

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2013] NZREADT 109

READT 04/13

**IN THE MATTER OF**

an appeal under s.111 of the Real Estate Agents Act 2008

**BETWEEN**

**HUTT CITY LTD and  
JOHN ROSS**

Appellants

**AND**

**THE REAL ESTATE AGENTS  
AUTHORITY (CAC 20002)**

First respondent

**AND**

**SHARON NICKLESS**

Second Respondent

**MEMBERS OF TRIBUNAL**

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

**HEARD** at LOWER HUTT on 31 October 2013

**DATE OF DECISION** 9 December 2013

**COUNSEL**

Mr J Waymouth, barrister for appellants  
Ms J Pridgeon for Authority  
No appearance for second respondent/complainant

**DECISION OF THE TRIBUNAL**

***Introduction***

[1] Hutt City Ltd (the agency) and John Ross (a licensee and principal of the agency) (together the appellants) appeal against the Complaints Assessment Committee 20002 decision finding that they both engaged in unsatisfactory conduct. The appeal is also against the penalties imposed. The licensee was censured and the agency censured and ordered to pay a \$5,000 fine.

### ***Basic Facts***

[2] The complainant is Ms Sharon Nickless. Her mother was selling her property at 40 Fraser Street, Wainuiomata. It was listed by Linda Turner (an employee agent of the agency) and sold by agreement dated 5 March 2012. The complainant has power of attorney over her mother's affairs. The transaction was due to settle on 5 April 2012.

[3] On that morning of settlement, the complainant dropped the keys to the property off to Linda Turner at the agency. Later in the morning another such employee licensee of the agency, Donna Tschurtschenthaler ("Donna"), telephoned Linda Turner to ask if it would be possible for the purchasers to move some of their belongings into the garage. The complainant agreed to this. However, in her initial complaint she states that she never gave permission for the keys to be handed over to the purchasers prior to settlement.

[4] In the early afternoon of the same day, Donna gave the prospective purchasers the keys to the property. A little later, the purchasers' bank refused to release their mortgage funds on the grounds that they could not obtain insurance. This was because certain building renovation work had not been effected by the vendor. As a result, the purchasers had taken possession of the property before settlement occurred, and then settlement became delayed. We understand that Donna did not know of the insurance issue prior to her handing over the keys.

[5] Late that day, it was agreed that the purchasers would rent the property from the complainant until settlement could be achieved. The complainant was concerned that no formal arrangement had been made and that only \$100 was taken as a bond; yet Linda Turner had arranged a formal tenancy agreement when she heard of the problem late that afternoon.

[6] In response to the complaint, Donna stated that around lunch time on the settlement date, when she was not in the office, she received a call from the agency's office manager, Judy Robinson, to say that the husband purchaser was outside the agency's office wanting the keys. The purchaser's removal company wanted to have the truck unloaded because they had another job that day. Donna telephoned the vendor's solicitor (who was also the purchaser's solicitor) and left a message to enquire as to whether this was in order. The solicitor did not respond until 4.45 pm. In the meantime, because the purchaser was becoming agitated, Donna released the keys. Then, at about 3.00 pm, Donna received a call from Linda Turner stating that the property was not going to settle that day.

### ***A Summary of Further Relevant Evidence before Us***

#### ***Evidence from the Solicitor***

[7] The solicitor for both vendor and purchaser in this case practises in Wainuiomata. She stated that the sale and purchase transaction was straightforward until the final hours of the actual day of settlement, 5 April 2012, which was the Thursday before the 2012 Easter vacation. Late that afternoon she was advised that the purchasers could not draw down their mortgage funds because of the refusal of their insurance company to insure the property. This came out of the blue as she had been assured by the purchasers that day that they had arranged their house insurance. The purchasers had nowhere else to live as they were

contemporaneously settling the sale of their previous home; so it was essential for them that they gain possession of the complainant's property.

[8] The solicitor said that when it became known late that afternoon that the settlement would not take place, she was in complete control of the matter and there was nothing that the real estate agents could do. She emphasised that it was a legal situation requiring legal solutions and she felt it was beyond the role of a real estate agent to deal with. She appeared to be commending Linda Turner and Donna for assisting the vendor to arrange a formal tenancy agreement with the purchasers pending their ability to settle. She said that the outcome was that the purchasers had somewhere to live and the vendor received a fair rental return in the meantime.

[9] The solicitor also advised that the purchasers came to her office in tears that afternoon to advise that the insurer would not proceed with the promised insurance cover because certain fairly minor remedial work had not been effected to the property. The solicitor had previously sent her solicitor's certificate to the mortgagee/lender on the basis of her arranging insurance on that afternoon of settlement.

### ***The Evidence of Mr T G Belcher***

[10] Mr Belcher is the branch manager of the Wainuiomata office of Hutt City Ltd. He was fully in touch with this transaction as was his practice but, at midday that Thursday, he left the Wainuiomata office to attend a funeral in the Hutt Valley and did not return to his office until about 4.00 pm. There had been no inkling that problems would arise with settlement of this transaction, although he knew that settlement had been previously delayed to allow the vendor to complete certain remedial work. He thought there could be a possibility, in terms of the provisions of the agreement for sale and purchase, that funds might be withheld from the vendor on settlement to cover inspection of the work.

[11] Mr Belcher explained that the Wainuiomata office has Ms Judy Robinson as its office manager and part of her duties "*were the responsibility for passing keys over to the buyers, following settlement*". He stated that the policy of Hutt City Ltd is that keys may only be handed over to the buyers upon written confirmation of settlement being received from the vendor's solicitors and Ms Robinson was well aware of that. However, he was unavailable to supervise the situation arising in this case because he was at a funeral and he did not learn until the following Tuesday, being the next working date after Easter, what had occurred regarding the keys and of the delay in settlement.

[12] Mr Belcher made it clear that apart from his supervision of agents as branch manager at Wainuiomata, Ms Robinson was a sound and experienced office manager and she and the agents knew they could also deal with the manager of Hutt City Ltd at Lower Hutt or with the other appellant Mr J S Ross. Mr Belcher noted that a factor in the problem situation which developed was that his staff could not make contact with the solicitor who was acting for vendor and purchaser; and also that solicitor had made it clear that she was in control of the situation and real estate agents should not be making decisions about settlement procedures.

[13] Mr Belcher emphasised that, if he had not been at the funeral, he would have been in his office and dealt with the pressure situation which developed for Donna. He said he would have put a stop to the idea of handing over the keys prior to

settlement and he would have dealt with the solicitor and the purchasers directly himself.

[14] However, he said that Donna took control of the situation and became unstopably determined to resolve the purchasers' housing problem and handed them the keys prior to settlement. He felt that Donna had acted on a "rogue" basis, which was quite out of character for her, and that she should have conferred with her fellow agent, Linda Turner, who is Donna's supervisor in the absence of Mr Belcher.

[15] He noted that Linda Turner put things back on course when she ascertained what had happened by liaising with the lawyer and arranging the formal tenancy agreement. Regrettably, Linda Turner had not known earlier of the pressure placed on Donna to hand over the keys to the purchasers and Donna had simply taken the keys without the knowledge of anyone.

[16] Mr Belcher emphasised that, as a matter of practice, the agency did not hand over keys until it was advised by the vendor's solicitor that settlement had taken place, and that aspect is always handled by the office manager at Wainuiomata, Judy Robinson. However, he said that Donna had got into such an emotional and stressed state on that said settlement day that she would not listen nor take advice from anybody, but he would have taken control of the situation and the keys had he not been at a funeral.

[17] Mr Belcher also said that Linda Turner did not know what was happening until after the keys had been handed over because she is an agent and was out of the office on other business. Accordingly, with Mr Belcher and Linda Turner out of the office, matters were in the control of Judy Robinson the office manager, but Donna simply took matters into her own hands, despite her training to the contrary, when she had a protocol in such a situation to deal with the Lower Hutt branch manager or with Mr John Ross.

### ***Evidence from Mr John Ross***

[18] Mr Ross is a senior and very experienced real estate agent who has made a significant contribution to the industry. Of course, he is most concerned at having been found guilty of unsatisfactory conduct by the Committee.

[19] He gave evidence about the totality of training, coaching, and support given to all his salespersons and to his availability and activities in a supervisory role to them; although the day to day running of many matters is left to his company's branch managers. However, he outlined the extensive lengths which he and his company go to in terms of their obligation to properly manage and supervise their salespersons.

[20] Mr Ross was not actively involved with the facts of the above property transaction and, until the following Tuesday after Easter that year (last year), simply did not know anything about the keys prior to settlement issue. He has branch managers at both Wainuiomata and Lower Hutt available for the conduct of daily business and supervision and management of salespersons. Also his office manager at Wainuiomata, Judy Robinson, had previously been a salesperson and fully understood the obligations of Hutt City Ltd regarding the handing over of keys, more so than might be expected from an office manager.

[21] Mr Ross, as the principal agent of the company, had always been particularly aware of the provisions of s.50 of the Act, especially s.50(1) (set out below) which requires that a salesperson, in carrying out any agency work, must be properly supervised and managed by an agent or branch manager. He had been conscious of the need for effective control under s.54 of the Real Estate Agents Act 1976. He noted that under the new Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, Rule 8.3 reinforces that requirement but those rules did not take effect until 8 April 2013.

[22] Mr Ross generally covered the above facts. He also seemed concerned that he felt he had not been properly interviewed in the course of the Committee's investigation.

[23] Mr Ross noted that Hutt City Ltd, in conjunction with The Professionals Real Estate Group, had developed through time an office policy and procedures manual and made all its salespersons familiar with that. He also seems to work on an ongoing basis with the group's legal counsel to facilitate the education of its agents. He covered that Donna is well aware of her legal obligations and well trained, but he felt that she was under extreme duress from the purchaser to facilitate release of the keys in this case.

[24] Inter alia, Mr Ross covered the agency's requirements and training about handing over keys and he stated that the agency *"has a specific written policy in its Policy and Procedure Manual regarding release of keys, and as an absolute rule keys are not released to a purchaser until the vendor's solicitor has authorised us to do the same"*.

[25] Mr Ross emphasised that, at all times, the solicitor was in complete and effective control of the transaction; and that on the morning of the settlement day the buyers had asked if they could place some boxes under the house and the vendor had agreed they could have possession of the garage for that purpose prior to settlement. However, in the afternoon of that day Donna released the house keys herself on an unauthorised basis due to pressure from the purchasers themselves. Mr Ross emphasised that Donna did that despite all the coaching and training and availability of advice and, without him knowing, and that at material times had appeared irrational due to the extreme pressure from the purchasers.

[26] It seems that the vendor had agreed that the purchasers could move some of their belongings into the garage before settlement and, upon learning late in the day that they had obtained the keys and were occupying the house, agreed they could stay there as tenants. This led to Linda Turner and Donna liaising with the solicitor to complete a sensible tenancy arrangement. It seems that, because the vendor was then departing overseas, she made a complaint more to give impetus to obtaining final settlement than to criticise the appellants. We understand she has not expressed any dissatisfaction to or about them.

[27] There is no doubt that Mr Ross is mortified and most regretful that his management systems were not complied with due to the determination of a particular real estate agent, or what he describes as an overt act by Donna herself.

[28] Mr Ross pointed out that, in not much more than five minutes or so, he can respond to a call from his Lower Hutt office to come to his Wainuiomata branch. However, he points out that he cannot respond to a problem if he does not know about it, and Donna had simply ignored his management structures which was an

out-of-character action on her part. He said he was simply not in a position to have stopped her handing over the keys, and nor was his management team, because that seems to have been done furtively by Donna under stress. No doubt it never occurred to Donna that settlement would not take place that afternoon as planned.

[29] Mr Ross said he reacts quickly and, had he known, would have immediately driven to the Wainuiomata office and taken control of the situation and the stress that Donna was under. He emphasised that she knew that she was breaking his rules but she was at that moment hell-bent on assisting the purchasers obtain a home. We note that she is still employed by the appellants who regard her breach as a one off inexplicable incident.

[30] Simply put, Mr Ross says that Donna was well trained by him and knew her duties and responsibilities but “*went rogue*” under pressure and feelings of sympathy for the purchasers needing possession of a home.

### ***The Committee’s Decision***

[31] The Committee determined that releasing the keys to the purchasers, without the consent of the complainant or her solicitor, was a breach of r.9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. Rule 9.1 provides: “*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.*”

[32] The Committee further determined that while the complainant had raised concerns over the tenancy arrangements, Linda Turner was acting on instructions from the complainant’s solicitor. This aspect of the complaint was not taken any further by the Committee.

[33] The critical issue for the Committee was lack of supervision of Donna Tschurtschenthaler. The Committee found it concerning that there was no reference to any support given to either her or Linda Turner when the purchaser was described as becoming agitated. The committee felt there was little reference to any support or advice from the licensee and found a breach of s.50 of the Real Estate Agents Act 2008.

### ***Discussion***

[34] The issue before us is whether Donna received adequate supervision from Hutt City Ltd and John Ross.

[35] We accept that supervision of salespersons is imperative for the proper functioning of the real estate industry. Section 50 of the Real Estate Agents Act 2008 provides:

#### ***“50 Salespersons must be supervised***

- (1) *A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager.*
- (2) *In this section **properly supervised and managed** means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure—*
  - (a) *that the work is performed competently; and*

(b) *that the work complies with the requirements of this Act.*”

[36] The appellants cite our decision in *Donkin v Real Estate Agents Authority* [2012] READT 44, where we stated:

*“[12] We need to make it clear that we do not consider that simple assertion that staff have been told to act in a certain way and have not is a proper discharge of the obligation to supervise under s.50. More is required. Section 50 makes this perfectly clear.”*

[37] Counsel for the appellants accepted that it is not a satisfactory excuse or discharge of an obligation under s.50 of the Act that Donna Tschurtschenthaler was advised not to act in this way. It is not enough that the agency policies contain references to not releasing the keys. Section 50 clearly requires more.

[38] The Committee was not persuaded that Linda Turner and Donna Tschurtschenthaler were adequately supervised or supported in a situation where the purchaser was obviously *“extremely agitated”*.

[39] In his evidence, Mr Ross places reliance on the fact that, by telephone, Donna first instructed the office manager, Judy Robinson, to release the keys to the purchasers who were in the office carpark. Ms Robinson is said to have refused the request, and consequently, Ms Tschurtschenthaler drove to the office to override the previous decision in order to release the keys. Ideally, this evidence would come from Ms Robinson herself and not from Mr Ross. This was without Timothy Belcher, the branch manager, knowing because he was away at a funeral. This evidence does not seem to have been before the Committee. It is a put as a matter for us whether this new evidence suggests there was adequate supervision given to Ms Tschurtschenthaler in the circumstances.

[40] Ms Pridgeon, as counsel for the Authority, disagreed with the appellants’ submission that it is difficult to see how assistance could have been given even if the agency or the licensee were more aware of the matter as it progressed. Ms Pridgeon responds that Donna clearly felt under extreme pressure to hand the keys over to the purchaser. In her initial statement in response to the complaint, Donna states: *“I released the keys because I was under extreme pressure and as I believed there would be no delay in settlement. I did it out of empathy for my purchasers not for any other reason.”*

[41] Ms Pridgeon puts it that an experienced supervisor, in a more objective position who was not under the same pressure, would have been able to assist Ms Tschurtschenthaler in the situation and remind her of the rules regarding the handing over of keys (effectively giving possession) prior to settlement; and this is what s.50 would require at least.

[42] Simply put, in terms of s.50 of the Act a salesperson must be properly supervised and managed by an agent or a branch manager in the sense that the salesperson’s work is carried out under some experienced direction. This is to ensure that the salesperson’s work is performed competently and complies with the requirements of the Act.

[43] We have heard far more evidence than was available to the Committee. In the ordinary course, Mr Belcher would have been available to deal with the crisis experienced by Donna but he was at a funeral and that is understandable.

[44] It was unfortunate that the other agent at Wainuiomata (Linda Turner) was out on business and that Donna did not contact her.

[45] It seems to us that the management structures which the appellants had in place are more than adequate and sensible and that it would be quite unreasonable to expect more management staff to be retained. All in all, the management structure we have described above seems a very satisfactory system but, on the day described above, it did not work because Donna succumbed to pressure from purchasers and unilaterally disobeyed the system. In the ordinary course she probably could not have done that, because Mr Belcher would have been present or Linda Turner the other agent might have known about the issue. Again the manager (Judy Robinson) might have contacted Mr Ross but then the manager did not know for some time that the keys had been taken behind her back.

[46] We think that strict compliance with the requirements of s.50 of the Act is fundamental to the real estate industry functioning properly. However, it needs to be applied in terms of sensible business practice and common sense. It cannot be that supervisors and managers need to have reserve backups in their own office when that is available 5 to 15 minutes away by car. In any case, the necessary and proper systems, with training systems, were in place but, perversely, a normally sensible real estate agent succumbed to human pressure from purchasers and prematurely handed over keys to the property on good faith.

[47] We note that the Committee felt obliged to find that there was little evidence adduced to it to show that supervision or support was provided to Donna. However the evidence adduced to us shows to the contrary.

[48] Simply put, there were appropriate management processes in place but the handing of the keys took place on a somewhat furtive basis. It is commendable that the management processes of the agency then facilitated a sensible enough interim tenancy arrangement. It cannot be that those in a management position can never leave the office during business hours and, in this case, that Mr Belcher attended a funeral is perfectly understandable.

[49] The evidence adduced to us shows that Mr Ross insists on and achieves high management standards.

[50] For all that has been said about Donna, it should be understood that she was placed under intense pressure as a human being. She merely sought to smooth the way for settlement without realising that important issues such as insurance problems can unexpectedly surface at the last minute as happened here.

[51] Ms Pridgeon is correct that this problem arose in the absence of the branch manager at a funeral; and there being no one of his stature in his place; and it happened that Donna then needed help which was not available. However, we have explained above that the appellants' management systems cannot be faulted and an agent succumbed to human pressure.

[52] In all the circumstances we do not think it just that the appellants have been found guilty of unsatisfactory conduct and we quash that finding and, consequentially, the fine imposed against the agency. Had the Committee heard the more extensive evidence available to us, the complaint could have simply been dismissed.



[53] 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.

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Judge P F Barber  
Chairperson

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Ms N Dangen  
Member

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Ms C Sandelin  
Member