

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2012] NZREADT 27

READT 117/11

**IN THE MATTER OF** an appeal under s.111 of the Real Estate Agents Act 2008

**BETWEEN** **DENIS LLOYD**

Appellant

**AND** **REAL ESTATE AGENTS  
AUTHORITY (CAC 10056)**

First respondent

**AND** **KARIN DAVIES**

Second respondent

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Ms J Robson - Member  
Mr G Denley - Member

**HEARD** at WHANGAREI on 12 April 2012

**DATE OF DECISION:** 18 May 2012

**APPEARANCES**

Mr D Grindle, counsel for appellant  
Mr L J Clancy, counsel for Authority  
Ms K Davies on her own behalf

**DECISION OF THE TRIBUNAL**

***The Issue***

[1] On the facts referred to below, was the Authority correct in finding that the appellant had engaged in unsatisfactory conduct as that term is defined in s.72 of the Real Estate Agents Act 2008?

[2] Essentially, the second respondent complainant considers, as did the Authority, that the appellant licensee was guilty of unsatisfactory conduct as the real estate agent marketing a house at 49 West View Crescent, Onerahi, Whangarei, which she sought to buy for her parents, and for which she was prepared to pay considerably more than the price attained.

[3] On 19 October 2011 the Committee found the appellant guilty of unsatisfactory conduct, censured him, and fined him \$500 to be paid to the Authority within 10 days from that Order. The appellant now appeals to us.

### **The Statute**

[4] Section 72 of the Act defines “*unsatisfactory conduct*” as follows:

#### **“72 Unsatisfactory conduct**

*For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that –*

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
- (c) is incompetent or negligent; or*
- (d) would reasonably be regarded by agents of good standing as being unacceptable.”*

[5] In the course of the hearing, the parties referred to some of the rules contained in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 and, in particular, to rules 6 and 9 which read:

#### **“6 Standards of professional conduct**

- 6.1 An agent must comply with the fiduciary obligations to her or her client arising as an agent.*
- 6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.*
- 6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.*
- 6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.*

#### **9 Client care and dealings with customers**

- 9.1 A licensee must act in the best interests of a client and act in accordance with the client’s instructions unless to do so would be contrary to law.*
- 9.2 A licensee must not engage in any conduct that would put a client, prospective client or customer under undue or unfair pressure.*
- 9.3 A licensee must not take advantage of a client’s prospective client’s or customer’s inability to understand relevant documents, where such inability is reasonably apparent.*
- 9.7 A licensee must not mislead customers as to the price expectations of the client.”*

### ***Basic Initial Background***

[6] In December 2010, the complainant made an unsuccessful offer to purchase the property which was listed for sale with the appellant, a licensed salesperson working for Goode Leith Realty Ltd, in Whangarei trading as "Allens".

[7] The complainant alleges that the appellant misled her as to the price expectations of his vendor client, with the result that she made an offer lower than the amount she was, in fact, prepared to pay. She states that the appellant failed to explain to her that, as there were likely to be multiple offers made for the property, she should put her best offer forward. The complainant contends that the results of the appellant's conduct was that her offer was not accepted and another party was successful in purchasing the property.

[8] The complainant also asserts that against her express wishes, the appellant included information on the offer documentation drawn up for her by the appellant, namely, a proposed settlement date in January 2011 and conditions relating to obtaining a LIM report and confirming finance. The Committee found that the appellant had included the LIM and finance conditions in the offer documentation without the complainant's consent and that this may have disadvantaged the complainant given that the vendor wanted a quick and uncomplicated sale. The Committee also found that the use of a "*multi-offer form*" by the appellant had been unnecessary and insufficiently explained to the complainant.

[9] The appellant contends that the complainant was fully advised as to the likelihood of other offers being made and that, consequently, her offer should be her highest. He asserts that the multi-offer form used is clear and unambiguous and includes an acknowledgement by the complainant that she had been advised that more than one party was interested in the property and that she had been advised to put her highest offer in writing for presentation to the vendor. The appellant also asserts that while the relevant conditions were "*pre-entered*" by him on the offer documentation, the complainant subsequently had ample opportunity to review and confirm the terms of the offer before signing it, which she did

### ***Factual Issues***

[10] The following key facts are in dispute:

- [a] Whether the complainant was adequately advised by the appellant that other parties were interested in purchasing the property and that, consequently, she should put her best offer forward;
- [b] What representations were made to the complainant by the appellant as to his client's price expectations and the likelihood of her offer being accepted;
- [c] Whether she had not sanctioned any terms in her offer;
- [d] Whether the appellant gave the complainant a proper opportunity to review and confirm the draft offer documentation before signing it.

[11] We not only have before us both the material available to the Committee and the further material filed by the appellant for this appeal, but we have had the benefit of hearing further extensive evidence given at the appeal hearing before us.

### ***The Decision of the Authority***

[12] We now set out the following paragraphs from the Authority's written decision of 19 October 2011:

*“1.5 The Licensee has provided a written submission dated 6 October 2011 in which he disagrees with the Committee’s findings. He believes that he did not influence or mislead the complainant as to what the vendor would accept. He acknowledges that he did indicate a range but he believes that at no time did he suggest what figure would be accepted. In relation to the complaint as to the multi offer he believes that the multi offer form had been fully explained and that this was the complainant’s opportunity to adjust and/or increase her offer before it went to the lawyers. The licensee is of the view that a written apology is appropriate with no fine and no publicity. ...*

*3.1 Whilst the Committee accepts that the licensee believes that he was helping the complainant the fact remains that he entered information on the agreement without authority of the complainant (LIM, finance clause and settlement date). The Committee remains concerned at the licensee’s actions in that by inserting the requirement for a LIM report despite the purchaser saying that she didn’t require one as well as raising in the vendors mind as to whether finance would be confirmed he could have disadvantaged the complainant in that the vendor wished to have an uncomplicated sale. The other area of concern to the Committee is the insistence of the licensee for the complainant to sign a multi offer form when in fact there were at that stage no other offers and in the view of the Committee a multi offer form was not required and as it turned out may have been to her disadvantage. The complainant would appear to have been given inadequate explanation of the consequences of signing a multi offer form. The Committee is of the view that the complainant may have been disadvantaged in that her signing the multi offer form confirmed that the price she had offered was her best. In fact the complainant has stated that she told the licensee that they were negotiable with the price.”*

[13] We also take this opportunity of setting out a portion of the Authority’s decision dealing with penalty because we consider that reasoning to be very sound.

*“4.1 The Committee, when determining whether or not to make an order under section 9(1), has also had regard to the functions which the imposition of a penalty usually must serve in professional disciplinary proceedings. They include:*

- a. Promoting and protecting the interests of consumers and the public generally  
Section 3(1) of the Act sets out the purpose of the legislation. The principal purpose of the Act is “to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency*

work". One of the ways in which the Act states it achieves this purpose is by providing accountability through an independent, transparent and effective disciplinary process (section 3(2)).

b. Maintenance of professional standards

*This function has been recognised in professional disciplinary proceedings involving other professions (for example, in medical disciplinary proceedings; Taylor v The General Medical Council [1990] 2 All ER 263; and in disciplinary proceedings involving valuers; Dentice v The Valuers Registration Board [1992] 1 NZLR 720). In the Committee's view this function is also applicable in the disciplinary processes under the REAA.*

c. Punishment

*The Committee accepts that a penalty in a professional disciplinary case is primarily about the maintenance of standards and the protection of the public. However in the Committee's view there is also an element of punishment – indicated by the power of the Committee has to impose a fine (section 93(l)(g); or make an order of censure (section (3)(l)(a)). The element of punishment has been discussed in the context of other professional disciplinary proceedings (see Patel v Dentists Disciplinary Tribunal (High Court, Auckland, CIV 2007-404-1818 Lang J 13 August 2007, where the Court said that disciplinary proceedings inevitably involve issues of deterrence, and penalties are designed in part to deter both the offender and others in the profession from offending in a like manner in the future.) ..."*

### **The Multiple Offer Presentation**

[14] There was much reference in the course of the hearing to the appellant having had the complainant sign his firm's version of a multi-offer document. We set that document out as follows by way of further background:

**"Multiple Offer Presentation**

*I/We acknowledge that the following statements have been read and are understood by me/us:*

- (a) *There is more than one party interested in purchasing the property described herein.*
- (b) *That I/we have been advised to put my/our highest and best offer in writing for presentation to the vendor, with no right of redress.*
- (c) *That my/our offer and any other offers will be presented at the same time to the vendor.*
- (d) *That the vendor may accept or reject any offer at the vendor's sole option.*
- (e) *That the vendor may counter-offer and negotiate with one of the purchasers at the sole choice and discretion of the vendor. The vendor may choose to decline all offers or ask the purchasers to re-submit another offer.*

- (f) *That the terms and conditions of my offer will remain confidential to me/us and the sales consultant drafting my/our offer and my/our offer will be sealed in an envelope and will be opened in the presence of the vendor or the vendor's duly appointed agent or solicitor.*

*Address of Property: 49 West View Crescent  
Onerahi*

*Offer to be presented: Time and Date 12.00 Midday 13<sup>th</sup> December 2010  
Specified place Allens offices or  
#49 West View Crescent*

*Purchasers Name Purchasers Signature*

*Purchasers Name Purchasers Signature*

*Purchasers Name Purchasers Signature*

*11-12-2010"*

### ***Further Evidence Adduced to Us***

#### *The Appellant's Evidence*

[15] The appellant has at least 16 years experience in the real estate industry. He referred to the vendor instructing him in December 2010 to sell the property. He noted that the vendor was an elderly man in his 90<sup>th</sup> year who was moving to a rest home but had excellent comprehension as well as some medical issues. The appellant emphasised that the vendor knew he did not have long to live and was most anxious to sell his property quickly and without problems.

[16] The appellant's firm appraised the property at \$240,000 to \$270,000 in value but, the appellant stated, the vendor wanted to market the property by inviting offers over \$195,000 because he wanted a "*quick, no fuss sale*" and that was important to the vendor. Also, the vendor wanted the property sold on a "*lock, stock and barrel*" basis. The relevance of that was that the sale was to include a substantial garage full of high quality industrial engineering equipment, and radio equipment, all of a sophisticated nature and valuable to the right person probably to the extent of about \$70,000.

[17] There seemed to have been full discussions between the appellant, the vendor, and the vendor's solicitor, Mr Bruce McGregor of Whangarei, who held a power of attorney for the vendor.

[18] The appellant felt sure the property would attract a lot of enquiry because the home was in a good area of Whangarei and he said: "*a real bargain at the vendor's asking price*". The vendor signed a listing authority on 8 December 2010.

[19] The appellant said he took care to give all potential purchasers the same information and, in particular, that price was not the vendor's major motivator and that "*the vendor wanted a crisp, clean total house lot deal where he could just walk*

*out and move to the rest home in the New Year and that he would consider offers over \$195,000 to \$200,000."*

[20] The appellant then referred to his dealings with the complainant who had telephoned him from Hamilton on Friday 10 December 2010 seeking to view the property the next day, Saturday. Her father lived across the road from the vendor and knew the vendor well and that the property was being put on the market.

[21] As arranged, the appellant met the complainant and her father at the property that Saturday 11 December 2010 at about 1.00 pm. The appellant says he carefully gave the complainant all the above information and that afternoon she completed an offer to purchase at the appellant's office. He says that, before completing the offer, they discussed the advertising proposed for the property; that the vendor would like settlement to be just after Christmas and New Year so that he could spend his last Christmas and New Year at the property before moving to a rest home; that there would be quite some competition to purchase the property and another couple were already booked to view it on the Sunday and it would very likely become a multiple offer situation; that although the complainant wished her offer to be presented to the vendor that afternoon, other interested parties had to be given the same opportunity to purchase but, in any case, the vendor's solicitor/attorney (the said Mr McGregor) was not available until Monday. This latter point disappointed the complainant who also made it clear that her bank finance was not quite yet confirmed and, in particular, she did not want to complicate matters by seeking a LIM report with a condition about that in the offer.

[22] The appellant pressed her into making the obtaining of a satisfactory LIM report a condition of her offer but said she could speed up the process by attending at the local Council 9.00 am the next Monday. The appellant explained that agents are trained to strongly suggest that a purchaser have a LIM condition clause for the purchaser's protection. He also encouraged her to make her offer subject to her raising satisfactory finance.

[23] The appellant emphasised his belief that the complainant knew the vendor wanted a clean offer over \$200,000; that there would be competition to buy the property; he would be unable to present the complainant's offer until at least the other offer had been received; that his market appraisal of the property was \$240,000 to \$270,000; and that she may be involved in a multi offer presentation.

[24] The appellant denies that the complainant wanted to offer \$230,000 at that point and says, if so, he would have proceeded with that as the price offer from her. He said that, after much discussion, she instructed him to show the price at \$205,000 with a three day finance clause. He says that he explained to her and her father at length about a likely multiple offer situation, how that would be handled, and what the above multiple offer presentation form meant. He said *"I always say that the form is designed to protect the purchasers and create a level playing field. I explained that there would be a set time by which all offers had to be submitted for presentation to the vendor. Obviously there was no time set at this stage but I told Karin that I would let her know what the deadline was. I explained to Karin that she had to submit the offer with her best price because the only chance she had to negotiate a further price with the vendor was if her bid was selected by the vendor"*. He also said he could not present the offers until Monday but if there were no other offers then hers would be presented on Monday with negotiations to follow.

[25] The appellant says that, after all this, the complainant read and signed the documents and then returned to her home in Hamilton.

[26] The appellant showed two other interested parties through the property one that Saturday afternoon and the other the next day Sunday. Both of those persons wanted to make an offer for the property and accepted the multiple offer presentation structure and time frame.

[27] On the Sunday night, the appellant telephoned the complainant and confirmed that the multiple offer situation was proceeding and that all offers needed to be lodged with him by midday the next day, Monday, and that there were two other offers. In his evidence-in-chief he states: *"I specifically said to Karin that you may only get one shot at this, now is the time to reconsider all aspects of your offer"*. He told her to press her bank to sort out the finance situation urgently. At her request, he wrote a letter to her bank on the Monday morning confirming his view as to the market value of the property but, he says, she chose not to increase her offer, and he understands her finance was not confirmed until two days later.

[28] The appellant specifically states that on the Monday morning, 13 December 2010, he contacted the complainant because he wanted to insert a further clause in the agreement to cover chattels and make it clear that they were to be acquired *"as is, where is"*. She returned to him an amended part of the agreement to that effect but did not give any instructions to increase her price offer. He had asked her about progress with her Bank.

[29] The appellant said that, later on the Monday, he presented three offers to the vendor all with conditions about a LIM report and finance and the only difference between the offers being price. He said that the vendor was keen to know about each buyer's background and their intentions for the property. As the vendor's solicitor was not available until Tuesday 14 December 2010, they (the vendor and his lawyer) did not decide on a successful buyer until that Tuesday and they chose a young doctor and his lawyer wife. It happens that the lawyer wife is employed by the law firm of the vendor's lawyer, although she and her husband were represented by another Whangarei law firm. The appellant understands that the successful bidders paid significantly more than the complainant offered.

[30] Also in his evidence-in-chief, the appellant dealt with some of the allegations he then understood the complainant to be making against him.

[31] He denies that he told her that *"the first clean offer around \$200,000 will take the property"*. He said that he simply said to her that the vendor would consider offers over \$200,000.

[32] He says it is untrue that he did not at any time advise her to put her highest offer forward. He says that, on the contrary, he told her that there would be keen interest for the property and it was important she put her highest offer forward. He says he particularly explained to her, with regard to the multiple offer structure, that the only chance she would get to negotiate a better price would be if the vendor chose her bid as the one to negotiate with. He said he rang her on the Sunday night to tell her that the multiple offer situation had come about *"and that she needed to reconsider all aspects of her offer"*. He then states: *"she confirmed to me on the Monday morning telephone call that her offer stood"*.



[33] The appellant denies that, with regard to the multiple offer presentation form, he said to the complainant *“you are the first in the door, you will have no problem because you are already above his minimum price and he likes you”*. The appellant also emphasised to the complainant that it was not open for him to present her offer until after that weekend. He knew that other offers were not able to be considered until some time on the Monday and that they were coming to hand. He also emphasised that his client was the vendor and he was endeavouring to obtain the best price he could for the vendor.

[34] He also totally rejects the assertion from the complainant that *“this deal reeks of insider trading and collusion”*.

[35] Before us, the appellant was extensively cross examined by Mr Clancy and by the complainant. The appellant said that it was agreed between the vendor and his lawyer to *“close the gate”* at midday on the Monday. He accepted that the complainant did not want a condition about a satisfactory LIM report but he strongly advised her to do that for her own protection and she ultimately decided herself to do that.

[36] The appellant mentioned, among many other things, that the vendor had been an inventor, and engineer, and a radio expert as well, so that the tools were of the highest quality and he felt were worth between \$50,000 to \$100,000 to the right person.

[37] The appellant said *“I have never struck such a hell bent vendor”*.

[38] The appellant emphasised that he had explained to the complainant a number of times that she might not have a further opportunity to name a price other than on her written offer. He said he reminded her about that again on the Sunday evening so that she could sleep on it. He knew that she was still sorting out finance with her Bank and was in touch with her on the Monday morning about the chattels clause being added to the agreement, but she did not give further instructions about price. He said he did not actually put it to the complainant that her offer of \$205,000 was on the low side but he said that the matter *“was heading for a melee and other buyers were circling”* and statements of that type, and that there was much interest in the property so that her offer needed to be very competitive. He seemed to be saying that he pressed the complainant as to whether \$205,000 was her best offer and told her she may not get a second chance. He seemed to be influenced by the fact that he regarded her as a mature successful businesswoman. He insists that he told her she would probably only have the one chance.

[39] The appellant was firmly cross-examined by the complainant second respondent. Inter alia, he asserted that at no stage did she contact him about raising her bid, and that he had emphasised to her that she must make her best offer, and that he had explained the full situation about the multiple offer presentation to her.

### ***The Evidence of Mr McGregor - the Vendor's Solicitor***

[40] As far as matters were within his knowledge, Mr McGregor corroborated the background set out by the appellant. Mr McGregor knew that the property had been appraised in the range of \$240,000 to \$270,000 but that the vendor had instructed the appellant to market the property with the banner headline *“offers over \$195,000 considered”*. He said that from the moment the property was placed on the market,

there was immediate interest from prospective purchasers and that on Tuesday 14 December 2010 he met with the vendor to consider the three offers. One was from a lawyer employed in his firm in a different department and she and her husband were represented by another law firm. They had offered \$220,000. Mr McGregor said that the vendor liked the fact that these prospective purchasers were young and intended to live in the property. He said that the monetary component of their offer was greater than the other offers and \$15,000 more than offered by the complainant and the vendor decided he wanted to accept their offer.

[41] It was made clear that the offers were all placed in sealed envelopes and delivered to the vendor unopened. The vendor was desperate to complete the sale transaction and his focus was not on the best price.

[42] Mr McGregor rejected the allegation of insider trading or collusion. He said that he never spoke with the successful purchasers about the sale process; that all conversations he had with the vendor were privileged and confidential; and that he never divulged any information which the vendor had given him to any other party. He said that all prospective purchasers bid on the same basis.

### ***Ms McKenzie's Evidence***

[43] There was evidence from Ms V K McKenzie a principal of the real estate firm which employed the appellant as a licensed sales person. She spoke well of the character of the appellant and of his experience and of the firm's expectations from its agents. She considered that, on the facts of this case, it was appropriate for the appellant to have had the complainant, as first purchaser, sign a multiple offer form. She also emphasised that the firm's agents are trained to recommend that residential purchasers obtain an LIM and gave reasons for that.

### ***The Evidence of the Complainant***

[44] Much of the evidence of the complainant has been covered above. She and her husband thought the value of the property was about \$230,000.

[45] A significant theme in her evidence is that she looked to the appellant for guidance throughout this transaction.

[46] She said that, early on, he put it to her that the first clean offer over \$200,000 will buy the property so that she said "*Well I'll put in an offer of \$205,000 for us*", but she did not feel comfortable about it so she emphasised that the appellant must let the vendor know that she and her husband would offer more. She said that, if pressed, they would have gone up to \$270,000. She seemed to be saying that she had no idea that all offers over \$190,000 would be put to the vendor. She also seemed to be saying that, when she found that one of the offerers was a local doctor, she told the appellant that she should offer more but he assured her that the vendor liked her and would like her offer of \$205,000.

[47] She explained that she did not want a condition that she obtain a LIM report because her family members were experienced tradespeople and knew the property, but she felt the appellant pressured her to put that condition in the offer and she felt this may have prejudiced her prospects with the vendor. She insisted that she had said to the appellant that this was not her best offer but was told not to worry as the vendor would come back to her.

[48] She said that, eventually, she heard from the appellant, probably late on the Monday afternoon or early on the Tuesday, and that the appellant was then quite distressed, that he had lost control of the sale process and it had been taken over by the vendor's lawyer. On the Wednesday, she was told that she had been unsuccessful. She maintained that there had been insider trading and collusion to favour a young female lawyer in Mr McGregor's law firm.

[49] The complainant noted herself that she is a forthright person. She is certainly self possessed and intelligent and concerned about this situation. She handled her case with confidence and fluency.

[50] Her overall concern and theme is that the appellant did not give her good advice so that she failed to acquire the property and that she was never given the opportunity to increase her offer when the appellant knew she was most willing to do that. She felt she had relied on the appellant's advice but had been misled by him. She seemed to understand that there was quite some extra value in the precision tools in the garage.

[51] Inter alia, it was put to her by Mr Grindle that she must feel duped because she was beaten by a young female lawyer. Her response seemed to be that she was beaten by "*overall collusion*" and that her offer was "*far too low based on the advice of the appellant*". She feels she was out manoeuvred by insider trading.

### ***The Evidence of Mr Tony Hillyear***

[52] The appellant also called her father (Mr Tony Hillyear) to give corroborative evidence to the extent that he was involved in the negotiations. He confirmed matters about the LIM report and that the complainant had made it clear to the appellant that her offer was not her highest offer by any means and that this bothered her.

[53] Mr Hillyear also said that he was a friend of the vendor's and that the vendor knew of the interest of his daughter and her husband, and he would have expected the vendor to accept her (the complainant's) offer. He also added that he, Mr Hillyear, had endeavoured to have the vendor sell on a more conventional basis in the vendor's own interests of getting the best price.

### ***Discussion***

[54] The stance of the complainant and of the Authority is covered above. Fairly extensive submissions were made by Mr Grindle for the appellant.

[55] He emphasised that the sale of the vendor's property was unusual in that the vendor wanted a quick sale where price was not a motivating factor, and that there was also a significant amount of sophisticated engineering, contracting, and radio equipment included as chattels in that sale. He noted that the complainant's father had previously tried to purchase that equipment from the vendor.

[56] Mr Grindle emphasised that the appellant simply conveyed to the complainant the vendor's wishes that price was not the vendor's major motivator and he would consider offers over \$195,000; that it was obvious that a multiple offer situation would develop, that the appellant prepared a sale and purchase agreement to include a LIM

and finance condition and, although the complainant initially did not want such conditions, after a discussion she accepted them, initialled them, and signed the sale and purchase agreement.

[57] Mr Grindle referred to the various communications between appellant and complainant in the course of the transaction as referred to above, and to her signing an amended offer on the Monday to include a specific clause about the engineering equipment, to her knowing that two further bids had been received, to her having been invited by the appellant to update her offer, and that she must have understood the effect of the multiple offer form.

[58] Mr Grindle referred to the Committee's finding that the appellant had exhibited unsatisfactory conduct in this case being also underpinned by its finding that he had breached Rules 9.3 and 9.7. Mr Grindle submitted that there is insufficient evidence to support a finding that the complainant did not understand the multiple offer form, and that she is an experienced and sensible business woman. He submitted that there is insufficient evidence to find that the appellant misled her as to the vendor's price expectations.

[59] Mr Grindle submitted that there has been no serious departure from the client care rules and that, in any case, orders under s.93 of the Act are discretionary and not warranted in this case.

### ***Our Conclusions***

[60] It is of concern to us that the case narrative of the appellant, compared with that from the complainant, is rather contradictory. They cannot both be correct. Frankly, to quite some extent, we do not know whom to believe on the balance of probabilities. Because the appeal before us is a rehearing, it could follow from our not knowing whom to believe that we should not accept the appellant as guilty of unsatisfactory conduct. However, we do make some findings of fact and we take into account sensible interferences.

[61] We can well understand the concern and distress of the complainant. Not only have she and her husband missed out in acquiring a desirable property for the purposes of a residence for her parents in a good location and at a good price in Whangarei, and with a substantial bonus of sophisticated equipment being included, but she feels that there has been some sort of collusion against her in that one of the purchasers is a lawyer in the office of the vendor's solicitor. One can understand that suspicion but there is no adequate reason to so conclude in this case.

[62] To deal with the four matters which Mr Grindle referred to above as the key disputed facts, there can be no doubt that the complainant was adequately advised by the appellant that there were two serious other interested purchasers. However was she advised that she should put her best offer forward?

[63] We do not think that representations as such were made to her by the appellant about the vendor's price expectations and the likelihood of her offer being accepted, although she seems to have got the impression that she need not place a competitive price in her offer.

[64] We cannot accept that she had not sanctioned any terms in her offer.

[65] Also we are satisfied that the appellant gave her a proper opportunity to review and confirm her offer document before she signed it.

[66] We have described above a rather unusual property selling situation in that the vendor seemed to have independent views about selecting a purchaser. Those views could probably be regarded as a little out of the ordinary. We do not think that the appellant can be criticised for pressing the need for the complainant to insert conditions in her offer (that of her and her husband) for a satisfactory LIM report and making the offer subject to finance. However we believe the complainant that it was not made clear to her as being vital that she fixed a price in her offer with which she was comfortable. Indeed, she had until late Monday morning to become comfortable with the price set out in her offer, yet she remained uncomfortable with her offer of \$205,000. The appellant must have known that. The winning offer seems to have been about \$15,000 more than the appellant's and yet that was a figure well below the complainant's view of the value of the property.

[67] We opine as above accepting that the complainant is a sensible and experienced businesswoman.

[68] We come to the overall view that the appellant should have made it more clear to the complainant that her offer must be put in at her best price. Even though not being sure in some respects whom to believe, we feel he has failed in that one respect. We cannot accept that the appellant's advice to the complainant merely confused her unwittingly.

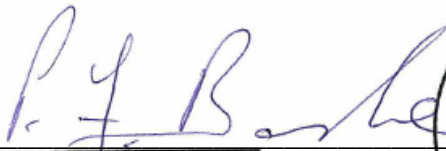
[69] We do not accept the finding of the Committee that the appellant entered information on the agreement without the complainant's authority i.e. regarding a LIM report, a finance clause, and a settlement date. We do not feel that the complainant has been at any way disadvantaged by the complainant except in that she should have been required to submit her best price from the outset, or certainly, by late Monday morning when there were clearly two other bids.

[70] The appellant certainly cannot be criticised for proceeding with the multi offer form process as it must have been obvious to an experienced real estate agent that there would be strong multi interest.

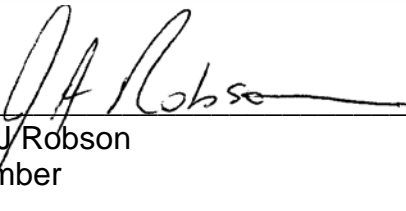
[71] Simply put, it is our concern that, at all stages, the complainant made it clear that her offer did not represent her best price, and that she and her husband were very much negotiable with regard to price; but she was not adequately protected in that respect.

[72] In terms of s.72 of the Act, we do not think that the appellant lacks competence, nor particularly contravened any rules made under the Act. However, we find that he was a little negligent, on the curious facts of this particular case, in not ensuring that the complainant put up her best offer or some figure reasonably near that. It follows that he acted in an acceptable manner.

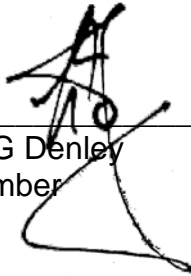
In terms of the penalty imposed by the Committee, we do not think a censure is warranted as arising out of this rather messy situation. However, the finding of unsatisfactory conduct and the \$500 fine should remain, and we confirm that.



Judge P F Barber  
Chairperson



Ms J Robson  
Member



Mr G Denley  
Member