BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 103

READT 048/12

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**PAUL HUMPHRIES**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 10070)**
	First respondent
AND	**ZHENDONG LI**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Ms C Sandelin - Member

HEARD at AUCKLAND on 5 September 2013 (together with a series of subsequent typewritten submissions)

DATE OF DECISION 26 November 2013

APPEARANCES

Mr T D Rea and Mrs S C R Eric, counsel for appellant
Mr M J Hodge, counsel for the Authority
The complainant second respondent on his own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] In a 19 December 2011 decision, the appellant was found guilty of unsatisfactory conduct by Complaints Assessment Committee 10070 as we detail below. The complaint against the appellant is that he gave the complainant incorrect advice about GST when the complainant purchased the apartment referred to below at auction. It is put that the GST position was complex. In a 26 June 2012 penalty decision, the Committee ordered the appellant to pay a $2,000 fine. It is arguable whether the relevant advice given by the appellant was erroneous but the complainant felt pressured by the appellant to sign the form of agreement related to his top bid at auction.

[2] This appeal is against the Authority's finding of unsatisfactory conduct against the appellant.

Background

[3] The appellant is a licensed agent working for Barfoot & Thompson Ltd in that agency's mortgagee sales team.

[4] The second respondent, Mr Z Li, is the complainant. On 1 December 2010 he purchased an apartment 1714 at 21-23 Whitaker Place, Auckland Central at an auction. Prior to the auction, the complainant dealt with Hanok Shin, another licensee with Barfoot & Thompson Ltd. The parties agree that on 30 November 2010 Mr Shin provided the complainant with material about the property including: floor plan; rental statement; valuation; deed of lease; particulars and conditions of sale; and certificate of title.

[5] The complainant went into the 1 December 2010 auction with the belief that the sale was in respect of a *"going concern"* and would be zero-rated for GST purposes. The complainant was the highest bidder with a bid of $130,000.

[6] Mr Shin prepared the consequential sale and purchase agreement based on the Conditions of Sale at Auction. The sale price of *"$130,000 (plus GST if any)"* was crossed out by Mr Shin and he changed the price to $149,500 stating that the sale attracted GST.

[7] The complainant queried this with Mr Shin saying he understood that the property was sold as a going concern and under tax rules did not, therefore, attract GST. The complainant refused to sign the agreement so that Mr Shin called the appellant into the room for further advice.

[8] The appellant conferred with another colleague and then advised the complainant that if he registered for GST, the sale could be zero rated. The appellant asked Mr Shin to change the purchase price back to *"$130,000 plus GST if any"*. He did and the agreement was then signed. The complainant paid the 10% deposit the following day. Settlement was due on 24 January 2011.

[9] However, on 23 December 2010, Bell Gully & Co, solicitors for the mortgagee (of the vendor), contacted the complainant's solicitor and advised that GST was payable by the complainant purchaser. An issue arose as to whether a sale from a mortgagee could be zero-rated.

The Committee's Findings

[10] In his initial complaint; the complainant alleged that:

[a] The appellant misrepresented the sale price in the auction documents by stating that the property had an existing lease and was a going concern; and

[b] The appellant's conduct at the signing of the sale and purchase agreement was deceptive because he knew the vendor's position regarding GST but concealed this in order to coerce the complainant into signing the agreement.

[11] Regarding the GST rating of the property, the Committee considered that the onus was on the complainant to ascertain the nature of the sale and the position

regarding GST, and it did not find that any of the documentation provided to the complainant misrepresented the GST status.

[12] However, the Committee found that the appellant's conduct at the time of the signing of the sale and purchase agreement was unsatisfactory. In particular, the Committee considered that because the law that applies to this type of transaction is complex, the appellant was on notice to take extra care in the preparation of the sale agreement and put it that it was subsequently discovered that the appellant's advice to the complainant was wrong.

[13] The Committee considered that the appellant's conduct was not of a standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee regardless of whether the complainant had suffered a loss. It found a breach of rule 5.1, that a licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work and, as such, a breach of s.72(a) of the Act.

[14] In broad terms, the appellant submits that the Committee failed to give sufficient weight to the context and timing of his conversation with the complainant just after the auction and erred in finding him guilty of unsatisfactory conduct.

The GST Position

[15] We note that paragraph 5.7 of the Conditions of Sale reads "5.7. All bids shall be exclusive of GST and the Purchaser shall pay GST (if any) in addition to the Purchaser's bid amount." Paragraph 6.1 of those Conditions of Sale commences: *"Except where the Purchaser is a telephone bidder, the Purchaser shall immediately upon fall of the hammer: (a) pay to the Auctioneer a deposit of 10% of the Purchaser's bid amount (before the addition of any GST) (the deposit)"; and ..."*. Paragraph 18.2 of those Conditions reads: *"If GST is chargeable on the supply of the Property under this Agreement, the Vendor will issue to the Purchaser a Tax invoice on the Settlement Date."*

[16] The relevant section in the Goods and Services Tax Act 1985 read as follows:

> *"**S11 Zero-rating of goods***
> *(1) A supply of goods that is chargeable with tax under section 8 must be charged at the rate of 0% in the following situations: ...*
> *(m) the supply to a registered person of a taxable activity, or part of a taxable activity, that is a going concern at the time of the supply, if –*
> *(i) the supply is agreed by the supplier and the recipient, in writing, to be the supply of a going concern; and*
> *(ii) the supplier and the recipient intend that the supply is of a taxable activity, or part of a taxable activity, that is capable of being carried on as a going concern by the recipient; or ..."*

[17] We observe that, in the ordinary course, where the apartment was being purchased subject to an existing tenancy there would have been no question but that it could be zero-rated if acquired by a purchaser registered for GST (which Mr Li or his purchaser company was) as a taxable activity which was *"going"* at the time of purchase; because it had been put to the purchaser at all times as being the supply of a going concern, so that should have been put in writing and still could have been after acceptance of the purchaser's bid, and the facts show that both parties intended

that the supply or sale was of the existing taxable activity, and there is no suggestion that it was not capable of being carried on as such by the recipient.

[18] The apartment was marketed at all stages as an investment property, presumably, because it was being sold together with an existing lease.

Further Evidence

Evidence of the Appellant

[19] The appellant covered the above facts. He is an experienced real estate salesperson with a blameless record. He works in his agency's mortgagee sales team and this property was listed for sale by the ASB in Auckland as mortgagee. Paragraphs 7 and 8 of the appellant's evidence-in-chief read as follows:

> *"7. Neither the Particulars and Conditions of Sale or any of the other documents provided to Mr Li recorded that the Property was to be sold as a going concern and/or to be zero rated for GST purposes. Although the extracts from the mortgagee's valuation contained a reference to zero rating this reference is clearly stated as relating to the valuation as opposed to the terms of any subsequent sale.*
>
> *8. The Particulars and Conditions of Sale contained the following clauses:*
>
> > *"3. The Property is sold subject to existing tenancies or occupations (if any) including holding over by the Vendor's mortgagor or any party claiming through or under the Vendor's mortgagor.*
> >
> > *[...]*
> >
> > *5.7 All bids shall be exclusive of GST and the Purchaser shall pay GST (if any) in addition to the Purchaser's bid amount.*
> >
> > *[...]*
> >
> > *12.4 The Vendor does not warrant the accuracy or completeness of any matter or fact in these Conditions of Sale or in the Particulars or in any advertisement of sale or marketing brochure ... and the Purchaser must verify such matters to the Purchaser's own satisfaction and purchases the Property in reliance solely upon the Purchaser's own judgment. The Purchaser acknowledges that the vendor has no duty to the purchaser to disclose any matter to the purchaser."*

[20] The appellant particularly emphasised that he did not tell a Mr John Chen (who is the director of the management company for the property and from whom the complainant sought advice) that any sale would be zero-rated for GST. He also says he had no contact with the complainant prior to the 1 December 2010 auction, nor was he aware that the complainant was interested in the property, or had a business relationship with Mr Chen. The appellant was present at the auction in his capacity as a salesperson. He was not the auctioneer.

[21] The appellant said that the complainant successfully bid for the property at a price of $130,000 plus GST if any. He said that the agreement to be signed by the purchaser immediately after the auction was altered by Mr Shin to record the GST

inclusive purchase price of $149,500 but that the complainant became upset and refused to sign that agreement. The appellant's paragraphs 17 and 18 of his typed evidence-in-chief read as follows:

> *"17 The Memorandum of Agreement was altered by Mr Shin to record the GST inclusive purchase price being $149,500. I understand that Mr Li became upset and refused to sign the Memorandum. Mr Shin then asked me, as a member of the mortgagee sales team, if I would discuss the situation with Mr Li. Mr Li told me that he understood that the sale was a going concern and therefore zero rated for GST. I initially referred him to the Particulars and Conditions of Sale which recorded that the sale price was plus GST if any and told him that GST may be payable. However, Mr Li insisted that GST was not payable. I then conferred with another colleague and, considering the existing lease, told Mr Li that I understood if he registered for GST then the sale could be zero rated. I asked Mr Shin to change the purchase price back to $130,000 plus GST if any. Mr Li signed the Memorandum (but did not pay the deposit until the following day 2 December). I produce a copy of the signed Memorandum of Agreement.*
>
> *18. I would not usually comment on the GST status of a sale. I provide advice to Mr Li on this occasion solely in response to his querying the GST position after he had already successfully bid for the Property. I was not seeking to persuade Mr Li to sign the Memorandum as I understood that as the successful bidder he was already bound to do so under the Particulars and Conditions of Sale. My intention was merely to answer the query as best as I could and I genuinely believed that the sale could be zero rated. Unfortunately, I now understand that the position was more complicated than I appreciated and my answer was, in fact, incorrect. However, I had no intention to deceive Mr Li nor was I aware of the mortgagee's solicitors' (Bell Gully) position regarding GST on the sale (i.e. that the sale could not be zero rated). I only learnt of this position after Bell Gully had advised Mr Li that GST was payable."*

[22] In further oral evidence-in-chief, the appellant added that he had honestly believed at the time that the transaction would be zero-rated, but he now wishes he had advised the purchaser to take his own advice about signing the memorandum presented to the purchaser for signature immediately after the auction.

[23] Rather surprisingly, the appellant seemed to be saying that his agency would not normally give consideration to the GST position at an auction and would simply advise a purchaser to obtain his or her own professional advice and they would not give advice about GST issues, but in this case the matter needed to be sorted out.

[24] The appellant noted that his agency had fairly recently paid $500 to the complainant towards recompense of his stress over this matter and noted that there had been no real loss to the complainant because, as a person registered for GST, he (or his company) has been able to receive an input belatedly.

[25] Under cross-examination, the appellant admitted that, at material times, he had simply not known what was the correct position regarding GST on the complainant's purchase of the said apartment so that he should not have given advice. However, he did that in good faith because he thought he had known the answer to the issue put to him.

The Evidence of Mr H Shin

[26] Mr Shin was the licensee assisting at the auction. Paragraphs 7 and 8 of his evidence-in-chief read as follows:

> *"7. Mr Li was the successful bidder at a purchase price of $130,000 (plus GST if any). The paperwork was provided to me to complete. I altered the Memorandum of Sale to read $149,500 being the GST inclusive price. Mr Li then refused to sign the Memorandum saying that he had bought another property in the building on the basis of a going concern. Mr Li denied that he had to pay GST.*
>
> *8. I then requested my colleague, Mr Paul Humphries' advice. Mr Humphries explained to Mr Li that the Property was sold plus GST if any and therefore he may have to pay GST. Mr Li insisted that he did not have to pay GST. Mr Humphries then left the room to consult another colleague and when he returned he told Mr Li that if he registered for GST the sale could be zero rated. I then changed the price back to $130,000 (plus GST if any). Mr Li signed the Memorandum but left without paying the deposit. I followed up with Mr Li regarding the deposit and this was paid the following day. I collected a cheque from Mr Li's solicitor's office.*
>
> *9. At no time, prior to auction, did I tell Mr Li (or Mr Chen of Theta Management Limited) that the sale was to be zero rated; nor did Mr Humphries to my knowledge."*

[27] Mr Shin is apologetic for the stress caused to the complainant.

The Evidence of the Complainant

[28] The complainant, helpfully, filed a short brief covering the facts as he understood them. He said that, at material, times his company owned another apartment in the apartment block in question. He said that the information he received from the licensee (Mr H Shin) included that the apartment was *"subject to a lease"* and was *"zero rated for GST"*. He made the highest bid for the apartment *"under the impression that unit 1714 can be settled zero-rated for GST"*. He said that, immediately after the auction, the licensee (Mr Shin) prepared a sales agreement and with regard to price first wrote $130,000 but then changed that to $149,500 *"by adding GST amount of $19,500"*. The complainant then continued:

> *"I was surprised and asked why I have to $19,500 GST since the auction document represented that there was an existing Deed of Lease and zero-rated for GST. Hanok said he as not sure and had to ask for instructions. Mr Humphries came into the room with Hanok and said if my company (8 Dimensions Management Limited) was GST registered, the sale would be GST zero-rated. I assumed Mr Humphries had confirmed the GST issue with the mortgagee. I confirmed my company was GST registered, and Mr Humphries told Hanok to change the price back to $130,000 (plus GST if any). I signed the sales agreement and paid the deposit of $13,000 to Barfoot the next day.*
>
> *My intention was to purchase Empire 1714 zero-rated for GST. Mr Humphries' statement made me believe the mortgagee agreed to sell Unit 1714 zero-rated*

for GST. However, I had to pay $149,500 (including $19,500 GST) on Unit 1714 settlement.

After receiving the Decision of Complaints Assessment Committee dated 26 June 2012, I claimed the $19,500 GST back in October 2012 (for the GST period April to September 2012). However, I had to send secure emails to IRD explaining the reason for the refund claim. I also paid my tax agent accounting fees for this claim."

[29] In his oral evidence to us, the complainant emphasised that he had claimed and received a GST input from the IRD. He seemed prepared to accept now that neither the licensee nor Barfoot & Thompson Ltd had intended to mislead him over the GST issue. He said he was appreciative the $500 which had been paid to him by Barfoot & Thompson Ltd for his stress and that amount fairly much covered the professional fees he had incurred over the issue. He seemed to be saying that the $500 gratuitous payment from Barfoot & Thompson Ltd went quite some way to covering his financial loss over all this and *"was enough"* in all the circumstances.

[30] The complainant was asked why he took one and a half years to claim an input on this purchase. He said he was not sure of his position so he waited for the decision of the Complaints Assessment Committee.

Expert Evidence

[31] On behalf of the appellant, we received two lots of expert evidence regarding the GST situation. One such was Mr D N Tuck a prominent Auckland solicitor with Simpson Grierson, Auckland solicitors. We set out portions of his evidence as follows:

> *"8. I do not agree with Bell Gully's view that in order to zero-rate a mortgagee sale for GST purposes, the agreement to zero-rate should be between the mortgagor and the purchaser and could not be between the mortgagee vendor and the purchaser.*
>
> *9. I have had the opportunity to read the draft opinion of Keith Turner of NSA Tax and agree with Mr Turner that it is possible for a mortgagee vendor and a purchaser at a mortgagee sale to agree to zero-rate a transaction that is capable of being zero-rated for GST purposes.*
>
> *10. Under the GST zero-rated provisions, which applied as at 1 December 2010, when selling a property on behalf of a mortgagee that would attract GST, Simpson Grierson would prepare sale terms on a "plus GST, if any" basis and would zero-rate the transaction provided both parties (vendor/mortgagee and purchaser) met the criteria. This criteria being that the supply was to a registered person of a taxable activity that was a going concern at the time of supply, and that the supplier and the recipient both agreed in writing that it was the supply of a going concern, and that the taxable activity was capable of being carried on by the recipient. We would not involve the mortgagor/registered proprietor in this process. These agreements between the mortgagee and the purchaser were recognised by the Inland Revenue Department ...*
>
> *12. With regards to the timing of the agreement to zero rate the sale as the supply as a going concern, it was Simpson Grierson's practice to ensure*

that this agreement was recorded in writing on or before "the GST time of supply" which was generally the date on which the deposit was (or could be) released by the stakeholder. Accordingly, it was possible to reach such an agreement after the auction date in some cases (depending on the Particulars and Conditions of Sale).

13. In this case, I do not see any reason why the parties could not have agreed prior to payment of the deposit on 2 December 2010 that the sale would be zero-rated, provided the purchaser met all the criteria for zero-rating such a transaction.

14. Although the advice provided by Mr Humphries to Mr Li was technically incorrect, given the GST provisions which applied at the time, this is a complex area (requiring taxation expertise and/or legal training) in which I do not believe that a real estate agent could reasonably be expected to give advice and, in any event, the advice provided would not have caused any real detriment to Mr Li in the circumstances:

(a) The advice provided by Mr Humphries was provided at Mr Li's request after he was already the successful bidder at the auction and therefore, according to clause 6.1 of the Particulars and Conditions of Sale, he was bound to sign the Memorandum of Agreement and if he did not do so the auctioneer could sign on his behalf.

(b) It appears that Mr Li's company, 8 Dimensions Management Limited (which purchased the property) was GST registered at the time of the sale and therefore the GST could have been claimed back. Even if this was not the case, retrospective GST registration could have been obtained and the GST then claimed back. In either case, the purchaser's after GST position would be the same. For this reason, I do not understand the basis of Mr Li's complaint against Mr Humphries."

[32] We are also appreciative of the expert evidence from Mr K H Turner another prominent Auckland solicitor on this GST issue. For present purposes, we simply set out his paragraphs 6, 7 and 8:

6. In my opinion, the advice provided by Mr Humphries to Mr Li was incorrect. This is because in order for the sale to be zero rated as at December 2010 (under section 11(1)(m) of the Goods and Services Act 1985 ("the Act")) a written agreement between the vendor and purchaser, that the sale was a going concern, was required at the time of supply. Furthermore, the purchaser was required to be GST registered as at the time of supply.

7. The time of supply is the earlier of payment or invoice for same. I understand that the particulars and conditions of sale were signed at the auction on 1 December 2010, resulting in an unconditional agreement as at this date, and the deposit was paid, in accordance with the conditions of sale, to Barfoot & Thompson as agent for the vendor albeit one day late on 2 December 2010. Therefore, the time of supply, in this case, was 2 December 2010. Had the agreement been conditional and/or the deposit been paid to the auctioneer as stakeholder (rather than as agent for the vendor), the time of supply would not have been triggered until the agreement was declared unconditional and/or the deposit was able to be released by the stakeholder to the vendor. With regard

to GST registration, retrospective registration as at the date of supply could have been obtained.

Position Taken by Bell Gully

8. With regard to the position taken by Bell Gully I agree that a written agreement that the sale was a going concern was required at the time of supply. However, I do not agree that only the mortgagor could agree to this. In the context of a mortgagee sale, the mortgagee is acting as a vendor and selling in satisfaction of a debt meaning that the mortgagee is deemed under section 5(2) of the Act to sell as part of the mortgagor's taxable activity. Therefore, either the mortgagee or the mortgagor could have agreed to the sale as a going concern."

[33] We also note his views that either the mortgagee or the mortgagor could have agreed to the sale as a going concern and that the standard Law Society/Real Estate Institute form of auction conditions could have been used and it contains a standard going concern clause. Alternatively, an appropriate clause could have been written in to the memorandum of agreement referred to above or in a side letter.

[34] As Mr Turner also said, there would be no disadvantage to the mortgagee in agreeing to the sale as a going concern (given that the sale price was expressed as plus GST, if any) subject to any dispute by the IRD regarding the going concern status, which was unlikely. Any agreement that the sale was a going concern could have been entered into by the mortgagee (or the vendor, mortgagor or supplier) and the purchaser at a later date. As he also pointed out, in any event the company which the purchaser used was GST registered at material times but, in any case, the purchaser could have subsequently obtained retrospective GST registration. Mr Turner was emphasising that there had been no need for the vendor's solicitor to require the complainant purchaser to pay GST at settlement.

Stance of the Complainant

[35] It was common ground that the advice the appellant gave the complainant on GST was wrong, although the appellant maintains that the position is complex and that the position Bell Gully has taken is disputed. As we note above, it is arguable whether that advice of the appellant was erroneous. In any event, the appellant argues that he should not have been found guilty of unsatisfactory conduct because:

[a] the Committee based its decision on incorrect findings or conclusions, namely:

  [i] that the appellant was the auctioneer;

  [ii] that the appellant should have been fully cognisant of the GST position and did not display requisite knowledge;

  [iii] that the appellant's conduct applied pressure on the complainant to sign the sale and purchase agreement.

[b] the Committee failed to give sufficient weight to various circumstances, namely:

[i] that the appellant was asked to advise on the GST status of the transaction after the complainant had successfully bid for the property and was obliged to sign the sale and purchase agreement;

[ii] the essence of the complaint was that the complainant was misled as to his GST status and therefore suffered a loss when GST was payable;

[iii] the complainant failed to undertake due diligence before bidding for the property; and

[iv] the appellant provided advice in unusual circumstances.

[36] As a secondary submission, the appellant argues that the Committee should have exercised its discretion to take no further action.

[37] Mr Rea carefully reviewed the facts of this case and submits that the appellant's conduct does not meet the threshold of unsatisfactory conduct. He also made helpful submissions that even if we consider that a finding of unsatisfactory conduct is available to us in respect of the appellant, it would nevertheless be appropriate in all the circumstances for us to exercise our discretion to take no further action.

[38] Mr Rea particularly referred to Rule 5.1 of the Real Estate Agents Act 2008 (Professional Conduct and Client Care) Rules 2009 which reads:

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

[39] Mr Rea thoroughly covered the bases of the Committee's decision for finding unsatisfactory conduct and submitted that it failed to give sufficient weight to a number of relevant circumstances. He particularly submitted that, in any case, we should determine that no further action is warranted in all the circumstances.

[40] He particularly emphasised that the appellant had not been the auctioneer as the Committee had stated initially but corrected in its penalty decision. He submitted that the Committee was wrong in its view that the appellant should have been fully cognisant of the GST position.

[41] Mr Rea also submitted that the evidence does not show that the appellant pressured the complainant in any way to sign the agreement after the auction and there is no evidence of inappropriate pressure.

[42] Mr Rea noted, inter alia, that the appellant was asked to give some advice to the complainant about the GST issue at a point when the complainant was already legally bound to sign the memorandum of sale. He emphasised that, in any case, the complainant has suffered no loss and, as an experienced purchaser, could have undertaken better due diligence and obtained advice himself about his likely GST situation on purchase.

[43] Mr Rea also dealt with the Committee's discretion under s.80(2) of the Act to take no further action on the grounds that further action is unnecessary or inappropriate in all the circumstances. He submitted that the conduct of the appellant falls at the lower end of the scale of unsatisfactory conduct if it is unsatisfactory conduct at all, which he does not accept.

[44] Mr Rea, as did the expert witnesses, seemed to be putting it that whether the property was capable of being sold as a going concern, and therefore zero rated for GST, was a complex legal area capable of being misunderstood. We accept that it is an area capable of being misunderstood.

[45] We agree with Mr Rea's submission that the appellant, as a person without tax expertise, might not be reasonably expected to provide appropriate advice regarding the GST implications of the sale to the complainant on the spot. We accept there is also the element that the relevant section of the GST Act has been subject to changes. It was changed, with effect as at 1 April 2011, to add as s.11(1)(mb) the more simple basis that there is zero rating for a supply of land made by a registered person to another registered person who acquires the land with the intention of using it to make taxable supplies and the land will not be used as a principal place of residence of the purchaser or any associated person. However, that change is subsequent to the events of this case.

Stance of the Authority

[46] It is submitted for the Authority that the Committee's decision was correct because:

[a] irrespective of whether the appellant was the auctioneer, he chose to give advice to the complainant in his role as a licensee and his advice was deficient;

[b] the Committee was correct to find that the appellant should have ensured he was fully cognisant of the GST position when he gave the complainant advice on that matter;

[c] providing incorrect advice can be seen as a form of pressure insofar as it operates to give misplaced assurance to a purchaser; but again, irrespective of whether pressure was applied, and whether it was reasonable, the issue is the provision of incorrect advice on the important matter of GST liability.

[47] It is further submitted for the Authority that:

[a] whether or not the complainant suffered a loss does not alter the question whether the appellant's conduct was unsatisfactory; and the focus in disciplinary proceedings must be on conduct not loss;

[b] the appellant did not take all reasonable steps in that neither he nor his colleagues took steps in advance of the auction to find out the position on GST liability from the mortgagor's solicitors or otherwise, and the appellant's position is that the complainant was obliged to carry out his own due diligence; yet he chose to give advice to the complainant on GST liability.

[c] whether or not the complainant should have carried out his own due diligence to ascertain the correct GST position does not change the position that the appellant's advice on GST was wrong;

[d] unusual circumstances do not alter the obligations on a licensee to ensure that advice provided to a consumer is accurate.

The Committee's Discretion to Take no Further Action

[48] We agree with Mr Hodge that s.80(2) of the Act is an important provision which provides Committees with a broad discretion to take no further action on a complaint. There are a wide range of factors which may potentially be relevant to such a decision in any given case. Section 80 reads as follows:

> ***"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."*

[49] In any case, there is considerable scope for judgment on the part of a Committee in deciding whether unsatisfactory conduct is proved. The tests in s.72 require the exercise of judgment, as may related questions which often arise under s.72, such as whether a licensee's conduct amounts to a breach of the Act, regulations, or rules.

[50] Mr Hodge submitted that once a Committee has concluded that a licensee's conduct amounts to unsatisfactory conduct, it must make a finding accordingly. He puts it that s.80(2) does not permit a Committee which has conducted an inquiry and a hearing on the papers, and concluded that a licensee's conduct falls within one or more of the four tests set out in s.72 and therefore is unsatisfactory conduct, to decide that, notwithstanding its conclusion, no further action should be taken. In other words, if a Committee is satisfied that a licensee has engaged in unsatisfactory conduct then there is no discretion to find otherwise.

[51] Mr Hodge submitted for the Authority that our decision in *Ryan v REAA & Skinner* [2013] NZREADT 45, while not specifically directed at s.80(2), is relevant to this issue. At paragraph [51] of that judgment we held:

> *"We have previously held that not every departure from best practice will amount to unsatisfactory conduct requiring a disciplinary response ... but care must be taken when applying this dicta. Any suggestion that licensee conduct must be at the more serious end of the disciplinary spectrum before a disciplinary response is warranted would be contrary to the statutory scheme of the Real Estate Agents Act 2008. The Act creates a two tier disciplinary scheme, where more serious conduct amounts to misconduct and less serious conduct to unsatisfactory conduct."*

[52] Mr Hodge also puts it that the appellant appears to, effectively, be submitting that we should apply case law decided under the Medical Practitioners Act 1995 which has a very different statutory scheme to the Real Estate Agents Act 2008. In *McKenzie v Medical Practitioners Disciplinary Tribunal* [2004] NZAR 47 the High Court confirmed that there was a two stage test in finding disciplinary liability under the Medical Practitioners Act 1995 as follows: *"... if the practitioner's conduct fell below the relevant standard (judged objectively), the Court must go on to then consider whether in all the circumstances the breach requires a disciplinary sanction."*

[53] In *S v New Zealand Law Society (Auckland Standards Committee No 2)* (High Court, Auckland, 1 June 2012, CIV-2011-404-3044 per Winkelmann J), the High Court held that the two stage test did not apply to disciplinary proceedings under the Lawyers and Conveyancers Act 2006 and held:

> *"[25] The final point raised by S in support of his appeal is that the Act required the Tribunal to first ask whether there had been any misconduct and to then ask whether such misconduct warranted the imposition of a disciplinary sanction. The two stage test proposed by the appellant is that which has been adopted in medical disciplinary cases. S argued that there was no reason in principle why the test should not equally be applied to legal disciplinary proceedings where the same community interest factor exists.*
>
> *[26] That community expectations are at stake in these proceedings, as they were in the medical disciplinary cases, adds little to the appellant's argument. Community interests are a factor common to all professional disciplinary proceedings an thus it is the applicable statutory regime rather than community interests which dictates the approach to be taken*
>
> *[27] The provisions upon which the medical disciplinary proceedings, and their two stage test are based, are very different from s.7 of the Act with which I am concerned. Most obviously, s.7 is concerned solely with a determination of the nature of the relevant conduct whereas the equivalent medical disciplinary provisions are additionally concerned with the circumstances in which sanctions may be imposed. Adopting the proposed test in this case would require the addition of a gloss to the words of the statutory provisions and one that has no justification as a matter of statutory interpretation. I decline to adopt that analysis. It would not avail S in any case given the seriousness of his misconduct."*

[54] The statutory regime under the Real Estate Agents Act 2008 is much more similar to that under the Lawyers and Conveyancers Act 2006 than it is to the regime under the Medical Practitioners Act 1995. The Lawyers and Conveyancers Act 2006 has the same two tiered disciplinary regime (unsatisfactory conduct and misconduct) as the Real Estate Agents Act 2008.

[55] We agree that the analysis of the High Court in *S v New Zealand Law Society (Auckland Standards Committee No 2*) is equally applicable when addressing ss.72 or 73 of the Real Estate Agents Act 2008. There is no justification for putting a gloss on the statutory language. If the Committee is satisfied that there has been a breach in terms of s.72 then a finding of unsatisfactory conduct must follow.

[56] Nevertheless, the Authority accepts that Committees have a broad discretion to take no further action pursuant to s.80(2). Not every error made by a licensee

amounts to unsatisfactory conduct, which it is is a matter of fact and degree to be assessed in the circumstances of each case. Errors by a licensee may, nevertheless, result in a decision to take no further action due to a variety of factors, including factors which are unique to the particular case.

[57] Mr Hodge also submits that if a Committee (or the Tribunal on appeal), has decided that a licensee's conduct was unsatisfactory in terms of s.72 of the Act then it is not open to the Committee (or Tribunal) to go on to decide to take no further action. In other words, it is not permissible for a Committee to reason that it finds unsatisfactory conduct under proved s.72, but decide to take no further action in any event. That would be to create a two step test which is not warranted under the scheme of the Act.

[58] Section 89 of the Act sets out the determination options for the Committee. The appellant pointed to s.89(3) seemingly in support of contrary argument to that of Mr Hodge above. That reads: *"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."* Again, the Authority readily accepts that the broad discretion under s.80 may be exercised following a hearing by the Committee, and in cases where the Committee finds that errors have been made by a licensee. However, that is different from saying that it is permissible for a Committee to take no further action in any case. If that were so, it would equally be permissible for a Committee to find that a matter should be considered by the Disciplinary Tribunal (s.89(2)(a)), but to decide to take no further action anyway.

[59] Having so referred to s.80(2), we understand Mr Rea's focus to be that in all the circumstances of this case the appellant is not guilty of unsatisfactory conduct. We agree, as we explain below, so that there is no need for us to consider the scope of s.80(2).

Our Conclusions

[60] In terms of ss.80 and 89 of the Act, the broad position must be that a Committee lays a charge of misconduct against a licensee for us to hear because it finds a prima facie case of misconduct; or it finds unsatisfactory conduct on the part of a licensee; or, because it does not make either of he two previous determinations, it determines there be no further action; or it considers that it does not need to decide on the first two said options or possible courses of action because, having regard to all the circumstances of the case, it is unnecessary or inappropriate to take any further action.

[61] As Mr Hodge put it, matters began to go wrong in this case when Mr Shin added on a GST component to the amount Mr Li bid at auction in arriving at the sum which Mr Li was required to pay to the vendor under the contract. Understandably, this was concerning for Mr Li who considered that the price he had to pay was the price he had bid at auction.

[62] It was this error which led to the involvement of the appellant, Mr Humphries, and the discussion about GST liability.

[63] It was also submitted for the Authority that Mr Humphries should have corrected Mr Shin's error and changed the amount payable back to that bid at auction, plus GST if any, and told Mr Shin he should get urgent taxation advice if he had any

questions about his GST liability. However, we accept Mr Humphries' evidence that he told Mr Shin to change the price back to $130,000 plus GST if any, and he did.

[64] It was submitted for the Authority that it was a significant failure on the part of Mr Humphries, an experienced licensee in this area, to not simply correct Mr Shin's error (Mr Shin being an inexperienced licensee in this area); and that, instead, he put himself in the position where he was giving taxation advice to Mr Li, which proved to be wrong. However, we find that the appellant did correct Mr Shin's error.

[65] GST issues can be complex. It is surprising that the licensees or the mortgagee sales team had not made inquiries of the mortgagee or its solicitors in advance about the GST position.

[66] It is surprising that an experienced property purchaser, such as the complainant, was confused about the GST status of his apartment purchase just after his top bid. However, he seemed to realise that his purchase would be zero rated and that he should not have been asked for GST to be added to his price and deposit. On the other hand, one would expect licensees to have had sufficient knowledge of GST, in terms of property sales, to have not been requiring GST from the complainant purchaser. In any case, prior to handling such a sale they should have given consideration to the GST situation.

[67] It is also surprising that the vendor's solicitors apparently sought GST from the complainant purchaser when his purchasing company was registered for GST and the property was *"going"* as a rental investment business and the contract only provided for GST from the purchaser if there was any GST due; and there should not have been. It seems rather basic that this transaction should always have been clearly on the basis of zero rating and that is the way it should have been handled by the licensees involved.

[68] However, we are concerned with the conduct of the appellant licensee and not with the conduct of Mr Shin or any other licensees of Barfoot & Thompson who may have been involved in the transaction at material times.

[69] Although real estate agents are not expected to be tax experts they should have a basic understanding of the application of GST to property transactions, especially in terms of the concept of a going concern. If they do not feel they can do that, then they should be alert to facilitating a prospective purchaser to prompt professional advice regarding GST.

[70] It seems to us that the appellant's involvement in this transaction was simply that when Mr Shin added GST onto the deposit immediately after the sale, the appellant (semi-correctly) advised that, because the purchaser company was GST registered, the price was to be $130,000 and the deposit was $13,000. It does not seem to us that the appellant was involved in the purchaser being later required to pay the GST content of $19,500 on settlement. The appropriate procedures for treating the supply as a going concern were available.

[71] It seemed to be accepted that the appellant gave incorrect advice over GST yet his advice seems sound to us in all the circumstances. The problem was that the procedure needed for compliance with s.11(1)(m) of the Goods and Services Tax Act 1985 was not being applied. In any case, the appellant gave sincere advice on an area of tax law which he did not quite understand on the basis that the purchaser was committed to signing the purchase memorandum and paying a deposit. That

advice was correct enough at that point. Also, we cannot regard the appellant as having pressured the complainant in any way.

[72] We cannot find any unsatisfactory conduct on the part of the appellant. The appeal succeeds and the findings of the Committee are quashed, but we observe that far more evidence and submissions were put before us than were available to the Committee.

[73] 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

_____
Ms N Dangen
Member

_____
Ms C Sandelin
Member