BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 45

READT 040/12

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**LEE RYAN**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20002)**
	First respondent
AND	**FRASER SKINNER**
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Ms N Dangen - Member
Mr J Gaukrodger - Member

HEARD at QUEENSTOWN on 19 February 2013 (with subsequent written submissions)

DATE OF OUR DECISION 28 May 2013

APPEARANCES

Appellant on her own behalf
Mr M J Hodge, counsel for the Authority
Mr M E Parker, counsel for second respondent/licensee

DECISION OF THE TRIBUNAL

Introduction

[1] Ms Lee Ryan ("the appellant") appeals against a 31 May 2012 Complaints Assessment Committee decision to take no further action in respect of her complaint against Mr Fraser Skinner ("the licensee"). Essentially, she alleges lack of prompt action from the licensee on her behalf.

[2] The Committee held a hearing on the papers pursuant to s.90 of the Real Estate Agents Act 2008 ("the Act"). The appeal to us is by way of rehearing.

Relevant Sections of the Act

[3] It is clear that the appellant alleges unsatisfactory conduct by the licensee and, possibly, misconduct by him. Those offences (or concepts) are as defined follows in ss.72 and 73 of the Act:

> *"**72 Unsatisfactory conduct***
> *For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—*
> *(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
> *(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
> *(c) is incompetent or negligent; or*
> *(d) would reasonably be regarded by agents of good standing as being unacceptable.*
>
> ***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."*

The Complaints Assessment Committee's decision to take no further action

Facts for Complaint

[4] On 23 March 2011 the appellant approached Harcourts in Queenstown for help in selling her gift shop business, Q Queenstown Ltd. The licensee was recommended to her by Harcourts as one of its licensed salespersons.

[5] In her initial statements of complaint, the appellant identified two *"specific major areas of concern"*, as she put it, namely:

> [a] negligence with an offer from a Mr and Mrs Anderson, and
>
> [b] inadequate communication with a Mr Sunni Pallavi Kaur.

[6] In relation to the Andersons, the appellant asserted to the Committee that:

> [a] She had been marketing the business for about six months prior to engaging the licensee. The purpose of engaging him was to enlist someone with the skills to reduce the Andersons' offer to a contractual form.

[b] The licensee was recommended by Harcourts as an expert for business sales.

[c] The appellant had worked on the Anderson offer for about six months and they had agreed to pay her company $120,000 plus stock at valuation for the said gift shop business (by emails of 16 February 2011, 23 February 2011, and 23 March 2011). The Andersons had even said: *"We would like to reiterate that we are serious cash buyers and able to conclude any sale as soon as possible"* (email of 16 February 2011).

[d] The licensee would charge a $500 fee to finalise the offer that the appellant had already negotiated.

[e] The appellant made it very clear how important it was to get the $120,000 offer into a contract and that she was engaging the licensee specifically for his skills to reduce that offer to written form.

[f] Despite an initial meeting with the appellant on 23 March 2011, the licensee did not contact the Andersons until 18 April 2011. By that time, they would not offer more than $80,000.

[g] The Andersons *"languished"* under the licensee's inattention from 23 March 2011 until they re-offered on 21 July 2011, but that offer had reduced to $55,000 plus stock.

[h] The licensee had not made the Andersons a priority.

[i] The Andersons told her:

[i] The licensee had met them and given them a contract but that was all. He did not communicate that the appellant had agreed to their $120,000 offer and did not try to get that price, or any, into contractual form.

[ii] He told the Andersons he was doing the licensee a favour in a manner which gave the impression he was not working as a professional contacted to reduce their deal to writing.

[iii] They had the impression that the sale of the business was not one of the licensee's priorities.

[7] In relation to Mr Kaur, the appellant had submitted to the Committee that:

[a] Mr Kaur came into the shop on 22 July 2011 and was *"very keen"* on the site.

[b] She thinks the licensee met Mr Kaur on 24 July 2011.

[c] She spoke to Mr Kaur several times because he would telephone her as the licensee was not responding to his enquiries.

[d] Mr Kaur told the appellant that he would rather deal with her and had communicated that he wanted to make an offer for the lease.

[e] The appellant telephoned the licensee on 4 August 2011 as he had not contacted Mr Kaur since 24 July 2011. The appellant instructed the licensee to contact Mr Kaur and get back to her by the end of the day.

[f] Rather than do this, the licensee telephoned the appellant and talked for 20 minutes, making excuses, saying that he was doing her a favour, that he was worried about the legality of aspects of what he was doing for the appellant, and asserting that the proposed Kaur deal would not work.

[g] The appellant explained to the licensee that Mr Kaur wanted to make an offer, but still the licensee waited as it had been left that Mr Kaur would call the licensee. The licensee took this approach with other potential customers also.

[h] The licensee lied to Mr Kaur regarding the appellant's knowledge (or otherwise) of whether his proposed use of the shop premises would be approved and was *"actively working (Mr Kaur) and myself against each other to stop an offer being pursued or presented."*

[i] Upon receiving an offer from Mr Kaur, the licensee suggested to the appellant that she deal directly with Mr Kaur.

[8] The appellant also asserts that the licensee did not handle a potential multi-offer situation well; that he was *"ineffectual; he was detrimental, misinforming, stalling, impeding, lying, resistant and actively discouraging"*; that there was no proactive communication and he was *"constantly doing something more important"*; and that he came across as *"depressed and consumed by other things, focussed on his own financial problems."*

[9] The Committee relevantly found:

[a] Other than detailed notes supporting her complaints the appellant did not supply evidence to support her claims regarding the licensee's alleged lack of responsiveness.

[b] By comparison, the licensee had provided copies of email communications with potential purchasers supporting his explanations regarding the efforts he made to conclude a transaction. These included detailed responses from the Andersons as to why they were not proceeding with the purchase.

[c] The licensee admits he *"could have been more responsive"*.

[d] It seemed to the Committee that the licensee:

> *"... had been active in following up leads, keeping in contact with the Andersons emailing the complainant with updates and seeking information that he had been requested by both the Andersons and other parties. He did produce two offers to purchase one from the Andersons and one from Suny Palwi (Mr Kaur) neither of which resulted in a sale. The reality was that the market for selling businesses in Queenstown over the period that the complaints relate to was challenging."*

[e] It did not find that any aspects of the complaint met the requirements of ss.72(b) or 72(c) of the Act; and it determined under s.89(2)(c) of the Act to take no further action.

The Stance of the Appellant

[10] The appellant covered the above facts and stated that the Andersons had repeatedly offered to buy her business at $120,000 after careful advice from their accountants. She maintains that at her meeting with the licensee on 17 March 2011 it was agreed he was to meet the Andersons and communicate her acceptance of their offer at $120,000, put that into a contract form, *"and work through any conditional issues"*. Simply put she maintains that he was so slow to move in those directions that she lost the sale to the Andersons and, similarly, a sale to another interested purchaser Mr Kaur referred to further below.

[11] The appellant was carefully cross-examined by Mr Parker for the licensee and by Mr Hodge for the Authority but adhered to the facts outlined above.

[12] Under cross-examination from Mr Parker, it emerged that the appellant had not been happy at a selling price of $120,000, but rather wanted $135,000 and hoped that the licensee would push the Andersons up to at least $125,000.

[13] It was unclear why the appellant had not accepted direct with the Andersons the $120,000 offer she says they put to her. She insisted that she accepted the $120,000 offer with the licensee and he was to communicate that with the Andersons and sort out a contract with them.

[14] We noted that, at all material times, the Andersons required various aspects of information about the vendor's business but they never seemed to be provided with that and the licensee sought to drag it from her.

[15] Inter alia in cross-examination from Mr Parker, the appellant was pressed that she had never given the licensee instructions to accept the sum of $120,000 from the Andersons and there was never such an offer from them. She insisted that she had given those instructions to the licensee and that she had hired him as a skilled agent *"to negotiate"* with the Andersons.

[16] With regard to Mr Kaur, there seemed doubt as to whether he had offered a firm price. It was put to the appellant that he had offered $50,000 or $55,000 for the lease only, because he would not be acquiring the appellant's business as he wished to start a different enterprise namely a convenience store in the premises. He had various conditions such as needing a different type of entrance and, of course, being able to obtain the landlord's approval to him changing the use of the premises to that of a convenience store.

[17] Mr Parker pressed the appellant that she had not herself settled to accept a figure of $120,000 from the Andersons but briefed the licensee on the basis of her seeking $125,000 as her sale price.

[18] Essentially, the appellant submits that the facts show a slack pattern of business behaviour by the licensee and that any reasonable member of the public or any other agent could not find the licensee's actions to be reasonably competent licensee behaviour and would find it unacceptable (focussing on the Andersons) that:

[a] the licensee delayed meeting the Andersons by three weeks; and

[b] failed to advise the Andersons the appellant accepted their offer of $120,000; and

[c] Failed to ask them to complete an appropriate contract to purchase.

[19] The appellant's various submissions on appeal to us effectively traverse the same ground as she covered before the Committee and which we deal with below.

Licensee's Response

[20] In a 5 October 2012 affidavit, the licensee relevantly:

[a] outlines the timing and nature of his correspondence with the appellant, the Andersons, Mr Kaur, and other potential customers.

[b] argues that it was not because of any delay on his part that the possible contracts did not proceed.

[21] Mr Skinner had filed a detailed typed brief and gave extensive oral evidence.

[22] He said that he had known the appellant since the 1970s and regarded her as a friend which is why he was prepared to only charge her $500 if he could sell her gift shop business. He recollected telling her at their first meeting on 23 March 2011 that he was very busy and could not give her situation full attention *"for a while"*. However, he soon came back to her seeking information about the business so that he could understand it enough to satisfy Harcourts to list the business for sale in their system and website.

[23] He said that, at their meeting on 23 March 2011, the appellant had provided him with an information pack which he was keen to review in order to understand the business so that he could handle marketing it.

[24] There were emails between him and the appellant on 4 April 2011 when he was endeavouring to get a grip on the business with a view to having the appellant enter into an exclusive agency agreement. That was done on 5 April 2011. It is clear from further 6 April 2011 emails between them that the licensee was obtaining photographs and financial information from the appellant relating to the business and preparing advertising copy, window displays, rack cards and the like, and seeking her approval to them. Again on 11 April 2011 there were emails between them whereby the licensee sought clarification of some of the financial information the appellant had provided him with, and he indicated that he felt able to meet with the Andersons that week. It seems that he did.

[25] The licensee emphasised that, in October 2010, the Andersons had made an offer for the business at $100,000 plus stock at valuation subject to various conditions, but that was rejected by the appellant. She sought to resuscitate the matter with the Andersons in February 2011 saying that her price had reduced to $135,000 plus stock at valuation. It seems that the Andersons then raised their offer to $120,000 plus stock at valuation subject to certain conditions, but that was all rejected by the appellant also. It is put that she then communicated with them in March 2011 indicating she would accept $127,500 plus stock at valuation. They then

requested the most recent sales figures of the business to 31 January 2011. It seems that those figures showed a profit reduction of 12% from previous figures.

[26] The licensee advised that the appellant had contacted the Andersons a few days before 23 March 2011 because they had told her that their accountant advised they should offer no more than $80,000 plus stock at valuation due to the business's figures as at January 2011 and conditional upon an acceptable valuation of chattels. This meant that, as at 23 March 2011, the Andersons were indicating to the licensee that they would not make any offer above $80,000 plus stock and chattels at valuation. There did not seem to be any valuation of chattels in existence despite all the previous requests for that from the Andersons.

[27] The licensee emphasised that, as well, the Andersons had various concerns about the business related to deficiencies and omissions of income and expenditure categories in the figures provided to them by the appellant, the true gross profit, the condition of chattels, and that the appellant's systems seemed rather outmoded. The licensee seemed to be saying that the appellant kept holding out for a basic sale price of $120,000 but the Andersons had never agreed to that, nor to forego their various conditions, so that the parties were far apart when he was retained on 23 March 2011 by the appellant to endeavour to achieve a signed contract.

[28] We were taken through the various communications, mainly email, between the parties over material times in great detail.

[29] The licensee also covered that other parties were interested in purchasing the business and he referred, in particular, to Mr Kaur (usually known as Sunni). The licensee opined that the appellant was endeavouring to have Mr Kaur increase his offer from an apparent sum of $50,000 to $80,000 but that Mr Kaur was only interested in the space itself and his wish to use it for a convenience store. He did not want to buy the vendor's business as such and needed to change the entrance to come off a particular street rather than through a pavilion centre. The licensee knew that Mr Kaur's requirements would never be approved by the landlord of the property whom he knew well.

[30] It seems that the appellant dispensed with the licensee's services on 8 August 2011. He feels he did his best to assist her but that she insisted on maintaining an unrealistic asking price for her business in the light of the accounts for the business. He did not accept her criticisms of him but admitted there could have been *"some ordinary delay at times"* due to his being busy in general on various matters but put it that she did not suffer any loss due to any such delays *"and certainly did not suffer the loss of any sale to the Andersons at the level of $120,000 as she claims"*. He puts it that the contemporaneous emails and other documents confirm that on his behalf.

[31] It emerged in cross-examination that the licensee is quite something of a business leader in the area with vast experience in property development and management.

[32] Under cross-examination, the licensee stressed that when he was instructed by the appellant, he made it clear that he needed to study the information she had given him and *"get a full grip on the business"* because he needed to have confidence about what he was to market and be satisfied that his company should list the matter. He seemed to also be saying that he was instructed by the appellant to generally seek a purchaser as soon as he had been able to understand *"what the business is*

about", and that there were very soon many emails and telephone communications between the appellant and him to assist in that respect. In particular, he wanted to be able to justify the price, then acceptable to the appellant, of $120,000 plus stock and chattels at valuation. He said that there was considerable delay by her in providing answers to his questions. He insists that matters were never as simple as him going to the Andersons and accepting an offer of $120,000 from them.

[33] With regard to Mr Kaur, the licensee ascertained that the building owner would not agree to the appellant's premises having a change of use to a convenience store because the building owner simply did not want that type of business conducted in the premises. Indeed, nor did the building owner want the vendor appellant's business to continue and he, the licensee, went to much effort and influence to have the building owner allow her remain there as lessee. The licensee also said that he made it clear to the appellant that he could not have Mr Kaur enter into a contract to buy her lease when he knew that the building owner would not approve a transfer of that lease from the appellant to Mr Kaur. We note from the documents exhibited to us that, at material times, the appellant's lease must have been close to expiry, or even expired and running on as a monthly tenancy. The extract of a sale and purchase form involving Mr Kaur suggests that his offer was subject to the building owner granting a new three year lease at a rent of $5,088.44 per annum with a three year right of renewal at a reviewed rent.

[34] Coming back to the situation of the Andersons, in cross-examination the licensee emphasised that he could not possibly have signed them up to an agreement for sale and purchase of the gift shop business because it took into April 2011 for him to get sufficient information from the appellant to be able to list the business, and he could not have them enter into a contract prior to listing which took place on 5 April 2011. He emphasised that he agreed to the very low fee of $500 simply to help out a friend. He insisted that there was never a deal available from the Andersons and, certainly, not at $120,000 plus stock and chattels at valuation.

[35] Evidence was also given by a prospective purchaser who dealt with the licensee at material times. She found him thoroughly professional and had met with him at the appellant's retail store. She commended the licensee for being punctual and clear in response to her questions. After she withdrew her interest, the appellant contacted her direct attempting *"herself to pitch the business to me for sale"* and indicated that she, the appellant, was unimpressed with the licensee's efforts on her behalf to sell her business. The witness then informed the appellant that she had found the licensee to be very professional and that she had strong concerns *"relating to the claims made regarding sales of various products within the store, in particular the astoundingly high volume of cushions supposingly sold"*. The witness said that her reason for not proceeding with the purchase of the appellant's business *"was based predominantly on what were perceived to be unusual figures, the degree of growth that the business had made in recent times was very encouraging but did not seem to marry up with the stock holding nor the percentage of sales across the lines"*. She said that the information provided to her by the appellant through the licensee, did not give the witness confidence about the business.

Discussion

[36] At the hearing before us on 20 February 2013, it became clear that this appeal turns on what was discussed between the appellant and the licensee at their 23 March 2011 meeting. We have no credibility issues regarding the evidence of the

witnesses before us; but feel that the appellant may not have quite understood commercial aspects of the relevant negotiations.

[37] The appellant's version of events is that she effectively entered into two agency agreements with the licensee, namely:

[a] The first was on the basis that the licensee would simply facilitate a written agreement for sale and purchase of the business with Mr and Mrs Anderson at or about the existing level of their offer of $120,000; and, on the basis that this would be done quickly, given the advanced state of negotiations with Mr and Mrs Anderson, a special fee of $500 was agreed for this task.

[b] In the event that a successful sale could not be achieved with Mr and Mrs Anderson for any reason, an exclusive agency agreement would apply on the basis that Mr Skinner's usual fee would be payable.

[38] Conversely, the licensee's version of events is that there was no agency agreement specifically in relation to Mr and Mrs Anderson. Rather, the agency agreement was that he would endeavour to negotiate an agreement for sale and purchase of the appellant's business with any purchaser, including Mr and Mrs Anderson, and that this would be done in the usual way and would require him to take the time necessary to gain sufficient knowledge of the business to be able to market it honestly and effectively. Mr Skinner says that the only special nature of the agreement was that, in the event a successful sale was negotiated with any purchaser, he agreed to a small $500 fee as a favour to Ms Ryan. In fact, the listing agreement provides for a normal commission rate.

[39] As Mr Hodge put it, the available documentary record arguably points both ways. While there is substantial email correspondence around the relevant time, it does not suggest a *"two agreement"* agency of the kind described by the appellant until her email of 28 June 2011. On the other hand, the written listing agreement sets out a normal commission structure, and that is consistent with it being the second of the two agency agreement referred to by the appellant rather than being a *"special fee"* agreement as referred to by the licensee.

[40] We agree with counsel for the Authority that no loss need necessarily be shown by a complainant to establish unsatisfactory conduct; and our emphasis must be on the conduct of the licensee. For example, in *Wyatt v The Real Estate Agents Authority* HC AK CIV 2012-404-1060 3 October 2012, Woodhouse J proceeded on the basis that no loss need be shown on the facts of the case before him. His Honour did not make a determinative finding as to whether loss was required. This means that the licensee can still have engaged in unsatisfactory or misconduct by virtue of him not being timely or appropriate in his communication with potential customers, even if they would not have bought the business in any event.

[41] It is submitted for the Authority that any arguments that, for example, the Andersons would have reduced their offer in any case upon advice from their accountant, or that Mr Kaur would not have been able to use the site for his intended convenience store, are irrelevant to an analysis of the licensee's conduct. We agree. Mr Hodge highlights this because the licensee appears to consider it significant that no actual loss was suffered as the clients would not have bought the business anyway. For example, at [37] of his affidavit of 5 October 2012, the licensee deposes:

"... Overall, whilst I recognise that due to the vagaries of work there may have been some ordinary delay at times (as I deal with multiple matters as a matter of course in my work), [the appellant] did not suffer any loss for such delay, and certainly did not suffer the loss of any sale to the Andersons at the level of $120,000 as she claims, and which the contemporaneous documents show."

[42] The licensee also relies on an email from the Andersons dated 20 October 2011 recording *"... there was nothing in your conduct what affected our decision not to go ahead with the purchase of Q Gift Shop. While at times we felt that communication was little slow we can categorically state that this did not influence our decision not to sign a contract."*

[43] Mr Hodge submits for the Authority that the central issue before us will be evaluative of (primarily) the documentary material and of the viva voce evidence given before us. He put it that we need to consider:

[a] whether the time frames involved and pattern of communication between the licensee and the appellant, the Andersons, Mr Kaur, and other potential customers, were acceptable; and

[b] the licensee's more general interactions with the appellant and potential customers and whether these were characterised by, for example, skill, care, competence, and diligence at all times.

[44] In this sense, Mr Hodge submits that we can step back from much of the evidential material which focuses on whether the licensee's alleged delay was the cause of any undue loss suffered by the appellant; and, rather, focus on the licensee's conduct in communicating with potential customers on the appellant's behalf. We agree that to be the correct approach for us to take.

[45] It appears that the timing of the various communications at material times is not in dispute and, in any event, much of this is documented.

[46] There is dispute over what was said at the initial meeting between the licensee and appellant on 23 March 2011, such as in relation to the licensee being busy, and to the appellant's instructions including, particularly, the urgency of getting the Andersons' offer into written form.

[47] The following rules in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 were referred to:

[a] Rule 5.1: A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.

[b] Rule 6.1: An agent must comply with the fiduciary obligations to his or her client arising as an agent.

[c] Rule 6.2: A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

[d] Rule 9.1: A licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest.

[48] A breach of any of these rules would, prima facie, result in a finding of unsatisfactory conduct under s.72(b) of the Act. Of course, it is a matter of judgment whether any of the rules have been breached. The Committee did not consider there was unsatisfactory conduct by the licensee.

[49] If the appellant's version of events is correct then, assuming the licensee properly understood the basis on which she was instructing him, he has arguably engaged in unsatisfactory conduct by taking a relatively long time to make contact with the Andersons. On the other hand, if the licensee's version of events is correct, then there was no specific agreement relating to the Andersons and he has acted entirely properly in taking time to gain sufficient knowledge of the business in order to market it honestly and effectively.

[50] Mr Hodge put it that, on one view of the facts, the differences in the evidence may serve to demonstrate that there was a complete misunderstanding between the appellant and the licensee about the basis on which the latter was instructed. He added that, if so, it could be said that best practice would require the licensee to follow up his 23 March 2011 meeting with the appellant in writing, confirming his understanding of the nature of his instructions. To the extent that his understanding did not accord with the appellant's, she would be expected to point that out, with the differences then able to be resolved one way or another. Clearly, that did not happen in this case.

[51] We have previously held that not every departure from best practice will amount to unsatisfactory conduct requiring a disciplinary response (*Wetzell v CAC & MacVicar* [2011] NZREADT 8 at paragraph [37]; 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] Broadly, we also agree with Mr Hodge that context is important. As he put it, any failure to comply with statutory requirements, such as the duty to deal fairly with all parties to a transaction, or disclosure requirements, will at least be unsatisfactory conduct, subject to a defence of all reasonable steps having been taken. However, it may be that some requirements, such as the need for timely communication with a client, may permit flexibility depending on the facts of the particular case.

[53] The Committee noted, inter alia, the licensee's admission that he could have been more responsive, presumably, to the desires of the appellant that he make marketing progress. However, the Committee felt the licensee had been active in following up leads, keeping in contact with the Andersons, emailing the appellant with updates and seeking information in terms of requests made to him by interested parties; and that he did produce offers, one from the Andersons and one from Mr Kaur, neither of which resulted in a sale; and the Committee added *"the reality was that the market for selling business in Queenstown over the period that the complainants relate to was challenging"*.

[54] In effect, the Committee considered that the conduct of the licensee did not amount to unsatisfactory conduct. It actually said that the licensee's conduct did not meet the requirements of s.72(b) or (c), and determined to take no further action. It directed publication of its decisions but omitting the names and identifying details of

any of the parties, subject to our making an order to the contrary if such application was made to us.

[55] Mr Parker put it that the thrust of the appellant's case is that the licensee was given a specific direction on 23 March 2011 to document acceptance by her of an offer by Mr and Mrs Anderson to purchase her company's gift shop business (the lease being the main asset) at $120,000 plus stock at value. However, the licensee disputes that such a direction was given and states that his usual sales preparation process is a measured one to gather all relevant material to hand, master and query it and, once a listing agreement is in place, to properly embark upon marketing the business.

[56] We agree that the contemporaneous email communications between the appellant and the licensee do not support her contention of a specific direction to simply document an acceptance of terms between her and the Andersons, in an agreement. The available evidence does not corroborate that contention.

[57] When we stand back and absorb the evidence, we are satisfied that when the appellant briefed the licensee on 23 March 2011 there was no suitable offer available from the Andersons as the appellant now maintains. We conclude that the Andersons sought more information and answers to their questions, and were by no means of a mind to purchase the gift shop business on the terms then required by the appellant.

[58] Similarly, the later negotiations with Mr Kaur never came to a conclusion because his offer was not high enough for the appellant and, in any case, he could never, realistically, have gained the approval of the landlord to the change of use he required at the premises.

[59] We rather think that, due to other business pressures, the licensee may have been somewhat slow to absorb his instructions from the appellant and to sift out the financial aspects of her business; but we do not think a licensee can be faulted or accused of unsatisfactory conduct for taking reasonable time to comprehend his (or her) instructions and obtain a proper briefing so that he (or she) can embark upon an honest and effective marketing campaign. It seems that the expectations of the appellant vendor were too high as to the value and prospects of her business.

[60] It may well be that a licensee should not accept instructions to represent a vendor if the licensee is really so busy that he (or she) does not have the time to promptly devote to that marketing cause. It is no amelioration that (by concession from the licensee only) a derisory fee would have been charged on any sale. Nevertheless, in this particular case, even if the licensee was a little slow off the mark, which is arguable, the appellant vendor received the wisdom of his experience and realistic advice.

[61] All in all, we agree with the Committee that, on the balance of probability, it has not been proved that the licensee's conduct was unsatisfactory. It is clear that there has not been misconduct on the licensee's part. We confirm that the appropriate course is to take no further action.

[62] Accordingly this appeal is dismissed.

[63] We also observe that the situation covered above might have been avoided if the licensee had kept a diary, or had recorded to her by email or letter, his understanding of the appellant's instructions to him from 23 March 2011.

[64] In terms of the public register provision in the Act and of the basic approach of the need for open justice in the public interest, we are not presently attracted to any aspect of non publication or name suppression in this case but, of course, there is leave to apply in that respect in terms of s.108 of the Act should there be a proper need to protect the public interest or the privacy of some person.

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

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Judge P F Barber
Chairperson

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Ms N Dangen
Member

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Mr J Gaukrodger
Member