

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**Decision no: [2013] NZREADT 6**  
**Ref Nos: NZREADT 69/11, 73/11 &**  
**88/11**

IN THE MATTER OF an appeal under s 111 of the Real Estate  
Agents Act 2008

BETWEEN WANDA (DIANA) JOLEN (69/11)  
CLARE BOLESWORTH AND DIETER  
CHALLENGOR (73/11)  
ELAINE ROSS (88/11)  
Appellants

AND THE REAL ESTATE AGENTS  
AUTHORITY  
First Respondent

AND CLARE BOLESWORTH AND DIETER  
CHALLENGOR (69/11)  
WANDA (DIANA) JOLEN (73/11)  
Second Respondents

**MEMBERS OF TRIBUNAL**

JUDGE P F BARBER – Chairman  
MS J ROBSON – Member  
MR G DENLEY – Member

Heard at Whangarei: 19 November 2012

Representation: Mr A Holgate counsel for Ms E Ross (a licensee)  
Mr B Joblin, as McKenzie Friend for Ms W Jolen (a licensee)  
Ms C Bolesworth for herself and Mr D Challenor, Complainant  
Vendors / Appellants and Second Respondents  
Mr L J Clancy, counsel for First Respondent Authority

Date of Decision: 23 January 2013

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## DECISION OF THE TRIBUNAL

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### Introduction

[1] This consolidated proceeding involves the following three appeals. All issues arise out of Mr Challenor selling his home property and believing he had arranged early release of the full deposit to him.

#### *Jolen v REAA & Ors*

[2] Licensee, Wanda Jolen appeals against the following two decisions of the Complaints Assessment Committee. In its 26 May 2011 decision in respect of Ms Jolen, the Committee determined that she had engaged in unsatisfactory conduct. The Committee determined to take no further action against a second licensee, Barry Joblin, in respect of a separate but related complaint. In its 23 June 2011 decision, the Committee determined to censure Ms Jolen and ordered her to formally apologise to the complainant.

#### *Ross v REAA & Ors*

[3] Pursuant to s 78(b) of the Real Estate Agents Act 2008, the Committee decided to inquire into allegations against licensee Elaine Ross on its own initiative, as allegations arose during the Committee's inquiries into the complaints against the Ms Jolen and Mr Joblin.

[4] Ms Ross appeals against a decision of the Committee dated 17 August 2011 in which the Committee found that the Ms Ross had also engaged in unsatisfactory conduct and determined to censure her. The Committee also ordered that the Ms Ross undergo specified further training within 12 months.

#### *Challenor & Bolesworth v REAA & Ors*

[5] Dieter Challenor and his partner Clare Bolesworth (together the Complainants) appeal against the Committee's determinations in respect of Ms Jolen on the basis that they assert the Committee should have determined that she engaged in misconduct and ordered her to refund the commission they paid her.

### The Facts

[6] Ms Jolen and Ms Ross work for Glenbarry Real Estate Ltd trading in Whangarei as Professionals Glenbarry Real Estate Limited. Ms Jolen is Ms Ross' manager.

[7] On 28 April 2010, Mr Challenor listed his property at 9 Hoey Street, Kamo, Whangarei with Ms Ross. In fact, he and his partner Ms Bolesworth are referred to as the vendors. He says that, after signing the listing agreement, he entered into a verbal agreement with Ms Ross on the following terms:

- (a) The Professionals would receive \$18,000 by way of deposit for the sale of the complainants' property from Jacqueline and Thomas Hayman;
- (b) Instead of deducting their \$15,252.50 commission from the deposit when the agreement went unconditional, the Professionals would give the full \$18,000 to Mr Challenor to use as the deposit on his next purchase;
- (c) Mr Challenor would pay the Professionals their commission on the date his sale settled.

[8] After the complainants had made a written offer to purchase a property at 100 Lamb Road, Parua Bay, they asked the Professionals to release the \$18,000 deposit to them. The Professionals did not release the deposit and instead deducted their commission from the deposit and paid the balance to the complainants' solicitor on 14 July 2010.

[9] Ms Ross says that the verbal agreement was made on the same terms as alleged by Mr Challenor but with one extra condition, namely, that Mr Challenor's solicitor would need to provide the Professionals with a written undertaking that he would pay their commission on settlement of the sale of his property.

[10] However, Ms Jolen says that the verbal agreement was made on different terms, particularly:

- (a) The Professionals would receive \$18,000 by way of deposit for the sale of Mr Challenor's property from Jacqueline and Thomas Hayman;
- (b) Instead of deducting their \$15,252.50 commission from the deposit within 10 working days of receipt, the Professionals would give the full \$18,000 to Mr Challenor to use as the deposit on his next purchase, only if:
  - (i) Mr Challenor purchased a property that was listed with the Professionals; and
  - (ii) Mr Challenor's solicitor provided an undertaking to the Professionals that he would pay their commission on settlement.

[11] We now set out more detail.

[12] In about mid-June 2010, Mr Challenor received an offer for his property from Jacqueline and Thomas Hayman (the purchasers). Before signing, he asked Ms Ross to amend the sale and purchase agreement by inserting a special condition that he could get the purchasers' deposit of \$18,000 paid to him early so that he could use it to purchase another property. Ms Ross told Mr Challenor that it was not necessary to include a special condition in the agreement which allowed the early release of the deposit.

[13] Instead, she said, the Professionals' management would need to approve the early release of the deposit in full on the basis that Mr Challenor agreed to pay the Professionals' commission (which amounted to \$15,252.50) later on settlement of his sale. Ms Ross says she also told Mr Challenor that his solicitor would need to provide an undertaking in this regard. On this advice, Mr Challenor then signed the sale and purchase agreement on 23 June 2010

[14] According to Ms Ross, she had approached her manager, Diana Jolen, who agreed on that basis to the early pay-out of the deposit on Mr Challenor's sale to be used for Mr Challenor's next purchase. Ms Ross says that at no time did Ms Jolen make her aware that her agreement to release the deposit in full to Mr Challenor was also subject to his purchasing his next property through the Professionals. Ms Ross then confirmed Ms Jolen's agreement with Mr Challenor.

[15] Ms Jolen says that Ms Ross did ask her whether the deposit from Mr Challenor sale could be released in full to him early so that it could be used as the deposit for his next purchase. She says that she said she could not see a problem with that if Mr Challenor purchased a property that was listed with the Professionals and his solicitor provided an undertaking that Mr Challenor would pay commission on the sale of his property to the Professionals later.

[16] Mr and Mrs Hayman paid \$18,000 by way of deposit to the Professionals on 5 July 2010.

[17] In 2009, Dieter Challenor and Clare Bolesworth had been interested in purchasing a property at 100 Lamb Road, Parua Bay. They were introduced to Lamb Road by licensed salesperson, Catherine McColl, who was working for Onerahi Real Estate Ltd in Whangarei. Around this time, they made an offer to purchase Lamb Road for \$300,000 but the offer was not accepted by the vendor.

[18] On 16 June 2010, the owner of Lamb Road signed a listing agreement with licensee, Barry Joblin, who was working for the Professionals, thereby cancelling its previous listing agreement with Onerahi Realty.

[19] Mr Challenor and Miss Bolesworth say that on 25 June 2010, they went to Onerahi Realty to make a second offer to purchase Lamb Road for \$280,000. Lynda

Gyton, acting on behalf of Catherine McColl (who was on leave), informed them that Lamb Road was now listed with the Professionals. However, because Onerahi Realty had introduced them to Lamb Road, Mr Challenor and Ms Bolesworth proceeded to present their offer through Onerahi Realty. After liaison between Ms Gyton and Mr Joblin, Onerahi Realty and the Professionals entered into an agreement to split the commission if Mr Challenor and Ms Bolesworth's offer was successful.

[20] Their offer of \$280,000, with a deposit payable on the offer going unconditional, was drawn up on 25 June 2010. After some negotiation, they increased their offer to \$290,000. However, by 19 July 2010, the vendor had still not accepted their offer. Mr Challenor and Ms Bolesworth then proceeded to purchase a different property.

[21] The \$18,000 deposit was disbursed by the Professionals as follows: \$15,262.50 to the Professionals Trading account on 14 July 2010; and \$2,737.50 to Mr Challenor's solicitors account on 20 July 2010.

### **Time Line**

[22] Mr Joblin rather helpfully supplied the following timeline:

28/4/109 Hoey Street listing signed and dated.

14/6/10 Offer Challenor to Hayman drawn up

15/6/10 or 16th Ms Ross presents offer to Challenor and negotiations begin

16/6/12 or 17th Ms Ross talks to Diana about deposit 18/6/10 Lamb Road Sole Agency signed

22/6/10 Contract 9 Hoey Street negotiations completed and signed by all parties

22/6/10 Mr Challenor reminded to get lawyer involved with deposit

23/6/10 Contract 9 Hoey Street Dated

25/6/10 Offer on 100 Lamb Road typed. Clare Bolesworth as buyer

28/6/10 Unconditional notice sent to solicitors from Glenbarry for 9 Hoey Street

30/6/10 Vendor solicitor confirms unconditional and release of deposit

30/6/10 Purchasers Solicitor confirms unconditional and release of deposit

5/7/10 Deposit 9 Hoey received from Haymen .Direct credited to Trust

6/7/10 Internet banking to Vendors Solicitor paying out balance of deposit

20/7/10 Call from Mr Challenor from Solicitors office to Diana. Discussed deposit.

20/7/10 Call from Claire to Diana re commission charged. 20/7/10 Contract Dated Bolesworth to Gray

28/7/10 Ms Ross paid commission out of sale

30/8/10 9 Hoey Street Sale settled and key release.

### **Some of the evidence detail**

#### *Oral Evidence of Ms Ross*

[23] Ms Ross stated that the vendors signed the Professionals' standard listing authority on 28 April 2010 and she proceeded to extensively market the property. By 14 June 2010 she had a buyer and protracted negotiations followed. Ms Ross said that the first time she presented the offer to Mr Challenor he said that he wanted to use the deposit for the potential purchase of another property, and she found that a fairly familiar request.

[24] Ms Ross explained to Mr Challenor that there existed a listing agreement entitling the Professionals to their commission on the sale upon it becoming unconditional and subject to the full deposit being held in their trust account for 10 days in terms of the Act. She pointed out that the variation he sought, that the Professionals not deduct commission from the deposit and only receive it at settlement of the purchase, was an inappropriate clause to be inserted in the agreement for sale and purchase because that was a contract between the two vendors and the purchaser and the Professionals were not a party to it; and that it was the real estate company known as the Professionals which was being asked to make a concession and defer taking its commission after 10 days from fulfilment of contract conditions until settlement.

[25] In the meantime she seemed to have discussed the request with her manager, Ms Jolen, and advised Mr Challenor that the Professionals would agree to so defer its entitlement to commission if the solicitor for the vendors would undertake to pay that commission to the Professionals out of the settlement proceeds on settlement date. In fact, the evidence of Ms Jolen is that she also required the solicitor to undertake that any purchase to which the full deposit would be applied by the vendors be also through the Professionals, but that further condition from the Professionals seemed to get lost.

[26] In any case, the complainant vendors deny that the condition of a letter of undertaking was spelt out to them. They understood that the Professionals had agreed to defer taking real estate commission until settlement of their sale of 9 Hoey Street, so that immediately it became unconditional, they would have the full deposit to assist them in negotiations over a new purchase.

[27] Ms Ross is adamant that she checked out that position with her manager, Ms Jolen and explained the terms of the variation about commission entitlement to Mr Challenor who said he would contact his solicitor and arrange that undertaking. In fact, that did not happen.

[28] At a later date, when the vendors realised that the Professionals had taken their commission in the usual way, Mr Challenor made a very angry phone call of complaint to Ms Jolen and a complaint to the Authority eventuated. There is no doubt that the required undertaking was never provided to the Professionals.

[29] In a supplementary brief, Ms Ross alleges it was not made clear to her by the Authority that her conduct was being complained about, nor the nature of the Authority's concerns about her alleged conduct with regard to the above transaction.

[30] Her oral evidence before us involved extensive cross-examination of her on behalf of all parties. It is clear that she understood that any alteration of significance to a listing agreement needed to be in writing, although it may well be that an oral such variation would be enforceable. We understood that she is used to the type of request made by the vendors (about the real estate company deferring its entitlement to commission so that the vendors would have more funds to facilitate negotiating a new separate purchase), but that she had been trained that it was inappropriate to insert an explanatory clause to that effect in the agreement for sale and purchase because the parties involved in such a concession were the real estate company, which was making the concession, and the vendor which was getting the benefit of that concession; and the purchaser had no involvement in that arrangement.

[31] The oral evidence of Ms Ross is consistent with the facts as set out above. She emphasised that at all times she made it clear to the vendors that the concession by way of variation to the listing agreement was made by the real estate firm (the Professionals) only subject to it receiving the letter of undertaking from the solicitor for the vendor. She said that never came to hand, so the proposed concession was lost sight of. This meant that Ms Jolen, as manager of the particular branch of the Professionals, took the commission in the usual way at the usual point of time.

[32] The vendor, Ms Bolesworth conducted very intelligent cross-examination on behalf of the vendor complainants. She emphasised that, as a mortgage broker, she had commonly seen such a concession from the real estate firm set out in an agreement for sale and purchase. We can accept that that is one way of covering the issue from a practical point of view, although it does not bind the real estate firm.

### **Oral Evidence from Ms Jolen**

[33] Ms Jolen was also extensively cross-examined. In making such a concession about commission it had been her practice to cover the variation to the listing agreement commission provision by a separate document rather than by altering the listing agreement itself.

[34] She confirmed that she authorised Ms Ross to advise the vendors that the Professionals would defer their receipt of commission as requested, so long as there was an undertaking from their solicitor that the commission would be paid to the Professionals from the settlement proceeds. Ms Jolen expected such a letter to come to hand from the solicitor for the vendors, but it did not. Accordingly, she assumed the vendors had changed their plans about needing the full deposit as soon as their sale became unconditional but accepts that, with hindsight, she should have checked out that aspect with Ms Ross and/or with the vendors.

[35] It also emerged in her cross-examination that she seemed to think that such a solicitor's letter would automatically vary the listing agreement, but we infer that she meant that would be subject to her endorsing such a letter so that it represented a variation to the listing agreement signed on behalf of real estate agent and principal (the vendor).

[36] When Ms Jolen fielded the very angry phone call from Mr Challenor (rather commendably in terms of her then understanding of the circumstances) she offered to reverse her company's book entries for taking the commission and advised Mr Challenor this might take up to 48 hours, but that did not seem to placate him.

[37] It also emerged in cross-examination of Ms Jolen, that the vendors had signed an unconditional offer to purchase another property on the basis of having \$18,000 available in cash as a deposit. Due to the commission being taken by the Professionals in terms of the listing agreement, the vendors could only pay their vendor \$3,000 but, fortunately, their vendor accepted that position and no financial loss resulted to Ms Bolesworth and Mr Challenor.

### **Oral Evidence from Ms Bolesworth**

[38] In the course of her evidence, Ms Bolesworth explained how she and Mr Challenor had felt they needed the full deposit of \$18,000 as soon as possible to give them purchasing or bargaining strength in dealing with their vendor. However, they had overlooked raising that aspect when they signed the listing agreement with Ms Ross and the matter did not really occur to them until Ms Ross brought them the said offer from the purchaser for their property. Ms Bolesworth had no recollection of Ms Ross having advised that the Professionals would make the concession about commission, as sought by her and Mr Challenor, only if the said form of solicitor's letter came to hand. She said that she simply assumed that concession had been made upon her request for it through Ms Ross.

### **Discussion**

[39] What were the terms of the verbal agreement between Mr Challenor and Ms Ross and the instructions from Ms Jolen to Ms Ross about the Professionals making the said concession?

[40] The briefs of evidence of Ms Ross and Ms Jolen are inconsistent as to whether it was a term of the verbal agreement that the deposit would only be released in full



if Mr Challenor purchased his next property through the Professionals; but this aspect becomes peripheral.

[41] There is a further inconsistency between the evidence of Ms Ross and Ms Jolen, as compared with Mr Challenor, as to whether it was a term of the verbal agreement that the deposit would only be released in full if Mr Challenor's solicitor provided the Professionals with a written undertaking from his solicitor that he would pay commission on settlement. One would certainly expect such a term in return for making such a concession well subsequent to the terms of the Listing Agreement.

[42] We need to determine the terms of the verbal agreement between the Professionals and Mr Challenor and then establish whether or not the licensees breached them and, if so, whether that amount to unsatisfactory conduct (or a *prima facie* case of misconduct). If a licensee enters into a verbal agreement with a client and subsequently breaches any or all of the terms of that agreement, this may amount to unsatisfactory conduct or misconduct under the Real Estate Agents Act 2008. Those offences are respectively defined in ss.72 and 73 of the Act which read:

**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.

[43] If all the relevant facts are found in favour of the complainant then the statutory obligation under s122(1) has been breached. That subsection reads:

**122 Duty of agent with respect to money received in course of business**

- (1) All money received by an agent in respect of any transaction in his or her capacity as an agent must be paid to the person lawfully entitled to that money or in accordance with that person's directions.

[44] It is also put that the following Rules of Professional Conduct and Client Care are relevant to such a situation:

Rule 9.1

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.

Rule 9.2

A licensee must not engage in any conduct that would put a client, prospective client or customer under undue or unfair pressure.

[45] Rule 9.1 confirms the fiduciary duty agents owe to their principals. In the context of a real estate agent/client relationship, the licensee is required to perform his or her services in accordance with this duty. At the same time, the licensee is contractually entitled to commission from the client. On the facts of this case, after the listing agreement between the Professionals and Mr Challenor was signed, prima facie, the Professionals were legally entitled to deduct their commission from the sale of Mr Challenor's property after the agreement was declared unconditional. However, Mr Challenor asked the Professionals to vary the agreement by deferring their entitlement to deduct commission after the unconditional sale date, until settlement.

[46] A licensee's obligation under Rule 9.1 does not require it to consent to such a variation request. It is a matter for the licensee to assess its own risk in agreeing to defer its entitlement to commission as against the client's interests. However, if a licensee does consent to vary its contractual entitlement to commission from the unconditional date to the date of settlement, then s 122 may be engaged and Rule 9.1 (and possibly Rule 9.2) will be engaged in respect of the licensee's subsequent conduct.

[47] In the context of a licensee/client relationship, a licensee who breaches its verbal agreement with a client may not be acting in the client's best interests (Rule 9.1) and may (depending on the circumstances) put unfair pressure on the client (Rule 9.2). Whether the licensee's breach in fact breaches these Rules will require an assessment of all the circumstances in each case.

[48] If a breach is established, the next step is to establish whether the licensee's breach was intentional or reckless, thereby reaching the threshold of misconduct (s73(c)(ii)) or unintentional or inadvertent and, therefore falling, within the ambit of unsatisfactory conduct (s72(b)).

[49] Mr Holgate made quite full submissions on the theme that Ms Ross had been denied natural justice because, in her dealings with the Authority, she had not been made aware of its concerns about her own conduct as distinct from that of Ms Jolen or the Professionals as a company. Mr Holgate put it that the Authority was required to explain what evidence was pertinent to a complaint against her and that "*in all the circumstances the communications between the CAC and Ms Ross were far too amorphous to comply with the requirements of natural justice*".

[50] He also made the point that the CAC did not seem to have appreciated that a real estate agent would not normally be a party to an agreement for sale and purchase which would be entered into by the agent's principal, i.e. the vendor, and the purchaser; and that the type of clause contemplated by the CAC for insertion in the contract for the sale of Hoey Street was quite inappropriate.

[51] We also received very helpful and detailed typed submissions from Mr Joblin and feel we have covered the issues dealt with by him in the course of this decision. He put the issues with regard to Ms Ross as to whether she conducted herself unsatisfactorily in advising the vendors not to include a clause in the agreement for sale and purchase covering the early release of deposit to them and in not actually doing that. With regard to Ms Jolen's conduct, he put the issue as whether she conducted herself unsatisfactorily in disbursing the deposit to the Professionals in the usual way and in the way, she dealt with the irate phone call from the vendor, Mr Challenor.

[52] In terms of credibility, all parties and all witnesses seemed honest and credible to us. Any discrepancies in evidence seem to be due to haziness caused by the passage of time.

[53] When we stand back and look objectively at the evidence in this case, we agree with the complainant vendors that Ms Ross "*did a good job at least until settlement of the sale*". However, a request had been made through her to the Professionals about early release of the deposit as we have explained above and the expected letter from the solicitor for the vendors had not come to hand, so that she ought to have checked the situation out. However, we think her stance that the type of clause sought by the vendors to go into the agreement for sale and purchase was technically correct, as the privity about releasing the deposit needed to be between the real estate company and the vendors and the matter was not an issue between vendor and purchaser.

[54] We find Ms Ross' conduct to be unsatisfactory conduct from a technical point of view, but very much at the lower end of the scale. However, in all the circumstances, in terms of our powers under s.80(2) of the Act, we consider that no

action should be taken against her so that we quash the finding and penalty orders of the Committee regarding her.

[55] With regard to the conduct in this case of Ms Jolen, we feel that, as manager, she should have been more proactive and checked with Ms Ross, or the vendors, or their solicitor, as to whether the Professional's concession about deposit release was still requested. We suspect that she may have been unconsciously influenced by her company not particularly wanting to so defer payment of its entitlement.

[56] It is true that as the CAC put it, she was the manager of the firm and had a duty of care to the vendors, but we do not see her conduct as particularly reprehensible. She herself accepts that, with hindsight, she could have done better and taken the initiative to ascertain whether the vendors still expected the concession about commission. Accordingly, we confirm the Committee's findings against her that she is guilty of unsatisfactory conduct but very much at the lower end of the scale. Also, we confirm the penalty of censure made against her by the Committee but order also that she undertake the educational course required by the Committee to be undertaken by Ms Ross. We detail that below. As indicated above, we quashed all the orders against Ms Ross but believe she has in the meantime undertaken that educational course.

[57] As Mr Clancy stressed in the course of his helpful final oral submissions, it was unsatisfactory that Ms Ross and Ms Jolen were simply awaiting an undertaking from the solicitor and might have regarded that as adequate to meet the request of the vendors. As Mr Clancy put it, good practice required that the change about time of payment of commission be recorded either on the listing agreement with initialling or signing and dating as such an amendment, or in a separate document to be kept with the listing agreement so that it was clear that commission entitlement for the real estate firm crystallised at settlement rather than on payment of deposit as is normal. As he also said, it is a realistic point made by the complainants, that an appropriate clause could have been inserted in the agreement for sale and purchase, because at least the arrangement would have been somewhere in writing and it would have been clear that it was conditional on a letter of undertaking from the vendors' solicitor and on the complainants purchasing their next property through the Professionals if that was also a condition for release of the deposit. To insert such a clause in that agreement would need to be acceptable to the purchaser and would not, as such, bind the Professionals which was vital for such a concession.

[58] Also as Mr Clancy emphasised, Ms Jolen was at all times aware of the request from the vendors but decided to take the Professional's commission at the usual time without further inquiry. We consider that a competent branch manager in the circumstances of this case, should have made some sort of inquiry as to the then need and understanding of the vendors.

[59] We record in this case that there is no issue about the requirement that the deposit be held in the real estate agent's account for 10 days.

[60] We also agree with Mr Clancy that, in terms of the submission by Mr Holgate about lack of natural justice for Ms Ross in the Committee's investigation, the hearing before us has been a complete rehearing for her and she has had full notification that her conduct was called into question and has been given every chance to respond to all evidence and allegations against her. Frankly, it seems to us that the Committee made proper inquiries of her and she was aware of the full complaint against her and was provided with entirely adequate information to put her on notice of such. In any case, we have quashed the findings of the Committee against her except to the extent that, technically, we have found unsatisfactory conduct on her part but that no further action is required of a disciplinary nature.

[61] We take seriously the submission about breach of natural justice because this is a situation where the Licensees' respective livelihoods were at stake and they were entitled to be made fully aware of why the Committee was investigating them.

[62] As Mr Holgate put it, with hindsight, there has merely been a failure by the two licensees to properly deal with a request from the vendors for a concession. Mr Holgate submits that should not amount to unsatisfactory conduct. We have explained that it does, but at the lower end of the scale.

[63] We are conscious that the vendors have experienced much stress and, perhaps, some embarrassment over this situation. They are not satisfied with their apology letter from the Professionals and believe that in the small community where they live, there is a feeling of distrust of them in the real estate community when they feel that the Professionals did not carry out their word to the vendors. In fact, it seems that the vendors did not fulfil the condition stipulated by the Professionals of providing an appropriate letter of undertaking from their solicitor.

[64] However, Ms Bolesworth puts it that the Professionals did not carry out their word and she feels that the vendors (she and Mr Challenor) paid \$15,500 commission to the Professionals but did not get the service they deserved. She seeks monetary compensation, apparently, by way of a refund of the commission of \$15,500 from the professionals to her and Mr Challenor. We understand that the registered proprietor of the property at Hoey Street was Mr Challenor. In any case, we do not consider that there can be any entitlement to compensation to the vendors. They have not suffered any loss caused by a licensee under the Act.

[65] Of course, it became obvious to all parties in the course of this rather intensive hearing that all that had been necessary upon the vendors requesting the Professionals to defer taking their commission, and the Professionals agreeing to do that, would have been the said solicitor's letter of undertaking (a sensible and reasonable requirement) coming to hand, and that there should have been a memo to that effect signed by the parties to the listing agreement so that the position was clear to all. Had that been done, there would have been no proceedings through the Committee nor before us.

## **Outcome**

[66] The appeal by Ms Jolen is dismissed so that the Committee's penalties of censure and apology are confirmed but with the additional Order from us that Ms Jolen undertake an educational course as follows:

To register within the next twelve months with the Open Polytechnic courses and attend onsite to complete unit standard 26149: Demonstrate Knowledge of Licensing and Code of Professional Conduct under the Real Estate Agents Act 2008. That within one month of this order she provide written confirmation of his enrolment in such a course to the Authority. In addition she must provide written evidence of having completed and passed that course to the Authority (section 93(1)(d)).

[67] The complainants' cross-appeal against Ms Jolen is dismissed because the failure of Ms Jolen does not amount to misconduct. As we have found above it is at the lower end of the scale for unsatisfactory conduct. The agents were entitled to their commission and we reject the complainants' submission to the contrary.

[68] The appeal of Ms Ross is allowed and, accordingly her penalties (censure and educational course) are quashed.

[69] 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 G Denley  
Member

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Mrs J Robson  
Member