and the Committee would expect any member of the public to easily understand it ramifications.

3.42. The Committee's view is that while this is a breach of Rule 9.7 it is relatively minor breach and is cognizant of what the High Court stated in the *Vosper* decision:

"*a balance needs to be struck between competing goals of promoting a constant and effective disciplinary process and avoidance of the stigma of unsatisfactory conduct, where the conduct in issue is relatively minor and in all other circumstances point to the absence of a need to mark the conduct in that way.*"

3.43. The Committee's view is that this is a situation where the statement in *Vosper* is apt.

3.44. The Committee therefore finds that while the Licensee has breached the Rules, and in particular has breached Rule 9.7 (recommend legal advice), the Committee has determined under s 89(2)(c) to take no further action on this part of the complaint.

3.45. The Committee notes that there was related aspect to this issue, where the Complainants have raised a concern that they were asked to sign the waiver without an inspection. The Committee is unsure as to what the issue is here. The Complainants accept and Licensee 1 agrees that there were two "final inspections", and presumably it was during these inspections that the Complainants identified the various defects that they brought to the Licensees' attention. If the Complainants were seeking a further final inspection the Committee has seen no evidence that such an inspection was not allowed by the Licensees. The Committee cannot identify any breach of the rules in respect of this concern, and no further action will be taken on this part of the complaint.

Did Licensee 2 offer to cover the Complainants' costs, and then did not make good on the offer

3.46. The Complainants have referred to a phone call with Licensee 2 where they say Licensee 2 said, "we'll definitely cover that", and "the buck stops with us". The Complainants' position is that these statements are an acceptance by Licensee 2 that he will provide financial compensation to cover some of the Complainants' costs.

3.47. Licensee 2's position is that he has never offered to cover the Complainants' costs.

3.48. The Complainants have provided a recording of a phone call which they say confirms that Licensee 2 did offer to cover some of the Complainants' costs. The Committee has listened to that phone recording.

3.49. The Committee's view is that there was no clear offer by Licensee 2 to cover any of the Complainants' costs. The Complainants may have interpreted certain statements as offering to cover their costs, but the Committee does not view any statements made by Licensee 2 as going as far as giving a commitment that any or all of the Complainants' costs will be covered by him.

3.50. As the Committee has found that there was no offer to cover the Complainants' costs it follows that there no need for him to make good on that offer as it did not occur. The Committee therefore, finds that Licensee 2 has not breached any of the Rules or the Act, and in particular has not breached Rule 6.4 (must not mislead), and no further action will be taken on this part of the complaint.

4. Publication

4.1. The Committee directs publication of its decision. This decision will be published without the names or identifying details of the Complainant (including the address of the Property), the Licensee and any third parties.

4.2. The Authority will publish the Committee's decision after the period for filing an appeal has ended, unless the Tribunal receives an application for an order preventing publication. The Authority will not publish the Committee's decision until the Tribunal has made a decision on the application.

4.3. Publishing the Committee's decision supports the purpose of the Act by ensuring that the disciplinary process remains transparent, independent and effective. The Committee also considers that publishing this decision helps to set industry standards and that is in the public interest.

5. Your right to appeal

5.1. If you are affected by this decision of the Committee, the right to appeal is set out in section 111 of the Act. You may appeal in writing to the Real Estate Agents Disciplinary Tribunal (the Tribunal) within 20 working days after the date notice is given of this decision. Your appeal must include a copy of this decision and any other information you wish the Tribunal to consider in relation to the appeal. The Tribunal has the discretion to accept a late appeal filed within 60 working days after the date notice is given of this decision, but only if it is satisfied that exceptional circumstances prevented the appeal from being made in time.

5.2. The Notice of Appeal form, which includes information on filing an appeal, can be located on the Ministry of Justice's website: https://www.justice.govt.nz/tribunals/real-estate-agents/apply/.

6. Provisions of the Act and Rules referred to

6.1. The provisions of the Act and the Rules referred to in this decision are set out in the Appendix.

Signed

Paul Biddington
Chairperson

William Acton
Deputy Chairperson

Belinda Moss
Member
Date: 11 March 2022

Appendix: Provisions of the Act and Rules referred to

The Real Estate Agents Act 2008 provides:

78 Functions of Committees

The functions of each Committee are—

(a) to inquire into and investigate complaints made under section 74:

(b) on its own initiative, to inquire into and investigate allegations about any licensee:

(c) to promote, in appropriate cases, the resolution of complaints by negotiation, conciliation, or mediation:

(d) to make final determinations in relation to complaints, inquiries, or investigations:

(e) to lay, and prosecute, charges before the Disciplinary Tribunal:

(f) in appropriate cases, to refer the complaint to another agency:

(g) to inform the complainant and the person complained about of its decision, reasons for the decision, and appeal rights:

(h) to publish its decisions.

79 Procedure on receipt of complaint

(1) As soon as practicable after receiving a complaint concerning a licensee, a Committee must consider the complaint and determine whether to inquire into it.

(2) The Committee may—

(a) determine that the complaint alleges neither unsatisfactory conduct nor misconduct and dismiss it accordingly:

(b) determine that the complaint discloses only an inconsequential matter, and for this reason need not be pursued:

(c) determine that the complaint is frivolous or vexatious or not made in good faith, and for this reason need not be pursued:

(d) determine that the complaint should be referred to another agency, and refer it accordingly:

(e) determine to inquire into the complaint.

80 Decision to take no action on complaint

(1) A Committee may, in its discretion, decide to take no action or, as the case may require, no further action on any complaint if, in the opinion of the Committee,—

(a) the length of time that has elapsed between the date when the subject matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable; or

(b) the subject matter of the complaint is inconsequential.

(2) Despite anything in subsection (1), the Committee may, in its discretion, decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Committee that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

89 Power of Committee to determine complaint or allegation

(1) A Committee may make 1 or more of the determinations described in subsection (2) after both inquiring into a complaint or allegation and conducting a hearing with regard to that complaint or allegation.

(2) The determinations that the Committee may make are as follows:

(a) a determination that the complaint or allegation be considered by the Disciplinary Tribunal:

(b) a determination that it has been proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct:

(c) a determination that the Committee take no further action with regard to the complaint or allegation or any issue involved in the complaint or allegation.

(3) Nothing in this section limits the power of the Committee to make, at any time, a decision under section 80 with regard to a complaint.

111 Appeal to Tribunal against determination by Committee

(1) A person affected by a determination of a Committee may appeal to the Disciplinary Tribunal against the determination within 20 working days after the day on which notice of the relevant decision was given under section 81 or 94, except that no appeal may be made against a determination under section 89(2)(a) that a complaint or an allegation be considered by the Disciplinary Tribunal.

(1A) The Disciplinary Tribunal may accept a late appeal no later than 60 working days after the day on which notice was given to the appellant if it is satisfied that exceptional circumstances prevented the appeal from being made in time.

(2) The appeal is by way of written notice to the Tribunal of the appellant's intention to appeal, accompanied by—

(a) a copy of the notice given to the person under section 81 or 94; and

(ab) the prescribed fee, if any; and

(b) any other information that the appellant wishes the Tribunal to consider in relation to the appeal.

(3) The appeal is by way of rehearing.

(4) After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.

(5) If the Tribunal reverses or modifies a determination of the Committee, it may exercise any of the powers that the Committee could have exercised.

The Rules from the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 referred to in this decision are:

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

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

Rule 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.

Rule 9.3 A licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest, unless otherwise instructed by the client.

Rule 9.7 Before a prospective client, client, or customer signs an agency agreement, a sale and purchase agreement, or other contractual document, a licensee must—

(a) recommend that the person seek legal advice; and

(b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and

(c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).

Rule 10.9 A licensee must not advertise any land or business on terms that are different from those authorised by the client.