BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 14

READT 062/12

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**MARK MILLER**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20003)**
	First respondent
AND	**SHANE ROBINSON**
	Second respondent

MEMBERS OF TRIBUNAL

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

HEARD at DUNEDIN on 29 November 2012

DATE OF DECISION 13 February 2013

COUNSEL

Mr C S Withnall QC, for appellant
Mr R M A McCoubrey, for the Authority
Mr Peter J Napier, for second respondent

DECISION OF THE TRIBUNAL

Introduction

[1] Mark Miller ("the appellant") appeals against the 22 August 2012 decision of Complaints Assessment Committee 20003 to take no further action on his complaint against fellow licensee Shane Robinson ("the licensee"). Should the Committee have found instead that the licensee's conduct described below breached the Act?

Background

[2] The appellant is managing director of Edinburgh Realty Ltd (Edinburgh). The licensee is a former real estate agent for Edinburgh who now works on contract for Harcourts franchise as Harcourts Highland Real Estate Group Ltd ('Harcourts').

[3] The appellant contends that after the licensee had ended his employment relationship with Edinburgh and had gone to work for Harcourts, the licensee concluded a sale transaction of Tirohanga Road, North Taieri, Dunedin, on behalf of a vendor family trust which had previously listed the property with Edinburgh. There is no dispute that the purchaser had been introduced to the property by the licensee during the term of the Edinburgh listing agreement while he was working for Edinburgh.

[4] The appellant therefore alleged that the vendor trust was exposed to a risk of paying two commissions, one to Edinburgh and one to Harcourts.

[5] A Mrs Bardwell, a vendor and trustee (with her husband) of the vendor family trust, stated to the Committee that, at the time of listing the property for sale with Harcourts, the licensee *"fully covered the commission issues"* with her and that she was *"completely aware of the situation"*.

[6] The Committee's essential conclusion on those facts is set out at its paragraphs 4.5 to 4.7 as follows:

> *"4.5 On the basis of the evidence before it, the Committee is in no doubt that the licensee made the client aware of her potential obligations to Edinburgh. It appears that the licensee has laboured the point but that the client was determined to deal with him regardless of that fact because she trusted him.*
>
> *4.6 For their part, the licensee and his new company, Harcourts, undertook not to pursue their fee if a dispute arose and this, in effect, rendered the double commission a moot point.*
>
> *4.7 The Committee has not turned its mind to the merits of the commission dispute between the companies but it is disappointed to note that the consumer was served with papers threatening legal action prior to any serious attempts on the part of the companies to resolve the issue using industry protocols."*

[7] In relation to an allegation that the licensee removed files from the appellant, the Committee found that: *"4.9 The Committee considered the matter of the removal and subsequent return of files from the complainant's premises to be an employment issue which is not a matter to be tested in this forum under the circumstances."* We explain below that while any removal of files might be an employment issue, it is also very much an issue about the licensee's conduct in the course of his changing employers.

Evidence of the Appellant

[8] The appellant emphasised two aspects of his complaint: namely, that the sale of the Tirohanga Rd property, in his view, exposed the vendor to a double commission; and that documents were taken from his real estate company (Edinburgh) without authority and have still not been returned.

[9] The appellant stated that the licensee and his wife were both licensed real estate salespersons contracted to Edinburgh. On 14 September 2011 the vendors of Tirohanga Rd (M and K Bardwell), as trustees for a family trust, listed that property

for sale with Edinburgh, through the second respondent as listing agent, on a 90 day sole agency to revert to a general agency in mid December 2011.

[10] On 28 February 2012 there had been a written offer through Edinburgh from a Mr J Stafford, but that lapsed and the offer document has disappeared.

[11] On Friday 2 March 2012, the licensee came to the appellant's office and stated that the licensee and his wife were considering leaving Edinburgh and would make a final decision over the weekend. Later that day the appellant noticed that several files and some boxes of papers had gone missing.

[12] In the late afternoon of 5 March 2012 the licensee and his wife came to the appellant's office and resigned. The appellant asked them to return all the files and the wife said they merely held copies, but the appellant responded that he wanted all the originals. They left the building and sent an email at 5.09 pm that day officially resigning from Edinburgh.

[13] On the morning of Tuesday 6 March 2012, the licensee's wife left the appellant a telephone message outlining the advertising effected on seven properties they had been dealing with. That caused the appellant to note that all files for those seven properties were missing so that he telephoned the licensee and left a message that the licensee return the files as soon as possible *"or I would have to call the Real Estate Agents Authority"*. He sent further emails to that effect and requiring all such data to be returned by 3.00 pm that afternoon. This resulted in a quantity of material being returned in the early afternoon but, because the appellant felt there was a substantial amount missing, he sent a further email detailing his concerns.

[14] At 8.50 am the next morning (7 March 2012), the licensee arrived at the appellant's office with eight boxes of files. It took the appellant one and a half days to organise that material and he found that none of the specific documents he had requested had been returned.

[15] Also, on 7 March 2012 the appellant received two cancellation of agencies notices dated 5 March 2012 for particular properties showing that the licensee had taken over such marketing on the basis of then being at Harcourts.

[16] Communications followed between the appellant and the licensee about a Sunninghurst Rd, Dunedin, property through which on 3 March 2012 there had been six groups of people with two interested in purchasing. The appellant found important file data for that property to be missing. That afternoon he was asked to call Mr Kelvin Collins, the manager of Harcourts, to discuss the *"transition"* of the licensee and his wife to Harcourts. Mr Collins seemed to want to share commissions on Harcourts' sales which had been originally listed with Edinburgh and where purchasers had been introduced to the properties through the licensee and his wife. The appellant told Mr Collins that would not be necessary because, if everything were to be done properly and by the book, there would be nothing to discuss. Later that evening, the appellant received an email from the licensee and his wife stating they had returned all Edinburgh material and that all future communications were to be with Mr Collins.

[17] On the following Sunday, the licensee arrived at the appellant's home and handed him two folders about two particular properties and also referred to the Sunninghurst property. He stated that Edinburgh would get paid commission and

that the information Edinburgh was missing must be in another folder. The appellant stated that he was less worried about the payment but *"was more concerned about him [the licensee] withholding our information, and sending me a bunch of Christian names amounting to nothing. He began to get argumentative, so I terminated the conversation"*.

[18] The appellant said that it took 11 days for him to get the information which he had wanted from the licensee about the Sunninghurst Rd property, and that he did not get the information he requested about any other property.

[19] During the week of 12 March 2012, the appellant discovered that the licensee had given the file for Tirohanga Rd to another Edinburgh agent but it did not contain the original offer signed by Mr Stafford.

[20] On Friday 16 March 2012 he found out that Mr Stafford had purchased that Tirohanga Rd property through the licensee under a Harcourts agency. The licensee stated that Mr Stafford was advised by Edinburgh that Mr Stafford was introduced by the licensee during his time at Edinburgh but the transaction completed during the Harcourts agency. The final agreement for sale and purchase contained the usual clause for commission but payable to Harcourts. At that time, Edinburgh had not been notified in any way that its agency regarding the Tirohanga Rd property had been terminated.

[21] The appellant congratulated the licensee on the sale and asked if Harcourts would be charging the vendors commission also. When there was no response to that, the appellant lodged a complaint with the Authority on 5 April 2012.

[22] There followed a number of communications between the appellant and the licensee involving commission disputes over various properties and, in particular, with regard to Tirohanga Rd for which Edinburgh had sent a commission statement to the vendors who seemed shocked as they had thought their agency with Edinburgh had been cancelled.

[23] That led to the licensee contacting the appellant and putting it that the dispute was a company to company matter and that the appellant should approach Mr Collins at Harcourts about it. On 24 April 2012, the appellant advised the licensee that Edinburgh had felt its only avenue to have been to pursue the commission from the vendors and put it that the licensee had exposed the vendors to double commission. The appellant also stated that if Edinburgh did not receive the $25,000 in question by 1 May 2012, then it would have no option *"but to pursue the vendor"*.

[24] On 1 May 2012, Mr Collins put it to the appellant by email that 50 percent of the commission be apportioned to the licensee, 40 percent ($10,000) to Edinburgh, and 10 percent to Harcourts. On that day Edinburgh received payment of $10,000. The appellant rejected that proposition and Mr Collins threatened to complain to the Real Estate Agents Authority if Edinburgh proceeded to seek the balance of the commission. In fact, Edinburgh so instructed its solicitors to proceed.

[25] The appellant was carefully cross-examined on behalf of all parties. We understood that if the licensee had not left Edinburgh then the latter would have got 50 to 70 percent of the total commission of $25,000; but it has worked out that Edinburgh has received 100 percent of the commission.

The Evidence for the Second Respondent Licensee

The Witness Mr Collins

[26] Mr Collins emphasised that on 8 March 2012 he telephoned and left a message with the principal of Edinburgh (Mr M Elford) to discuss handling any potential disputes arising out of the resignations of the licensee and his wife. That call was returned by the appellant who advised that there was no point in meeting for such a discussion because Edinburgh had its own policy and procedures for dealing with such issues.

[27] Mr Collins also said that when the vendors of the Tirohanga Rd property asked the licensee to relist their property with Harcourts, the licensee came to Mr Collins for advice. Harcourts took the view that the agency with Edinburgh had been cancelled by the vendors and, if the vendors insisted on continuing with the licensee, then the latter would have to work under a Highland agency. Accordingly, Highland listed the property on the basis of the licensee informing the vendors of the commission risks due to Edinburgh claiming an introduction. Mr Collins said he agreed that Highland undertake not to pursue commission from the vendors if a dispute arose so that, he asserted, the vendors were never exposed to a double commission.

[28] Mr Collins then referred to a commission invoice being sent by Edinburgh to the vendors prior to the sale contract becoming unconditional, and before Highland had collected a deposit, and to communications between the parties about that. He said that the appellant was not prepared to discuss the matter and demanded payment of the full commission by 5.00 pm on 1 May 2012, and that led Mr Collins to make his own apportionment of the commission referred to above. He concluded his evidence-in-chief as follows:

> *"8. We then became aware that [the appellant] had delivered a letter to the vendors threatening legal action for the full commission. On 18 May 2012 we forwarded the balance of the commission in the sum of $15,000 to Edinburgh on a without prejudice basis. This was in accordance with our undertaking to the vendors that they would not be put in a double commission situation"*.

[29] Mr Collins was thoroughly cross-examined for all parties.

The Evidence of the Licensee

[30] Then there was detailed evidence from the licensee, the second respondent, but much of it has been covered above. He emphasised that on 12 March 2012 he was contacted by Mrs Bardwell as an owner of 135 Tirohanga Rd, and by when he was working for Highland, and she asked him to relist the property and to approach the Staffords to see if they could still be interested in purchasing it. His evidence-in-chief then continued as follows:

> *"Sunninghurst Road*
>
> *9. I explained to Mrs Bardwell that I was unable to list the property as I had resigned from Edinburgh and there was no agency agreement for me to sell the property. She advised me that she did not want to proceed with Edinburgh as she had only used Edinburgh because I had been there.*

She further told me that she did not believe anyone else had knowledge of the property or of the Staffords. I therefore sought advice from the General Manager of Highland, Kevin Collins, who contacted the Harcourts Business Development Manager in Christchurch for advice. I was told that I could list the property under a new listing agreement with Highland.

10. *I was aware of my obligations to inform the vendors of the risks pursuant to Rule 9.11 of the Professional Conduct and Client Care Rules 2009. Therefore, prior to entering into the agency agreement, I fully explained to Mr and Mrs Bardwell the implications of entering into a further agency agreement with Highland. I explained to them that as I had been with Edinburgh when the Staffords were introduced to the property, Edinburgh could potentially claim a fee from them under their agency agreement.*

11. *I undertook not to pursue Highland's commission from the vendors in the event that a dispute over the right to the commission arose which meant they would avoid being exposed to two commission fees. I made this undertaking after consulting my supervisors as my interest was in selling the Bardwells' property ahead of any issue regarding the commission from the sale. At all times it was very clear that only one commission would ever be payable on the property.*

12. *The agency agreement was entered into between Highland and the Bardwells on 13 March 2012 (CAC Tab 3, pgs 44-47]. It is noted on the agreement that Edinburgh was appointed prior to the agreement with Highland and the vendors have acknowledged the advice of the need to cancel such prior appointments because if a sale is effected by or through the instrumentality of any other real estate agent, they may be liable for more than one fee or damages. The vendors have signed their acknowledgement of that advice and written alongside it the word "cancelled" with a tick [CAC Tab 3, pg 47]."*

[31] The licensee also stated that he did not reply to the appellant's letter of 28 March 2012 asking whether Harcourts was planning to charge commission also, because he considered that information to be confidential between him and the Bardwells so he forwarded the email to Mr Collins to deal with.

[32] The licensee also emphasised that, at the date he and his wife resigned from Edinburgh (5 March 2012), they had approximately 15 properties listed for sale between them and it was their usual practice to carry current property files with them. He said they felt they had a duty to let their current vendors know that they were changing firms and how it would affect those vendors; so they did not immediately return the files to Edinburgh.

[33] He said that there was nothing unusual about Edinburgh finding some boxes of files missing because he and his wife stored their completed files off-site at their house or at their parents' houses; and had done so for approximately four years. He also seemed to be saying that some of the communications from the appellant went to an email address only used by his children and he did not receive them. He seemed to be saying that he did cooperate in returning material to Edinburgh; and he does not accept that a number of documents went missing or that he deleted emails from Edinburgh's system. He said he even returned files, pads, pens, keys, lock boxes and the like. He then stated:

"27. I believe that Mr Miller's complaint regarding the files is an employment matter. My wife and I did not have employment contracts with Edinburgh and there was no system in place for handling our resignation. However, we complied with Mr Miller's requests and returned everything to him as soon as practically possible."

[34] The licensee finished his evidence-in-chief as follows:

"Sunninghurst Road

29. At paragraph 13 of his statement Mr Miller says that one of the Edinburgh's agents visited the owners of the property in Sunninghurst Road and was advised by the owners that there had been six groups of people through the house on Saturday 3 March 2012 and two of them were interested in purchasing the property. That is not correct. The open home for the property took place on Sunday 4 March 2012, not Saturday 3 March 2012 and I advised the vendors after the open home that there was interest from two parties, not that two parties were interested in purchasing. This is consistent with Mr Miller's email to me dated 8 March 2012 [CAC Tab 1, pg 19]. I gave the file for Sunninghurst Road back to Edinburgh and I did not remove anything from it. When Mr Miller requested the details of the interested purchasers I gave him the rough details from memory by text message on 8 March 2012 [CAC Tab 3, pg 66].

30. On 14 March 2012 I received a text message from Mr Miller again requesting contact details for the two interested parties from the Sunninghurst Road open home [CAC Tab 3, pg 69]. I tracked down the telephone numbers of the two interested purchasers through their place of employment and the telephone book and I texted the details to Mr Miller later that day [CAC Tab 3, pg 70].

Grendon Street

31. At paragraph 26 of his evidence Mr Miller refers to a property at Grendon Street and a wrangle with me over the commission. I was never involved in any wrangle with Mr Miller over the commission for this property. An arrangement was made to have the commission split 50:50 between myself and Matt Shepherd, a real estate agent at Edinburgh. Documents were drawn up by the vendor's solicitor to ensure that the payments were made [CAC Tab 3, pgs 60-63]. Despite the agreement, payment from Edinburgh was still withheld for a period of two weeks as set out in my text message to Mr Miller on 20 April 2012 [CAC Tax 3, pg 71]."

[35] The licensee was comprehensively cross-examined on behalf of all parties. In particular he asserted that he had never told Mrs Bardwell that she would be liable for two commissions but said he had a full and frank discussion with Mr and Mrs Bardwell that, whatever happened, there would only be one commission payable; although that did not seem to be put in writing. We understood that he took legal advice as to his commission entitlement.

Relevant Legal Provisions

[36] Sections 72 and 73 of the Real Estate Agents Act 2008 ("the Act") are in the following terms:

> ***"72 Unsatisfactory conduct***
>
> *For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that –*
>
> *(a) Falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
>
> *(b) Contravenes a provision of this Act or any regulations or rules made under this Act; or*
>
> *(c) Is incompetent or negligent; or*
>
> *(d) Would reasonably be regarded by agents of good standing as being unacceptable.*
>
> ***73 Misconduct***
>
> *For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct –*
>
> *(a) Would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or*
>
> *(b) Constitutes seriously incompetent or seriously negligent real estate agency work; or*
>
> *(c) Consists of a wilful or reckless contravention of –*
>
> *(i) This Act; or*
> *(ii) Other Acts that apply to the conduct of licensees; or*
> *(iii) Regulations or rules made under this Act; or*
>
> *(d) Constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee."*

[37] Also relevant to this appeal is Rule 9.11 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (Rules), which reads:

> *"9.11 A licensee must not invite a prospective client to sign a sole agency agreement without informing the prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded".*

[38] We also set out the definition of *"real estate agency work or agency work"* contained in s.4 of the Act, namely:

*"**Real estate agency work or agency work***

(a) means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction; and
(b) includes any work done by a branch manager or salesperson under the direction of, or on behalf of an agent to enable the agent to do the work or provide the services described in paragraph (a); but
(c) does not include –

(i) the provision of general advice or materials to assist owners to locate and negotiate with potential buyers; or
(ii) the publication of newspapers, journals, magazines, or website that include advertisements for the sale or other disposal of any land or business; or
(iii) the broadcasting of television or radio programmes that include advertisements for the sale or other disposal of any land or business; or
(iv) the lending of money on mortgage or otherwise; or
(v) the provision of investment advice; or
(vi) the provision of conveyancing services within the meaning of the Lawyers and Conveyancers Act 2006"

[39] In *Dunn v Murray* [2012] NZERADT 56, the Tribunal considered the approach to be adopted in an appeal under s.111 of the Act where a Complaints Assessment Committee has determined to take no further action. The Tribunal held:

"[18] Considering all of these matters and the important function and protection of the public contained in the purposes of the Act (s.3) we consider there is no general rule preventing an appeal from being considered by this Tribunal, however we consider that the Tribunal's role on an appeal from the exercise of a discretion <u>not</u> to prosecute on appeal will be limited to the consideration of the four grounds set out above, i.e. treated as an appeal from a decision in exercise of a discretion.

[19] Thus in this appeal the Tribunal would only consider the appeal if it could be said the decision was an error of law, took into account irrelevant considerations, or failed to take into account relevant considerations, or is plainly wrong. This is an approach which recognises many of the police reasons applicable to criminal charges but still allows an appeal under s.111."

Issues

[40] The appeal against the Committee's decision to take no further action is by way of rehearing before us. We have the material available to the Committee and also the further material filed by the parties to this appeal. Further, we have the benefit of hearing the evidence given at the appeal hearing before us.

[41] We must assess all the evidence and reach our own judgment as to the facts in dispute, *Kacem v Bashir* [2010] NZFLR 884 at [32]. The realistic issue is whether the second respondent is guilty of an unsatisfactory conduct within the meaning of s.72 of the Act.

A Summary of the Main Submissions for the Parties

For the Authority

[42] Mr McCoubrey noted that the issues were factual matters for us to decide having heard the evidence.

[43] He referred to the licensee denying having deleted any emails and to the issue whether file material was appropriately returned to Edinburgh being a matter for us to decide. Mr McCoubrey put it that while there is the concern of the appellant's file information being insecure, no one seems to have been disadvantaged in this case.

[44] Mr McCoubrey emphasised that Mrs Bardwell was informed of the possibility of a double commission. He put it that Rule 9.11 is aimed at disclosure of that possibility to a consumer, and is not a ban on double commission, and was not breached in this case. He noted also that it seems the licensee gave his word that there would be no double commission claim in this case, and that undertaking should be taken into account by us, and neither the licensee nor Harcourts sought a double commission situation.

[45] Mr McCoubrey put the main issue as whether the Committee's decision to take no further action was open for it to make. He emphasised that there has been no consumer complaint about the relevant conduct of the licensee. He noted that although Mrs Bardwell is a consumer, she approved what the licensee did and confirmed that he explained the double commission possibility to her.

For the Licensee

[46] Mr Napier submitted that the licensee did not expose the vendors of the Tirohanga Rd property to a double commission; and that he did not withhold important vendor information from Edinburgh.

[47] Mr Napier submitted that the licensee's conduct complained of does not give rise to a finding of unsatisfactory conduct or misconduct under the Act.

[48] He also put it that, in any case, we should not be dealing with employment matters and that the Committee correctly decided that the aspect the licensee possibly withholding important administration client information is an employment matter not to be dealt with in our forum.

[49] Mr Napier particularly noted the findings of the Committee that Mr and Mrs Bardwell did not want to deal with anyone from Edinburgh even when the licensee told them that their sale might need to be handled by Edinburgh; that Mr and Mrs Bardwell were aware of their legal obligations to Edinburgh and the licensee had fully covered the commission issues with them so that there could be no breach of Rule 9.11; and that, in any case, the licensee and Highland had undertaken not to pursue commission if a dispute arose so that the double commission aspect is a moot point.

[50] Mr Napier did accept that the Committee had expressed the hope that less heavy-handed alternatives would be considered at the outset should similar

circumstances arise in the future; but put it that the licensee had not acted unprofessionally or unethically.

[51] We agree with Mr Napier that the emphasis under Rule 9.11 is on informing the client, not on ensuring that the client does not have to pay a double commission. We accept that the licensee clearly communicated the commission issues with the vendors who were determined to have him handle the marketing of their property. We also accept that Mr and Mrs Bardwell were never put in a position of ultimate liability for double commission, because there was an arrangement between them and the licensee that he and Highland would not pursue them for commission in the event a double commission dispute arose.

[52] Mr Napier also submitted that the Committee was correct in determining that the complaint regarding the removal and subsequent return of files from the complainant's premises is an employment issue and not a matter to be tested in our forum. He seemed to submit that there is support for that submission from *Wyatt v The Real Estate Agents Authority* [2012] NZHC 2550 at paragraph [51] on the basis of Woodhouse J stating that the underpinning for an assessment as to whether particular real estate work is unsatisfactory is s.3(1) of the Act which has the clear purpose of protecting consumers. Mr Napier's rationale is that the appellant is not a consumer and the Act is not a vehicle to be used for resolving employment disputes between real estate agencies and their sales people.

[53] He also submitted that a finding of unsatisfactory conduct must relate to the carrying out of *"real estate agency work"* which is defined in s.4 of the Act, essentially, as *"means any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction"*. Mr Napier submitted that the issues surrounding the return of the files do not fall within that definition. He noted that the licensee and his wife stored completed files at their home or at their parents' home, and had the standard practice of carrying their current property files with them. Mr Napier also submitted that when the appellant requested documents and information, the licensee provided them as soon as possible and cooperated and returned all the information sought.

For the Appellant

[54] Mr Withnall QC submitted, inter alia, that the Committee failed to give reasons for its finding that the second aspect of the complaint, i.e. the removal and belated return of files from the complainant's premises, was an employment issue and not to be tested by the Committee.

[55] Mr Withnall also thoroughly and carefully covered the evidence and the effect of ss.72 and 73 of the Act in terms of the facts of this case and he also addressed the effect of Rule 9.11.

[56] Mr Withnall particularly submitted that, as at the date of his resignation from Edinburgh, the licensee was procuring cancellation of listings held by Edinburgh in which the licensee had been involved and was endeavouring to negotiate a commission sharing agreement with Edinburgh in respect of them, but Edinburgh had rejected all that.

[57] He submitted also that when the licensee dealt with Mrs Bardwell and had her (with her husband) complete a listing agreement with Harcourts including commission

in the usual way, the licensee was fully aware that Edinburgh would also be entitled to that commission. Mr Withnall noted that, in the event, Harcourts deducted commission from the deposit and for some time did not cooperate with the appellant on that subject and it was only when Edinburgh sought to recover its commission direct from the vendors that the commission matter was resolved.

[58] Mr Withnall QC submitted that the licensee had put the vendors at risk of being legally liable to pay commission to both Edinburgh and Harcourts and that Mrs Bardwell did not expect that to happen and, indeed, accused Edinburgh of unprofessional conduct for pursuing its entitlement to commission. Mr Withnall submitted this was part of a pattern by the licensee of attempting to get for himself and Harcourts a slice of commissions to which Edinburgh had become entitled. He emphasised that at all stages, Edinburgh was entitled to commission on the Tirohanga Rd sale.

[59] It is put for the appellant that the licensee's conduct falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee and/or would reasonably be regarded by agents of good standing as being unacceptable. If so, the definition of *"unsatisfactory conduct"* in s.72 of the Act (set out above) has been met.

[60] We particularly agree with Mr Withnall QC that if a salesperson chooses to leave a licensed agency, he or she does not have any rights in respect of a prior introduction or prior listing which are transferable, in the absence of any agreement to the contrary.

[61] Mr Withnall also put it that we should infer from the licensee's removal of files, even before he had tendered his resignation, that he had intent to poach from Edinburgh in terms of clients, knowledge base, and goodwill and that neither the public, nor agents of good standing, would regard such conduct as reasonable and acceptable and that we should denounce such conduct as contrary to any standard of ethical, professional, and commercial conduct. We do.

[62] We also agree with Mr Withnall that it is irrelevant that no consumer has made a complaint in this case. Our concern is with the conduct of the licensee.

[63] We also agree with Mr Withnall that the completion and storage of files and documents relating to a real estate agency's prospective vendor client or their property is very much part of real estate agency work. There are many steps involved in work and services to bring about a transaction. We find that files were taken by the licensee (and his wife) from the Edinburgh office site and stored and retained for a period and information copied from them and that very likely, portions were never returned. Also, relevant emails do not seem to have been all recorded. We take the view that this information belongs to the employer and not to the licensee, whether an employee or a contractor.

[64] Simply put, licensees have a duty of good faith to their employer agency just as they have to the vendor or anyone else with whom they deal.

Discussion

[65] We accept that the obligation in Rule 9.11 is one of disclosure. It is not a prohibition on exposing a client to double commission. In fact, the Rule expressly envisages that a client could be liable to pay full commission to more than one agent.

[66] In this regard, we note that the Committee sought the evidence of the vendor trust on the matter. Mrs Bardwell supplied a statement to which the Committee refers in detail at paragraphs 4.3 to 4.4 of its decision as follows:

> *"4.3 The Committee sought the evidence of the Trust on the matter and Ms Bardwell supplied a statement. She says that the licensee sold her the property in the first place which is why she went back to him some time later when her marriage had broken up, as she needed to sell the property. She explained that she had been disappointed that the original offer from the Staffords was below her expectations and so withdrew the property from the market. Not long after, she had a change of heart and contacted the licensee to try to resurrect the offer, which he did. She states that at the time of listing with Harcourts, the licensee "fully covered the commission issues" with her and that she was "completely aware of the situation". Ms Bardwell goes on to say:*
>
> > *"I find the lack of professionalism and communication on this matter appalling. I refuse to accept that a reasonable person could reasonably expect that this commission is due to Edinburgh – they did nothing after Shane had left (regardless of the law). Their conduct has been unprofessional, lacking in ethical behaviour and non-communicative, and they then seek me out to recover monies which they should have sorted out with their departing agent. I wonder what attempts have genuinely been made on Edinburgh's part to resolve this matter with Harcourts, as I have always known Shane Robinson to be fair, honest and operate with integrity with his Vendors best interests at heart."*
>
> *4.4. The Committee notes that although the client is aware of her legal obligations to Edinburgh Realty she does not consider that the company is morally entitled to the commission. During our investigation Ms Bardwell commented to our investigator that she did not want to deal with anyone from Edinburgh even when the licensee told her that the deal might need to be done with them. She believes that the licensee is entitled to the commission and was disappointed that "Harcourts had handed all the commission to Edinburgh as a result of me receiving a letter threatening legal action (Webb Farry – acting on behalf of Edinburgh)".*

[67] We consider that all matters raised, including whether documents were taken from Edinburgh to Highland Harcourts, are very much part of real estate agency work and should not be treated as an employment issue to be dealt with in some other forum. The opening, keeping, and securing of files or records of real estate agency work is fundamental to that work. Their removal, or return, or whatever is all part of undertaking real estate transactions. We accept that these matters may well be also categorised as, or become, employment issues; but the issues which we have

outlined above between the above parties come within our jurisdiction fair and square.

[68] With regard to that issue of removal and subsequent return of files, we cannot be precisely satisfied as to the true facts due to the conflict of evidence as to what was taken and when, and for how long, and for what reason. In this case, on the balance of probabilities, we conclude from the evidence that the licensee and his wife did retain information, at least for copying and for recording contacts which they intended to use, and we think that is unsatisfactory; but, in all the circumstances, not at the high end of the scale of offending.

[69] We consider that if an agent decides to move from one employer to another then, prima facie, that agent has no right to any of the papers of the first employer (or contractor as the case may be).

[70] With regard to the issue of the licensee having put Mr and Mrs Bardwell in a position of liability for a double commission on the sale of their home; it is clear that he did. However, there are a number of mitigating factors, such as that he seemed to explain the risk to those vendors but they were most anxious to retain his personal services even though he had changed firms. They may not have understood their real liability at law. However, he had given his word that, one way or another, they would not need to pay two lots of commission. Also, we rather think that, at material times, the licensee did not realise the gravity of the situation in which he had placed Mr and Mrs Bardwell; and he seemed to think that either his new employer or previous employer would capitulate, and do a deal, so that only one lot of commission would eventuate. Indeed, that is what happened. Nevertheless, he did not breach Rule 9.11.

[71] However, it is concerning conduct that vendors be placed in that risk of double commission situation. Standards of conduct cannot be contracted out of.

[72] Also, as we have indicated above, in endeavouring to make use of his current files at the time of his transition between real estate firms, the licensee's conduct was deficient in terms of the Act.

[73] Unlike the Committee, we think that an outcome of no further action being taken is inappropriate. We find the licensee's conduct to have been *"unsatisfactory"* in terms of s.72 of the Act. Indeed, depending on the facts of a particular case, the type of background outlined to us could sometimes well amount to misconduct.

[74] Accordingly, we find the licensee guilty of unsatisfactory conduct so that this appeal is allowed.

[75] The parties are, of course, entitled to a hearing on penalty. In case it helps resolution, we currently contemplate that the licensee be censured, fined $1,000, and be ordered to pay $1,000 towards our costs. If the parties were to agree, we could confirm that; but, otherwise, we direct the Registrar to arrange a fixture to deal with penalty in the usual way.

Further General Remarks

[76] As Mr Withnall QC remarked, this type of situation is a general consumer issue. We expect that it is quite common for agents to wish to move on from one agency to

another from time to time for various understandable reasons. However, they must always act with honesty and transparency in all respects in the course of such a transition. They must respect the property and know-how which they have been using on behalf of their former employer. In particular, it is fundamental that no consumer be put at risk by such a transition and, particularly, not to the possibility of a double commission, or even any type of litigation, or even the cost of obtaining legal advice. Even compliance with Rule 9.11 by explaining the risk of double commission to a client, may not overcome exposing the client to other costs and or stress.

[77] Practically speaking, the transition by an agent from one firm to another requires a sensible process involving the old and the new employer (or contractor), the licensee, and particular clients. It is to be expected that an employment contract contain a process for that type of transition by an agent to another employer or, at least, some type of simple arbitration clause to cover disputes which may arise. It may be helpful that such a simple arbitration clause become a standard clause in a Listing Agreement (which, of course, is between the real estate company and the vendor client, and not between the agent and the employer real estate company) so that, should any disharmony arise between the owners of the property being marketed and the real estate firm or any of its agents or any involved third parties, there is an arbitration procedure.

[78] We think it rather likely that, in the present case, the licensee and the manager of his new employer at Highland/Harcourts, (Mr Collins), were endeavouring to acquire whatever benefits they could from Edinburgh for whom they had little concern; except that they did not wish to breach the law and genuinely intended that there would never be a double commission issue because, at the end of the day, Highland/Harcourts would yield.

[79] 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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Mr J Gaukrodger
Member

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Mr G Denley
Member