BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2012] NZREADT 71

READT 107/11

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**JOHN DAUNTON**
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 10065)**
	First respondent
AND	**JASON MORGAN**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Mr J Gaukrodger - Member

HEARD at CHRISTCHURCH on 5 and 6 September 2012 with a subsequent series of written submissions

DATE OF DECISION 4 December 2012

COUNSEL

Appellant on his own behalf
Mr M Parker and Ms M R Cowan for second respondent
Ms H McKenzie, counsel for Authority

DECISION OF THE TRIBUNAL

Introduction

[1] This is an appeal by John Daunton (the appellant) against the 8 September 2011 decision of Complaints Assessment Committee 10065 to take no further action against Jason Morgan (the licensee). The appellant had complained about aspects of the licensee's conduct in marketing a residential property (8 Happy Home Road) purchased by the appellant and his wife. Those complaints are listed in paragraph [11] below.

Our Jurisdiction on Appeal

[2] The Committee held a hearing on the papers pursuant to s.90 of the Real Estate Agents Act 2008 and made a determination under s.89(2)(c) of the Act. This appeal to us is by way of rehearing.

[3] In *Kacem v Bashir* [2010] NZFLR 884, the Supreme Court articulated principles identified by the Court in the earlier case of *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141:

> *"[32] ... for present purposes, the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong. The distinction between a general appeal and an appeal from a discretion is not altogether easy to describe in the abstract. But the fact that the case involves factual evaluation and a value judgment does not of itself mean the decision is discretionary.*

[4] We have previously held that CAC determinations under s.89 are subject to general rights of appeal and the wider principles described in *Austin Nichols* will apply. In *O v CAC 10028 and T* [2011] NZREADT 15, the Tribunal remarked at [25]:

> *"Determinations pursuant to s.89 will generally involve factual determinations on the basis of the available evidence. Determinations made pursuant to s.89 would generally be regarded as a 'general appeals'. All parties agree that the Tribunal should apply the principles set out in Austin, Nichols as reiterated by Kacem v Bashir."*

[5] Section 111(4) of the Act empowers us to confirm, reverse, or modify a CAC's determination. If we reverse or modify the determination, we may exercise any of the powers that the CAC could have exercised (s.115(5)). This means that we can uphold the Committee's decision not to take any further action; or grant the appeal and make a finding of unsatisfactory conduct and any associated orders; or grant the appeal and refer the matter back to the Committee for a charge of misconduct to be laid. We have had the advantage of a full hearing with detailed evidence, cross-examination, and submissions.

Factual Background

[6] On 17 October 2009 the appellant and his wife listed their house at 8 Happy Home Road, Christchurch for sale with the licensee.

[7] On 14 November 2009 the appellant attended an open home. After the open home, the licensee forwarded the appellant a builder's report commissioned by the vendors when they had bought the property 18 months earlier. The property went to

auction on 26 November 2009 but was passed in at $535,000 on a vendors' bid. The appellant had bid up to $525,000.

[8] The appellant and his wife signed a multiple offer form and corresponded with the licensee regarding a counter-offer on 28 November 2009.

[9] On 30 November 2009 the licensee gave the appellant a REINZ Housing Price Index Graph. There were quite intensive negotiations. Also on 30 November 2009, the appellant entered into an agreement for sale and purchase on the property at a purchase price of $546,000.

[10] Settlement occurred at about 4.00 pm on 14 December 2009. The appellant and his wife took possession at about 6.50 pm that day. The appellant had requested a pre-settlement inspection for 10.00 am on 14 December 2009 but he required to inspect the property as vacant and the vendors would not vacate until settlement.

[11] In late October 2010, the appellant complained about the following matters:

[a] The licensee gave the appellant misleading information about house prices in the area, with reference to the REINZ price graph;

[b] The licensee knowingly promoted and supplied an out-of-date building report for the property.

[c] The licensee should have disclosed that he lived at the property and had a relationship with the vendors;

[d] The licensee would have known the property's faults given he lived there and should have disclosed them prior to the appellant submitting an offer on the property; and

[e] On the settlement date the licensee was unhelpful, uninformative, appeared to be stalling for time for the benefit of the vendors.

The Committee's Decision To Take No Further Action

[12] Relevant extracts from the Committee's well-reasoned and full decision are:

"2.4 In relation to the first allegation that the Licensee provided false and/or misleading information about house price movements in the area of the property, the Complainant alleged that on 30 November 2009 the Licensee provided him with information concerning house prices in the area. In this regard the Licensee sent an email with a link to an REINZ Housing Price Index Chart showing Annual Percentage Change v Rolling Three Month Percentage Change from 1992 to 2010. In the Licensee's email to the Complainant he stated: "here is an REINZ graph which shows a clear increase in property values in 2009, and an even bigger increase in value from Feb 2008 when my clients bought".

2.5 When the Complainant queried the Licensee about the data the Licensee is alleged to have informed the Complainant that he (the Complainant) was interpreting the data incorrectly. The Complainant stated that he was unable to find relevant data before purchasing the property and he maintained he relied on the information which the Licensee had provided in this regard. The Complainant stated: "as we were told this was a multi-offer situation we felt pressure to sign a contract".

2.6 After the Complainant had purchased the property the Complainant found the REINZ chart that showed the median sale prices for the area. This information, he alleged, showed "a reduction in sale price over the period in question of around 15.44%, this equates to a decrease of around $85,000, not a price increase as we were told by the Licensee".

2.7 The Complainant maintained: "this information played a significant role in us paying a much higher price than we originally thought the house was worth. We bid to $525,000 at auction, where the bidding stopped, other than a vendor's bid at $535,000. We finally purchased the property for $546,000 sometime after the auction."

2.8 In relation to the second issue which was the allegation that the Licensee promoted an outdated building report as still relevant when he knew it was not, the Complainant alleged that the Licensee promoted the outdated building report verbally at the open home on 15 November 2009 and he then sent the report to the Complainant after the open home. The email which the Licensee sent to the Complainant stated "... a copy of the vendor's building inspection from when they purchased 18 Months ago. It's quite a comprehensive report, so it's still quite relevant, but if you would like to get your own building inspection before auction day we can arrange that ...

...

4.4 The Committee considered that this allegation was unfair and in any event was not established to the required standard. The Committee considered that if the Complainant intended to place so much emphasis on house price movements in the area when he was considering his offer price then he should have made further inquiries including seeking a registered register valuation for the property before making his offer. If the Complainant had doubts about the information he was being provided by the Licensee with reference to the REINZ Housing Price Index chart which the Licensee provided to him and if it was his intention to rely so heavily on that information, the Committee considered it would have been reasonable for him to have had that information independently verified.

Provision of 'out of date' builder's report

4.5 The Committee considered that this allegation was without foundation.

4.6 The Committee was satisfied with the Licensee's evidence that at the time he provided the building report to the Complainant he told him it had been

obtained 18 months previously by the vendors and that he also advised him that while the report was still of some relevance, if he wished to get his own building inspection report then that could be arranged.

4.7 The Committee considered that in all the circumstances it was not reasonable for the Complainant to on the one hand accept that he had a responsibility to undertake due diligence (as he did to an extent) but on the other hand attempt to hold the Licensee to account for having stated that the report was still of relevance, implying that the Complainant could still in part rely on it.

4.8 The Committee does not accept that the Licensee in providing this report to the Complainant in the manner alleged was guilty of unsatisfactory conduct. The report was provided in circumstances where the property was being marketed as an unfinished renovation project, the Complainant was reluctant to obtain his own independence and up-to-date report and where there was no attempt by the Licensee to conceal the age of the report and who had commissioned it.

4.9 The Committee considered that there was a degree of responsibility or onus on the Complainant as the proposed purchaser to obtain his own independence information and to have carried out his own due diligence inquiries if he wished. The Committee considered it unfair to hold the Licensee professionally responsible for the Complainant's own failure to make sufficient enquiries in all the circumstances of this case.

...

4.13 The Committee understands that it is usual practice for the pre-settlement inspection to be undertaken by a purchaser in the day or two prior to the settlement date. That is to enable any issues which may arise from the inspection to be dealt with by the respective lawyers (with input from the licensee involved) for the parties, prior to settlement.

4.14 The Committee accepted the Licensee's explanation that all he could reasonably be expected to do with to provide keys and to facilitate the opening up of the property to enable an inspection to occur.

4.15 The Committee considered the vendors were within their rights to withhold moving from the property until settlement had occurred. The Committee considered that it was unreasonable of the complainant to insist that the pre-settlement inspection be undertaken once the vendors had moved from the property, particularly when it would appear he knew there was a chain of transactions involved on the settlement date in question.

4.16 The Committee considered that as the Complainant was taking advice from a solicitor at the time of the settlement he ought to have raised issued with his solicitor and taken advice from him or her about his requirements for a pre-settlement inspection."

[13] The above extracts from the Committee's decision show that the Committee identified and made findings on the above issues as follows:

[a] *Licensee gave the appellant misleading information about house prices in the area.* The Committee felt this allegation was *"unfair"* and was not established to the required standard. It put it that if the appellant intended to place so much emphasis on house price movements in the area, he should have made further enquiries and sought a registered valuation for the property before making an offer; and in the alleged circumstances, it would have been reasonable for the appellant to have independently verified the REINZ price graph.

[b] *Licensee knowingly promoted and supplied a building report for the property which was out of date.* This allegation was *"without foundation"*. The Committee accepted the licensee's evidence that, at the time he provided the building report to the appellant, he told him it was 18 months old and advised him that his own building inspection could be arranged, and considered that providing the report in the manner alleged was not unsatisfactory conduct.

[c] The Committee further found that there was a *"degree of responsibility or onus"* on the appellant, as the proposed purchaser, to obtain his own independent information and to have carried out his own due diligence inquiries if he wished; and it was *"unfair"* to hold the licensee professionally responsible for the appellant's own failure to make sufficient enquiries.

[d] *Licensee should have disclosed the fact that he had lived at the property and had a relationship with the vendors.* The Committee did not make a finding in relation to this aspect of the complaint.

[e] *Licensee would have been made aware of the faults in the property during the period of time when he lived there and he should have disclosed those faults to the appellant prior to him submitting on offer on the property.* The Committee considered that appellant had an obligation to do his own investigations and due diligence if he was serious about buying the property being marketed as a renovation in progress; and he further had an obligation to fall back on the vendor warranty clause in the agreement for sale and purchase in the event issues arose with the property following settlement.

[f] *The licensee was unhelpful, uninformative, appeared to be dishonest and was stalling for time for the benefit of vendors on the settlement date. The Committee held that this allegation was "unreasonable and/or without foundation"*. It accepted that all the licensee could reasonably be expected to do was to provide keys and to facilitate the opening up of the property to enable an inspection; the vendors were within their rights to withhold moving from the property until settlement had occurred; it was unreasonable of the appellant to insist that pre-settlement inspection occur once the vendors had moved from the property, particularly when it would appear he knew there was a chain of transactions involved on the

settlement date; and the appellant ought to have raised issues with his solicitor.

[14] There has been a re-hearing before us and we consider that the Committee's views and reasoning were sound.

General Issues

[15] In various documents, the appellant lists the four issues on appeal as:

[a] Provision of incorrect house price information;

[b] Knowingly providing a misleading building report;

[c] Non-disclosure of known defects; and

[d] Possession-day unsatisfactory service.

[16] Rule 6.4 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (inter alia) prohibits a licensee from withholding information that should by law or fairness be provided to a customer or client. Rule 6.5 includes that while a licensee is not required to discover hidden or underlying defects in land (which includes any building), he or she must disclose known defects to a customer.

[17] The Tribunal considered the duties imposed by rules 6.4 and 6.5 in *Wright v CAC 10056 and Woods* [2011] NZREADT 21 and held that the obligation to disclose defects is a wide-ranging one and stated:

> *"[41] The emphasis in Rule 6.4 and 6.5 is on the conduct of licensee. The Rules provide that a licensee must ensure that they are open and honest with a purchaser so that they are not misled in their decision to make an offer to purchase a property. There does not need to be any reliance by the purchaser on the statements (or lack of statements) by the agent and it is clear that a duty of utmost good faith is required from the agent."*

[18] We agree with the first respondent about the following relevant points of principle:

[a] *Provision of incorrect house price information*. Rule 6.4 may be relevant depending on the facts as determined by us. Rule 9.3 further provides that *"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"*. The first respondent submits that it is a factual matter as to whether the REINZ price graph was misleading or false, and also as to whether the appellant showed any *"reasonably apparent"* inability to understand it;

[b] *Knowingly providing a misleading building report*. The above Rules would apply to a misleading building report. It is a matter for us as to the factual context in which the licensee provided the building report and in which the appellant declined to obtain an updated version;

[c] *Non-disclosure of known defects*. Again, Rule 6.4 may be relevant, as may Rule 6.5. It is a matter of fact for us as to the extent of the licensee's knowledge of the alleged defects in the property and what he told the appellant. The nature of the alleged defects is also relevant given that a licensee may not be under an obligation to point out very minor/cosmetic *"defects"*;

[d] *Possession day/unsatisfactory service*. It is a matter of fact for us as to what occurred on settlement day.

[19] Obviously, this appeal is highly factually-based. We heard extensive oral evidence from the following witnesses:

[a] Colin Dean, a previous owner of the property and still a neighbour;

[b] Dr Melanie Atkinston, the appellant's wife;

[c] John Daunton, the appellant;

[d] James Morgan, the second respondent licensee; and

[e] Mrs Michele Wilson one of the vendors.

[20] Mr Dean's evidence focused on his perception of the relationship between Mr Morgan and the Wilsons, the state of the house when he sold it to the Wilsons, and his knowledge of the building/renovation work given factors including the on-going noise. We understand that there was no neighbourly harmony between the Deans and the Wilsons.

[21] Mr Daunton's comprehensive evidence treated each of his four areas of complaint.

[22] Dr Atkinson spoke about various matters including attending open homes at 8 Happy Home Road and the process on settlement day.

[23] Mrs Wilson's evidence focused on the renovations to the property, how apparent these were to others living there, and the nature of her relationship with Mr Morgan, including how he came to be the agent for the property. She said that she and Mr Wilson had spent $20,000 on materials and tradesmen for renovation work on the property with Mr Wilson doing further work as a joiner and being able to purchase some materials at discounts.

[24] Mr Morgan's evidence was comprehensive and the appellant extensively cross-examined him on factual matters relevant to the four areas of complaint. He was also asked by the first respondent to comment on general practice in the industry including giving advice on whether a purchase represents a good deal, settlement procedures, and the extent to which the average purchaser knows that an agent acts for the vendor (notwithstanding they are subject to requirements of fairness on both sides).

The Stance of the Appellant

[25] It happens that the appellant is a highly regarded and very experienced Police Sergeant and we found him to be a person of complete integrity and courtesy who was thoroughly prepared and clear in his evidence and submissions.

[26] He feels that the licensee misled him as to the market value of the property and influenced him to offer a higher price than he, the appellant, originally decided it was worth in terms of comparable sales information. In particular, the appellant says that he was misled by a graph provided to him by the licensee which was difficult to understand. The appellant also considered that information about median house prices in the area did not support the licensee's assertions about the value of the property having increased during its ownership period by the vendor, but rather showed a 12.81% decrease.

[27] The appellant feels misled by the licensee and feels he was not provided with proper skill, care, competence and diligence nor good faith from the licensee.

[28] The appellant also put it that he was misled by the licensee promoting and providing a building report which did not show significant issues with the property nor damage to the master bedroom where two wardrobes had replaced a shower room, and part of the roof had been rebraced above a wall between the lounge and kitchen. It is put all that caused the appellant to buy the house with issues needing correction and that the licensee must have known of those faults but did not reveal them. It was also put that the licensee knew of these defects due to his relationship with the vendors and, allegedly with Mrs Wilson in particular, and through having lived at the property prior to the sale while building work was being undertaken for the vendors.

[29] As already indicated, the appellant puts it that the licensee *"promoted and provided a building report to the appellant that he knew did not show significant issues with the property including damage to the master bedroom, two wardrobes replacing a shower, and a rebraced roof above a load bearing wall between the kitchen and lounge"*. The appellant submitted that the building report provided to him by the licensee caused him to not commission a report of his own.

[30] The appellant also put it that as well as the licensee having been living at the property prior to its sale and having assisted the vendors purchase it about 18 months previously and having a close relationship with the vendors, he had discussed renovation plans with them and assisted with some painting work for their renovations and was acting for them to sell the property. It was put that the licensee had not told the appellant that the wardrobes had replaced a shower. It was put that the appellant had been advised that the work done on removing a wall did not relate to a load bearing wall when, in fact, it was and there was a need for rebracing. It was put that the licensee must have known of the rebracing of the roof.

[31] Simply put, the appellant is particularly concerned about damage to the master bedroom due to a shower having been replaced with wardrobes and of the need to rebrace the roof above a load bearing wall between the kitchen and the lounge. Apparently, these matters were not readily apparent to a purchaser. There was also reference to carpet damage especially in the main bedroom.

[32] The appellant considers that the licensee caused him to pay $21,000 too much for the property. He would like that sum in compensation form the licensee. He felt misled by the licensee's overconfidence about the value of the property and various documents about its value and the appellant trusted the licensee.

[33] There was much emphasis by the appellant on his allegation that the licensee was most unhelpful on possession/settlement day leading to much stress for both parties to the transaction. The appellant had expected a presettlement vacant inspection to be arranged by the licensee as part of his duties. In fact, the vendors would not vacate without settlement but the appellant was not told this until very late on the day of settlement.

[34] Essentially, the alleged conduct of the licensee which concerned the appellant on possession day was that the appellant thought a time of 10.00 am had been arranged that day for him to have vacant inspection of the property when the licensee knew that was not possible. It is alleged that the appellant was not told about this until late in the day and yet, throughout the day, the appellant had been told by the licensee that vacant inspection was imminent.

Basic Stance of First Respondent

[35] The first respondent emphasised that determination of the issues on appeal will turn on our factual findings. It submits that if our factual findings are such that any of the Rules have been breached, the licensee has engaged in unsatisfactory conduct unless there was a total absence of fault.

[36] We agree that a wilful or reckless breach of the Rules is misconduct under s.73(c)(iii) whereas a breach of the Rules simpliciter is unsatisfactory conduct under s.72(b). Section 72(b) creates strict liability in this regard, reflecting Parliament's view of the importance of compliance with the Rules (as well as with the Act and regulations made under it).

[37] Committees have a wide discretion whether to inquire into, or inquire further into, a complaint or allegation under the Act. However, if, having held a hearing on the papers under s.90, a Committee is satisfied on the balance of probabilities that an agent has breached the Rules, then a finding of unsatisfactory conduct must follow pursuant to s.72(b).

[38] A defence of total absence of fault may be available to a licensee. Additionally, a breach of the Rules involving a low level of culpability will generally be reflected in a lower level penalty.

The Stance of the Second Respondent Licensee

[39] Counsel for the licensee referred to the vendors (Mr and Mrs Wilson) having listed the property with the licensee on 17 October 2009. There is no dispute that the licensee was a close friend of the vendors. Because the appellant had taken an interest in the property, on 14 November 2009 the licensee emailed him a copy of the Title to the property and a LIM and property inspection report dated 28 January 2008 which the vendors had commissioned prior to their purchase.

[40] There seemed to be no dispute that the licensee offered the appellant the opportunity to obtain his own building inspection report and valuation, but the appellant declined to do that.

[41] The vendors had undertaken extensive renovations since their purchase and, but for a change in their matrimonial circumstances, had intended further renovations. The licensee had advised potential purchasers about those as including an intention to move a wall from the kitchen to increase a view.

[42] On 16 November 2009, the appellant was provided with the Government Valuation for the property and also an attachment showing sales data recorded from two sources, namely, the Property Guru and a Real Estate Institute of NZ graph showing median sale prices from January 2008 to December 2009 over a number of Christchurch suburbs but the sales data was not specific to the property nor to the suburb of Westmoreland. The licensee also advised the appellant that the vendors had purchased the house property in January 2008 for $555,000.

[43] The property went to auction on 26 November 2009 and the appellant bid to $525,000 but the property was passed in. Negotiations followed and the purchaser eventually bought at $546,000. The appellant gave evidence that final figure was more of a *"guess"* than a calculation on his part.

[44] Essentially, counsel for the licensee strongly submitted, in some detail related to the evidence, that there had been no misconduct nor even unsatisfactory conduct on the part of the licensee with appropriate reference to sections of the Act and the various relevant rules.

[45] In final submissions counsel for the licensee emphasised, inter alia, that the data complained of by the appellant is a graph from the Real Estate Institute of NZ which, while showing that generally the market at the time was not in a healthy state, indicated that it was improving. The graph was not specific to any particular area of Christchurch nor to the particular suburb in which the property is located. It was put that this must have been apparent to the appellant as it was fairly readily discernible.

[46] Counsel also pointed to some of the evidence showing that the appellant had undertaken his own internet research about values at material times and was a very intelligent person.

[47] Counsel put it that the appellant (and his wife) increased their offer post auction as a result of their own deliberations and information and that does not correlate to any figure suggested by the licensee and seemed to be due to their keenness to purchase.

[48] Counsel for the licensee submit that the appellant's alleged reliance on the graph becomes less credible when the following email of 17 November 2009 from the licensee to the appellant is considered, namely:

> *"Hi, John, the Government valuation of 8 Happy Home Road is $564,000.*
>
> *As far as comparable sales for this property, this is a bit more difficult, due to the age of the stature of the home. It is one of the first homes on Westmoreland*

and built at the time to be quite significant. I have attached two database searches for you from two different sources. Take a look at these to assist you, but keep in mind my client is committed to a sale.

Probably the most significant price indication would be the price my clients bought it for in January 2008. At that time, they paid $555,000 for the property and since then, they have spent quite significantly on both the inside and out. Even if you didn't factor in anything for market appreciation in this period, you definitely could buy a great house at a very good price. Would you like to organise an independent building inspection or registered valuation before auction day ..."

[49] We assess the evidence as that the appellant undertook his own research to which he gave much thought.

[50] Part of the final submissions for the licensee read as follows:

"***Allegation – Knowingly provided a misleading building report***

[21] The Appellant insists on selectively quoting from the email from Mr Morgan relating to this document. The full text thereof is as follows:

"Thank you for coming through our open home this weekend. Further to our conversation earlier this evening, I have attached a copy of the LIM and title for the property. There is also a copy of the vendor's building inspection form when they purchased about 18 months ago. It's quite a comprehensive report, so it's still quite relevant, but if you would like to get your own building inspection before auction day, we can arrange that.

We will give you a call next week when you have had a chance to look through this information."

[22] The report on it face is clear that it is only relevant at the time of inspection. There is nothing misleading in the suggestion that it might still be "quite relevant". What Mr Morgan's comments do not say is that it is up to date and deals with all the matters that may have changed since the date of the report being compiled. The Appellant cannot suggest that somehow the email by Mr Morgan meant that they had any kind of guarantee or assurance about the integrity of the building as it was when they bought it; nor indeed any comment about the integrity of the building. Mr Morgan was simply the vendor's real estate agent and was providing some information from the vendors."

[51] Counsel put it that the licensee was not a privy to the vendor's renovation plans or to what work they had done and nor did he know about the rebracing of the roof above a load bearing wall between the kitchen and the lounge. We felt that the licensee convincingly denied being aware of any such matters or being aware of any defects.

[52] Inter alia, counsel for the licensee submitted that he had gone out of his way, when he did not need to, to try and organise a presettlement inspection for the

appellant and his wife on settlement day but that the appellant refused to undertake such an inspection while the vendors were still present. The evidence is that the husband vendor would not move out of the property until settlement so that a succeeding transaction for him could take place that day and he would that day have somewhere to live. It seemed to be accepted that the vendors were completing a marital breakup by selling the property and that difficulty was compounded by Mr Wilson's significant deafness. It is put for the licensee that he did his best by telephone calls to organise an inspection at 10.00 am on the morning of settlement day and that this was a matter which really should have been dealt with by the appellant's lawyer. It was also put that the vendors did not seem to be in a position to provide a vacant inspection before settlement and that the licensee should not be blamed for that.

[53] Essentially, counsel for the licensee submitted that all his actions were reasonable, and he was doing his best for his client vendors, but had also been expansive in providing information to the appellant as a prospective purchaser.

Our Conclusions

[54] We are in broad agreement with the submissions for the licensee which we have summarised above.

[55] It did trouble us that there appeared to be some type of emotional relationship between the licensee and the vendor Mrs Wilson. That does not create a good look in terms of a professional real estate agent's role and duties and, inter alia, it could well influence the advice such an agent might give to a prospective purchaser. There needs to be transparency in all respects. However, we do not think that the licensee misled anyone or failed in his obligations with regard to the sale of 8 Happy Home Road.

[56] We feel that the licensee did not mislead the appellant in any way. We observe that the licensee may have been a strong advocate for the vendors and should have realised that the appellant placed quite some trust and reliance in him. However, the licensee is the vendor's agent and is paid by the vendor. We note that often purchasers seem to expect that a real estate agent will be zealously acting in their best interests and even to assume obligations and give advice which should come from the purchasers' lawyer. The agent is representing the vendors primarily but, of course, also has an overall obligation of fairness and justice to all those with when the agent deals.

[57] Also, the appellant clearly exercised his own judgement on the material supplied to him which, at least with hindsight, was rather general and it would have been much better to have sought local data. One wonders if the licensee's friendship with Mrs Wilson caused him to oversell in terms of price but, having said that, the price which the appellant paid does not seem excessive in terms of comparable properties in the area at the time.

[58] In terms of the state of building repairs, the appellant knew renovations had been carried out and further work had been intended. The appellant does not seem to have been misled by the licensee but one can understand that he would have expected the licensee, as a previous boarder at the property, to know much detail

about the house and any renovations, even though he seemed to live below the main part of the house.

[59] In terms of the confusion and stresses which took place on the settlement date, it is unfortunate that the purchasers (the appellant and his wife) did not realise that settlement procedures and sequences are part of the legal services and advice from their lawyer. A licensee need be no more involved than, helpfully, facilitating those procedures, particularly if he or she still holds a key to the property. There was reference to clause 3.2.(2) of the sale contract, but that only permits a pre-settlement inspection entry to the property by the purchaser to confirm compliance with any agreement of the vendor to carry out work on the property and the chattels and fixtures. In any case, a perceived non-compliance of the contract was a matter for the vendors' lawyer. However, the purchasers should not have gone through the stress of waiting all day in the expectation of imminent entry to inspect the property.

[60] The price seems to have been eventually finalised between the parties after quite intensive negotiations. The licensee advised the appellant more than once to obtain his own building report. It is unfortunate that the appellant did not take up the opportunity to buy the valuation which another interested purchaser (a Mr Gunn) had obtained in November 2009. The licensee organised that opportunity for the appellant who did not take it up. We are satisfied that the licensee did not know the bottom line valuation figure advised to Mr Gunn in that valuation. If we thought the licensee had known that, we would consider his conduct in that respect at least to be unsatisfactory conduct and possibly misconduct. It happened that the appellant met with Mr Gunn on 23 May 2012, well after the event, and arranged to obtain a copy of that valuation from him. It considered values in the area and valued the property at $523,000. We observe that valuation seemed directed at supporting mortgage lending so one would expect it to be conservative.

[61] It does seem from the evidence of negotiations that, unless the appellant had offered $546,000, he would not have had willing sellers.

[62] On the balance of probability, we cannot find that the appellant was provided with incorrect house price information by the licensee; although more relevant information must have been available. There is no evidence of the licensee providing any misleading information and, certainly, not intentionally or carelessly. Nor can we be satisfied that the licensee failed to disclose any defects in the house which he knew of.

[63] With regard to the Rules specifically referred to above, in terms of Rule 6.4 we find that the licensee did not withhold any information from the appellant which should by law or fairness have been provided; nor did he mislead the appellant in any way. With regard to Rule 6.5, we do not think that the licensee failed to disclose to the appellant any defects in the property of which he knew. In terms of Rule 9.3, the licensee did not take advantage of any inability of the appellant to understand relevant documents as any such inability was not reasonably apparent and, in our view, does not exist because we consider that the appellant is a very intelligent and thoughtful person who had an intelligent grip on the purchase transaction. We do not think that the licensee's conduct was unsatisfactory in terms of s.72 of the Act.

[64] It is regrettable to us that such a respected person as the appellant felt obliged to pursue this appeal in a thorough, concerned and balanced manner. However, when we stand back and absorb all the evidence and argument we confirm the Committee's decision to take no further action. Accordingly, this appeal is dismissed.

[65] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

_____
Judge P F Barber
Chairperson

_____
Mr G Denley
Member

_____
Mr J Gaukrodger
Member