

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2013] NZREADT 65

READT 008/13

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

**BETWEEN** **PETER THOMPSON,  
DENNIS LAW, ALEXANDER  
ELTON, AND MAXWELL HOUSE**

Appellants

**AND** **REAL ESTATE AGENTS  
AUTHORITY (CAC 20006)**

First respondent

**AND** **GRANT ADAMS**

Second respondent

**MEMBERS OF TRIBUNAL**

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

**HEARD** at AUCKLAND on 5 April 2013 (with subsequent series of written submissions)

**DATE OF DECISION** 1 August 2013

**APPEARANCES**

Mr T D Rea and Ms C Eric for appellants  
Mr M J Hodge for the Authority  
The respondent on his own behalf

**DECISION OF THE TRIBUNAL**

***The Appeal***

[1] Peter Thompson, Dennis Law, Alexander Elton, and Maxwell House (the licensees) all appeal against decisions of Complaints Assessment Committee 20006 finding unsatisfactory conduct proved against them and making orders as follows:

- [a] Mr Thompson – a reprimand;
- [b] Mr Law – fine of \$1,500;

[c] Mr Elton – a reprimand;

[d] Mr House – a reprimand.

[2] The primary issue is whether the Committee was correct to find unsatisfactory conduct on the part of the licensees stemming from a complaint by Grant Adams, the second respondent, (“the complainant”) that:

*“On 9 May 2012 I discovered that my family property, 244A Blockhouse Bay Road, Avondale, Certificate 191297 North Auckland, was being advertised by Barfoot and Thompson (MREINZ) Mt Roskill Licensed Agent (REAA) 2008 Agency reference 475806, without my knowledge, consent or authorisation on the internet site Trademe.”*

### **Background Facts**

[3] Two vacant sections at 244A and 244B Blockhouse Bay Road, New Windsor, Auckland, were listed for sale with Barfoot & Thompson Ltd on 7 May 2012 by Ms Van Yu, who was a purchaser in possession under his prior sale and purchase agreement with the complainant.

[4] On 9 December 2011, the complainant (as vendor, together with a third party, Mr Miguel) entered into an agreement with Ms Van Yu (as purchaser) for the sale of two vacant sections described in the agreement (albeit incorrectly) as 244B and 244C Blockhouse Bay Road, New Windsor, Auckland. These two sections formed part of the land contained in certificate of title 191297. The remainder was a third section on which the complainant’s home was situated and was described (albeit also incorrectly) as 244A Blockhouse Bay Road, New Windsor, Auckland. The land was to be subdivided and new titles issued for the three sections.

[5] Under the terms of that agreement, the possession date was 10 December 2011 and settlement was to take place on the issue of new titles for the sections. A Mr Lan Pang signed this agreement on behalf of Ms Van Yu; and the sales agent was Re/Max Pinnacle Real Estate Associates Ltd.

[6] On 26 April 2012, Dennis Law of the Mt Roskill branch of Barfoot & Thompson was contacted by Lan Pang (on behalf of Van Yu) who told him that Ms Yu was a purchaser of two vacant sections at 244A and 244B Blockhouse Bay Road, New Windsor, Auckland (“the properties”) under a sale and purchase agreement dated 9 December 2011 with the then owner, the complainant, Mr Adams, and that she wished to on-sell the properties through Barfoot & Thompson. Mr Law was aware that Ms Yu was not yet the registered proprietor of the properties.

[7] Ms Pang provided Mr Law with a copy of the sale and purchase agreement between the complainant and Ms Yu (which she had entered into on behalf of Ms Yu), and a copy of building plans and consent documentation relating to this agreement. Ms Pang also provided Mr Law with a copy of the existing certificate of title, which included the properties, and told him that the Council had advised that, once the subdivision (which was underway) was complete and the new titles were issued, the properties’ addresses would be 244A and 244B Blockhouse Bay Road. In fact, the Council had reviewed the street numbers when the application for subdivision consent was made and had already allocated 244A and 244B as the new addresses for the sections and 244C as the new address for the existing dwelling at

the rear of the sections (the complainant's family home). These new addresses were effective as from 17 October 2005.

[8] The complainant, Mr Adams, and the other registered proprietors of the land were advised of the new allocated addresses by letter from the Council dated 12 September 2005. In January 2010, Mr Adams objected to the change of addresses, but the Council declined to make any change to the previous allocation; so that the sections were to remain 244A and 244B, and the existing dwelling was to remain 244C.

[9] On 26 April 2012, Ms Pang (on behalf of Ms Yu) entered into a sole agency agreement to sell the sections with Barfoot & Thompson for the period 26 April to 30 May 2012.

[10] On 26 April 2012, Mr Law prepared a written market appraisal for the properties in accordance with Rule 9.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. It was prepared to reflect the current market conditions and confirmed comparable information on sales of similar land in the area. It recorded the recent sale of two similar vacant sections in the area. However, the recent sales information was limited as few sales of comparable properties had recently taken place in the area and none of a comparable size to the subject properties. No properties were recorded in the "For Sale Now" section of the appraisal because there were no comparable properties for sale at the time. Mr Law explained the lack of comparable sale information to Ms Pang. This appraisal was provided to Ms Pang (on behalf of Ms Yu) on 26 April 2012 at the Mt Roskill branch."

[11] On 7 May 2012, the properties were listed with Barfoot & Thompson by Ms Yu as their equitable owner under the sale and purchase agreement. The listing salesperson was Mr Law. On 8 May 2012, they were advertised on Trademe and in the Chinese property overview for release on 10 May 2012. They were described in the advertisements as 244A and 244B Blockhouse Bay Road. The advertisements contained a photograph of a vacant, cleared section, and the text read:

*"Developers, builders or private homeowners want to **build their dream home**. All hard work has been done. **Two sunny sections** with building consent underway, all services are available, close to amenities, and 10 minutes driving to the new motorway. Keen vendor wants it sold, call me now to commute and take advantage of capital growth". [emphasis added]*

### **The Complaint by Mr Adams**

*Wednesday, 9 May 2012*

[12] In the evening of Wednesday, 9 May 2012 (at 6.51pm), the complainant sent an email to Barfoot & Thompson's general administration email address "admin@barfoot.co.nz" asserting that Barfoot & Thompson was "*knowingly and actively pursuing the sale of [his] property at 244A Blockhouse Bay Rd, all without [his] knowledge, consent or authority*". The complaint instructed Barfoot & Thompson to immediately withdraw all sales and advertising of the property.

*Thursday, 10 May 2012*

[13] On the morning of Thursday, 10 May 2012, that email was directed (in the absence of Barfoot & Thompson's Customer Relations Manager, Max House) to the manager of the Mt Roskill branch, Alexander Elton. Upon receipt of this email, Mr Elton arranged for the properties' listing to be immediately withdrawn and took the extra precaution of arranging for all branches to be notified by email.

[14] On the same day, Mr Elton sought an explanation from the listing salesperson, Mr Law and investigated the matter. Mr Law explained to Mr Elton that Barfoot & Thompson had a signed agency agreement to sell two sections, described as 244A and 244B Blockhouse Bay Road (and not the home of Mr Adams which was at that time part of the same title), by the purchaser of these sections who according to the sale and purchase agreement had been given possession of the sections four months earlier on 10 December 2011.

[15] In the evening of 10 May 2012, the complainant sent a further email to Barfoot & Thompson's general administration email address in which he requested a copy of the listing authority by close of business on 11 May 2012.

*Friday, 11 May 2012*

[16] On the morning of Friday, 11 May 2012, Mr Adams' emails of 9 and 10 May 2012 were forwarded to Barfoot & Thompson's Customer Relations Manager, Maxwell House.

[17] That same morning, Mr House emailed Mr Adams and advised that he had been asked to investigate the matter on behalf of the directors of Barfoot & Thompson, that reports had been requested from the practitioners involved and that Barfoot & Thompson would endeavour to respond within 10 working days. A copy of its In-house Complaint Process was provided with this email.

[18] Mr House then contacted Mr Elton and requested that he provide all relevant information to him and said that he would then correspond with Mr Adams.

[19] In the evening of 11 May 2012, Mr Adams sent a further email to Mr House (copied to Mr Thompson and to the general administration address) in which he acknowledged the investigation but repeated his request for a "*full certified*" copy of the listing authority which enabled Barfoot & Thompson to sell his "*home and land*" (to be provided by 5pm Saturday, 12 May).

*Saturday, 12 May 2012*

[20] On the morning of Saturday, 12 May 2012, Mr Adams attended at the Mt Roskill branch and requested to speak to the branch manager and, when he was not available, requested to see the agency agreement for the properties. The receptionist telephoned Mr Law who told her that the agency agreement could not be provided to Mr Adams as he was not the vendor under the agreement and explained that Mr Adams' complaint was being dealt with by Head Office. Mr Adams was advised accordingly. Mr Law's view seems correct and reasonable to us.

[21] Later that morning, Mr Adams left a telephone message on Mr Elton's mobile and sent an email to Mr Thompson (copied to Mr Elton) in which he complained about the treatment of him at the branch and repeated his request for a copy of the agency agreement by 5.00 pm.

[22] Mr Thompson's receipt of this email (and Mr Adams' earlier email of 11 May) was delayed due to these having been sent to an incorrect address. Mr Thompson received these emails about noon on 12 May when celebrating his birthday with family. He promptly contacted Messrs House and Elton and instructed them to investigate, in accordance with Barfoot & Thompson's complaints procedure. Mr Thompson was advised that they were aware of the complaint, that the listing had been withdrawn, and the investigation was underway.

[23] Mr Elton responded by email to the complainant, Mr Adams, (copied to Mr House) later that day advising Mr Adams that he was unable to provide him with a copy of the agency agreement as this would breach Barfoot & Thompson's client's privacy and that his complaint was being dealt with by the customer relations manager, Mr Max House. Mr Adams was asked to direct any further concerns to Mr House.

[24] Mr Adams responded by email to Mr Elton (and Mr Thompson and copied to Mr House) that afternoon asserting that, as the owner of the properties, he was the client, demanding a copy of the agency agreement and stating that any non-cooperation by Mr Elton was obstructive.

[25] Later that evening, Mr Adams sent a further email to Messrs Thompson and Elton in which he requested that they disclose the name of the solicitor who Barfoot & Thompson consulted to sell his "*house and land*" before 8am the following day (being Sunday, 13 May).

[26] Mr Thompson's receipt of both of these emails was again delayed due to these having been sent to an incorrect email address. Upon receipt, both Messrs Thompson and Elton referred these to Mr House who confirmed that he was investigating the matter and would respond to Mr Adams.

*Monday, 14 May 2012*

[27] On Monday 14 May 2012 Mr Elton discussed the matter further with Mr Law, consulted with Mr House, and passed all relevant information to Mr House.

[28] Although it was considered that Ms Yu had every right to list the properties, the listing was cancelled due to the complexity of the terms of the sale between Mr Adams and Ms Yu and Mr Adams' concern over the resale. Ms Yu was notified of this by letter dated 14 May 2012.

[29] That morning, Mr House responded to Mr Adams by emailed letter (copied to Mr Elton) that:

- [a] The properties had been listed for sale with Barfoot & Thompson by Ms Yan Yu, a purchaser in possession of the properties under a sale and purchase agreement with Mr Adams (which had been negotiated through another real estate agency, Remax Pinnacle).

- [b] Barfoot & Thompson were unable to provide Mr Adams with a copy of the listing authority as this was a contract between Ms Yu and Barfoot & Thompson.
- [c] Upon receiving notice of Mr Adams' concerns regarding the listing Barfoot & Thompson had immediately arranged for the properties to be withdrawn from the market and for advertising to cease.

[30] In this letter, Mr House observed that there was obviously a conflict of interest between Mr Adams and Ms Yu regarding her right to sell the Properties and that these issues would need to be resolved directly with Ms Yu.

[31] In the evening of 14 May 2012, Mr Adams emailed Mr House (and Mr Thompson and copied in Mr Elton) asserting that he had not made a complaint to Barfoot & Thompson but rather had requested a copy of the agency agreement which had been withheld and advising that he had made a complaint to the Real Estate Agents Authority regarding this. Mr Adams went on to make various puzzling allegations that Barfoot & Thompson were intentionally acting deceitfully with regards to the sale of his home. Mr House could not understand Mr Adams' comments in that regard or the basis for his ongoing concerns given the information provided.

*15 -17 May 2012*

[32] In the evening of 15 May 2012, Mr Adams emailed Mr Thompson and Barfoot & Thompson's general administration address stating that he had received *"in writing a solicitors confirmation that [Barfoot & Thompson] has sold my family home and land situated at 244A Blockhouse Bay Rd, identified on CT 191297, North Auckland, without my authority, knowledge or consent"* and demanding a copy of the agency agreement which allowed Barfoot & Thompson *"to sell [his] house and building"* by 4pm, 16 May.

[33] This email was forwarded the following day to Mr House, who investigated Mr Adam's claim that his home had been sold. Mr Thompson's receipt of this email was again delayed as it was sent to an incorrect email address. Upon receipt, he immediately contacted Mr House who said that he was already investigating the matter as he had also received Mr Adams' email.

[34] On the morning of 16 May 2012, Mr House searched Barfoot & Thompson's records and could find no record of any sale or sale agreement relating to the properties. Mr House also obtained a copy of the certificate of title for the properties which did not record any sale. Mr House then emailed Mr Adams that same morning and provided him with a copy of the certificate of title. He also advised Mr Adams that he could find no record in Barfoot & Thompson's system of a sale of the properties and asked for details of the sale so that further investigations could be made. Mr House reported to Messrs Thompson and Elton the outcome of his investigation.

[35] With regards to Mr Adams' assertion that he had received correspondence from a solicitor which advised that his home had been sold, this correspondence (from GW Lawyers Ltd dated 14 May 2012) referred to a sale from *"G Adams and A Miguel to Lan Pang -244B and 244C Blockhouse Bay Rd"* and, therefore, it related to the original sale of the sections by Mr Adams to Ms Vu (the reference to, Ms Pang as purchaser being incorrect) and not any subsequent sale. Also in this letter the

solicitor noted that he had been advised by his client that the correct addresses for the sections were 244A and 244B Blockhouse Bay Road.

[36] Mr Adams subsequently responded to Mr House by email confirming that the title provided was his property and family home and again requested a copy of the agency agreement.

[37] On 17 May 2012, Mr House emailed Mr Adams (copied to Mr Elton) and advised that nothing further could be added to his response of 14 May which explained that the properties had been listed by Ms Van Vu, the listing had been withdrawn following his complaint, the agency agreement cancelled, and that Barfoot & Thompson were not able to provide him with a copy of the agency agreement as it was a contractual issue between Ms Vu and Barfoot & Thompson.

[38] Therefore, Barfoot & Thompson considered that the matter had been fully addressed and its investigation file was to be closed.

*18 May 2012*

[39] On 18 May 2012, the appellants received notification of a complaint having been lodged with the Real Estate Agents Authority by Mr Adams. In this complaint Mr Adams stated that he had discovered that his "family home" had been advertised by Barfoot & Thompson on Trademe without his authorisation and had subsequently been sold without his authority; and he asked the Authority to instruct Barfoot & Thompson to release a copy of the agency agreement to him. Mr Adams asserted that the vendor of the properties was acting fraudulently.

*19 May 2012*

[40] On 19 May 2012, Mr Adams emailed Mr House and complained that he had "failed to highlight the correct boundary lines for CT 191297". Mr Adams subsequently complained to the Real Estate Agents Authority alleging that Barfoot & Thompson had failed to identify the correct legal owner of the properties and their correct boundaries.

#### *Subsequent Investigations by Glaister Ennor*

[41] The appellant's solicitors, Glaister Ennor, searched the Council records relating to the properties and obtained a copy of correspondence from the Council to Mr Adams (and the other registered proprietors) which recorded that, as from 17 October 2005 the legal addresses of the properties were 244A and 244B Blockhouse Bay Road and Mr Adam's home was 244C Blockhouse Bay Road, and that Mr Adams had been notified of these changes of address in September 2005 and again in January 2010.

[42] Glaister Ennor also obtained a Landonline "Spatial Map Print" dated 16 November 2012 and a copy of the new certificate of titles issued for the Properties which confirmed that the addresses of the properties are currently 244A and 244B Blockhouse Bay Road and also record that Ms Yu is now the legal owner.

***The General Stance of the Licensees (the appellants)***

[43] The licensees submit as follows:

- [a] Yan Yu was entitled to on-sell the proposed sections within the proposed subdivision that he was purchasing under the agreement for sale and purchase dated 9 December 2011. These were described as 244B and 244C in the agreement, although it is understood they are numbered 244A and 244B following the subdivision;
- [b] Barfoot & Thompson was entitled to act as agent for Yan Yu on an on-sale;
- [c] Barfoot & Thompson were entitled to act on Yan Yu's instructions on advertising the properties for on-sale as 244A and 244B, notwithstanding their description as 244B and 244C in the agreement; and their a subsequent check of Council records demonstrates that the properties for on-sale were correctly described as 244A and 244B.

***Relevant Legislation***

[44] *"Unsatisfactory conduct"* is defined in s.72 of the Act as follows:

***"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."*

[45] We also set out Rules 5.1, 6.3 and 9.5 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 as follows:

- "5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.*
- 6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.*
- 9.5 An appraisal of land or a business must be provided in writing to a client by a licensee; must realistically reflect current 'market conditions; and must be supported by comparable information on sales of similar land in similar locations or businesses."*



## **Discussion**

### **On-Sale by Yan Yu**

[46] Mr Adams' central complaint is that his family property was advertised for sale by Barfoot & Thompson without his knowledge, consent or authorisation. While there has been much focus on the proposed street numbering of the proposed sections within the proposed subdivision of the property at 244A Blockhouse Bay Road, the licensees' essential answer to this complaint is that Yan Yu was entitled to on-sell and Barfoot & Thompson was entitled to act as agent. We agree.

[47] As a general proposition, a purchaser of land in New Zealand under an unconditional agreement for sale and purchase has an equitable estate in the land which, among other things, is able to be on-sold by that purchaser. However, the position is not always so clear-cut where an agreement for sale and purchase is subject to conditions.

[48] The leading New Zealand case is *Bevin v Smith* [1994] 3 NZLR 648 where the Court of Appeal held that "*an equitable interest in land should, and does, pass under a conditional contract of the kind involved here ...*". However, the Court went on to stress that:

*"... whether the equitable interest has passed must always depend on the terms of the contract itself. There will be some conditional contracts, particularly those subject to true conditions precedent, where the parties cannot be regarded as intending that equitable title will pass to the purchaser until the condition is fulfilled or waived."* (at p. 655).

[49] In the present case, the agreement for sale and purchase has some unusual features. While the possession date was described as being one day after the date of the agreement, namely 10 December 2011, the special conditions included the following provisions:

- [a] The purchaser was given access to the property for the purpose of building (clause 20);
- [b] The purchaser's access for building purposes was only effective on release of the deposit. Clause 28 required the deposit funds to go from the real estate agent's trust account to the vendor's solicitor's trust account, but did not otherwise alter the effect of the standard deposit clauses at 2.1 to 2.4. Clause 2.4 required the deposit to be held by the stakeholder until the requisitions procedure was completed, and in this case it was to be some time before new titles issued;
- [c] If the vendor was not able to transfer clear titles within one year of the date of agreement, then the agreement was effectively at an end, with the deposit being forfeited to the purchaser and the vendor owing any additional building costs by way of a loan to the purchaser, together with interest (clause 22);

- [d] Under clause 27, the purchaser was not permitted to register a caveat against the existing certificate of title, other than in the limited circumstances contemplated by, and for the purpose set out, in clause 21;
- [e] Clause 25 imposed various obligations on the purchaser in relation to construction on the property, including an obligation to lay foundations within a specified time.

[50] We accept that it is at least arguable that, under this particular agreement, the parties cannot be regarded as intending that equitable title would pass on 10 December 2011 such that Yan Yu was entitled to on-sell. The deposit was not able to be properly released until completion of the requisitions procedure, long after 10 December 2011. More importantly, clause 22 arguably meant that the agreement constituted little more than a loan agreement if the vendor did not obtain clear titles within one year of the agreement. In addition, the passing of an equitable estate in land enables a purchaser to register a caveat to protect his or her equitable interest, yet here, the purchaser's ability to register a caveat was limited by the agreement.

[51] It appears that Messrs Law and Elton at Barfoot & Thompson, Mt Roskill, did not obtain legal advice on this issue before listing and advertising the property for sale. They would have been prudent to have done so.

[52] Whatever the strict legal position, given the uncertainty created by the unusual terms of the agreement, Mr Hodge submits for the Authority that, at a minimum, Mr Law should have ensured that there was communication with Mr Adams before listing and advertising the property for sale. That would have been a prudent course. As set out above, the agreement provides access to the purchaser for the purpose of building (clause 20), not access for the purpose of on-selling (whether the access was by real estate agents, prospective purchasers or otherwise). Similarly, Mr Adams might reasonably have expected the purchaser to be working to progress construction in accordance with the obligations created by the agreement, rather than creating delay through an on-sale process.

[53] Ensuring communication with Mr Adams would have avoided him finding the property advertised on TradeMe without his knowledge and in circumstances where there was at least a question as to Yan Yu's entitlement to on-sell (and, therefore, Barfoot & Thompson's entitlement to act).

### ***Acting on the Basis of Yan Yu's Instructions Alone***

[54] Yan Yu's instructions were that the properties being on-sold were properly described as 244A and 244B. This conflicted with the agreement, which was the only means by which Yan Yu had any kind of interest which could be on-sold, and it described the properties as 244B and 244C.

[55] In these circumstances, Mr Hodge submits that Mr Law could not safely proceed on instructions alone but had to undertake sufficient checks to properly satisfy himself of the position before the property was listed and advertised; and that this did not occur.

[56] In the event, checks subsequently undertaken show that Yan Yu's instructions were correct. Even so, steps should have been taken to reconcile the position with the position described under the agreement, before Mr Law could safely proceed. If

nothing else, it was evident from the agreement that Mr Adams would have thought that he was selling 244B and 244C, and the on-sale of a property described as 244A would likely cause him considerable concern. We agree that Mr Law should have ensured that there was communication with Mr Adams before listing and advertising the property for sale as 244A and 244B.

### ***Findings Against the Licensees***

#### ***Mr Law***

[57] The Committee found that Mr Law had engaged in “*sloppy practice*” in failing to take reasonable care in the preparation of the listing agreement with Yan Yu. There has been much focus on the various descriptions of the street numbering allocated, or to be allocated, to the proposed three sections of the proposed subdivision. Mr Hodge has submitted that Mr Law failed to make adequate checks before listing and advertising the property, and should have ensured there was communication with Mr Adams. This relates to the confusion about the street numbering, and also to general issues raised by an on-sale given the unusual terms of the agreement.

[58] Mr Hodge submits that a finding of unsatisfactory conduct against Mr Law was open to the Committee. We deal further with Mr Law’s situation below.

#### ***Mr Elton***

[59] Mr Elton is the branch manager of Barfoot & Thompson Mt Roskill, and the supervisor of Mr Law. Section 50 of the Act imposes significant duties on a branch manager in Mr Elton’s position.

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

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

[60] The present case involved a complex and unusual set of circumstances. It may be argued whether Yan Yu was entitled to on-sell and, at the least, there was obvious confusion about the description of the properties to be on-sold. Assuming an on-sale was possible, and given the unusual terms of the agreement, any on-sale would need to have been carefully structured to ensure that Yan Yu complied with her obligations under the agreement.

[61] Mr Hodge submits that, as an effective supervisor, Mr Elton should have required that Mr Law obtain his review and approval of key steps to be taken before listing and advertising properties in such complex and unusual circumstances. We agree that would have been a wise course. Mr Hodge therefore submits that it was open to the Committee to find there was a failure of supervision in this case. We consider that submission below.

***Mr House***

[62] Mr Hodge submits that it is artificial and unhelpful to characterise the involvement of Messrs House and Thompson as dealing with a complaint which is outside the scope of real estate work (as Mr Rea submitted); and puts it that the reality is that Barfoot & Thompson was acting for Yan Yu for the purpose of bringing about a transaction (an on-sale). As we explain below, we do not disagree but need not deal with that issue due to our overall findings.

[63] We accept that Mr Adams was caught by surprise by the advertising on TradeMe and was understandably concerned by the prospect of an on-sale. In the unusual circumstances of this case, he raised urgent concerns about what was happening. This ultimately led to Barfoot & Thompson Ltd terminating the listing with Yan Yu and removing the proposed sections from the market. Responding to, and managing, the issues raised by Mr Adams was part and parcel of Barfoot & Thompson acting for Yan Yu and seems to us to be real estate agency work.

[64] Indeed, it was Mr House's apparent (to Mr Adams) treatment of the issues raised as being appropriately dealt with pursuant to a standard complaints process (with a response within ten working days), rather than requiring urgent attention, which was alleged to be unsatisfactory. At the branch level there was an appropriately rapid response, including putting a hold on all marketing. However, Mr Hodge puts it that the impression conveyed by Mr House to Mr Adams was that his concerns were a routine complaint to be dealt with in accordance with standard procedure.

[65] Mr Hodge submits that, in all the circumstances, an unsatisfactory conduct finding was open in respect of Mr House and we refer further to that below.

***Mr Thompson***

[66] As a licensee officer of Barfoot & Thompson Ltd, Mr Thompson has duties which, depending on the particular facts and circumstances of any given case, may mean that he has liability (in a disciplinary sense) arising out of conduct of Barfoot & Thompson staff members, because their conduct (allegedly) should have been prevented or ameliorated by Mr Thompson's fulfilment of his duties. Whether this is so will depend on the particular facts and circumstances of the case.

[67] As a general proposition, Mr Thompson is entitled to place considerable reliance on a senior manager, such as Mr House, to manage the type of situation which arose in this case. This does not mean that Mr Thompson does not still retain responsibility to ensure that senior managers are properly fulfilling their duties.

[68] In the present case, Mr Thompson had at least a degree of direct involvement, and must have been responsible to ensure that Mr House dealt with the situation adequately, and to take steps if he believed Mr House had not. Mr Hodge submitted that the substantive effect of the Committee's decision is that Mr Thompson failed in this respect. As we explain below, we do not think so.

### ***Lack of Care before Listing/Marketing***

[69] The opening submissions of counsel for the Authority were that Messrs Law and Elton should have ensured that contact was made with the current owner and occupier of the property, the complainant Mr Adams, before the property was listed and marketed for sale. Counsel for the appellants rejects that submission arguing that there is no duty on a licensee to communicate with a vendor when receiving instructions from an intermediate purchaser about an on-sale. However, as we have said, it would have been a sensible course.

[70] Mr Hodge does not argue for a blanket such duty, but rather that, in the particular circumstances of this case, a reasonably competent licensee would have made contact with Mr Adams to ensure that the listing and marketing proceeded on a proper footing. We have said that such a course would have been prudent. It is also put that to the contrary, the evidence is that Mr Law took an approach of *“list and market the property now, worry about the practical and legal ramifications later”*, and was cavalier in this respect or, as the Committee put it, *“sloppy”*. We do not find that stance to be warranted against Mr Law on the evidence adduced to us.

### ***Importance of Mr Adams’ Views***

[71] Mr Hodge submits that the evidence demonstrates the importance of making contact with Mr Adams in the circumstances of this particular case. The evidence was that Barfoot & Thompson Ltd chose to terminate the listing with Yan Yu as a commercial decision because of the combination of two factors:

- [a] The complexity of the sale and purchase agreement between Mr Adams and Yan Yu; and
- [b] Mr Adams’ negative views of the proposed on-sale.

[72] We accept that the complex terms of the agreement were known to Barfoot & Thompson Ltd at an early stage, before the property was marketed for sale; and the only thing that changed prior to Barfoot & Thompson’s decision to terminate the listing with Yan Yu, was knowledge about Mr Adams’ negative views of an on-sale. It is put that if Mr Adams’ views were so important that, in combination with the complex terms of the agreement, they led to Barfoot & Thompson terminating the listing with Yan Yu, that shows that contact should have been made with Mr Adams at an early stage as part of initial due diligence; and this would have avoided Mr Adams first learning of a possible on-sale by seeing an advertisement on TradeMe, which has led to the complaint. There is much merit in that submission.

### ***Terms of Agreement made Mr Adams’ Involvement Inevitable***

[73] The Authority is not arguing, and does not seek our ruling, that Yan Yu did not acquire a right to on-sell. It is simply noted that the position was not as straightforward as Mr Law appears to have taken for granted. Mr Hodge also puts it that more important are the real practical difficulties arising in any on-sale of this property without the involvement of the owner and occupier, Mr Adams, e.g.:

- [a] The agreement contemplated construction by Yan Yu on un-subdivided land without separate titles. However, completion of the subdivision and obtaining separate titles was in the hands of Mr Adams;
- [b] Yan Yu had no ability under the terms of the agreement to step in and complete the subdivision and obtain new titles if Mr Adams failed to do so within a certain period of time;
- [c] The agreement contained no guidelines on what Yan Yu could construct on the proposed subdivision and there was no provision preventing Mr Adams from raising an objection to the development proposed by Yan Yu;
- [d] There was no requirement in the agreement that Mr Adams would lend support to Yan Yu's application for a building consent (and sign any required documents as the owner);
- [e] There were no dispute resolution provisions in the agreement;
- [f] Any on-purchaser could not achieve greater rights than these, which were unsatisfactory, without separate covenants from Mr Adams. Furthermore, any on-purchaser would be entirely reliant on Yan Yu enforcing the rights which did exist under the agreement, for the benefit of the on-purchaser.

[74] The above factors are relevant and we take them into account.

[75] We also accept that, given the complexities and difficulties with the agreement, which gave Mr Adams the ability to take steps (or to refuse to take steps) affecting the development, an on-sale would have been a highly unattractive proposition for any on-purchaser without the involvement of Mr Adams, in order to achieve at least some level of assurance in this regard.

[76] We agree with Mr Hodge that the involvement of Mr Adams was always going to be critical to the viability of an on-sale in the particular circumstances of this case; and he should have been contacted before the property was listed and marketed for on-sale. It is not good enough for a licensee to take the view that these things do not matter because they can be addressed later, if they can be addressed at all, once an on-purchaser has been found and there is a deal to be done. However, is such a failure, in all the circumstances, unsatisfactory conduct as defined in the Act?

### ***Directorial Responsibility***

[77] We also agree with Mr Hodge that the issue of directorial responsibility in the management of a real estate company, in accordance with good agency practices and the various regulatory requirements imposed on real estate agents, is an important issue. The appellants and the Authority seem at odds on matters of principle regarding this issue in addressing the position of Mr Thompson. As it happens, we find that Mr Thompson had limited involvement and essentially relied on Mr House and we do not criticise his conduct in the circumstances of this case.

### ***Our Further Conclusions***

[78] For all that, when we stand back and absorb the facts of this case we do not think that the conduct of any of the licensees is particularly concerning. We find it difficult to regard as credible the complainant's assertion that he thought his home was being advertised for sale without his knowledge or approval. In our view, the response of the real estate agency firm and the various appellants does not particularly warrant criticism or a finding of some type of deficient professional conduct.

[79] We have detailed the relevant facts above but, essentially, on Wednesday 9 May 2012 at 6.51 pm Mr Adams, as complainant, asked Barfoot & Thompson Ltd to withdraw all sale advertising of the property. Mr Elton arranged for that to be done the next day on the morning of 10 May 2012, and also commenced an immediate in-house investigation into Mr Adams' concerns.

[80] There were many communications between the parties. In the evening of 10 May 2012, the complainant requested a copy of the listing agreement between Ms Yu and Barfoot & Thompson Ltd by the close of business on 11 May 2012. Indeed for some days thereafter he kept demanding that. However, the stance of Barfoot & Thompson Ltd and the licensees is that such a listing agreement could not be provided to the complainant because it was between other parties. We consider that view must be correct because the document was confidential to its signing parties. Understandably, Barfoot & Thompson Ltd would therefore not provide it to the complainant. The latter's continuous demands for it were ill founded.

[81] The complainant was advised of the situation by an email from Mr Elton of 12 May 2012, but we infer he was up with the play orally from the outset, and there were many other communications between them. By 17 May 2012, Barfoot & Thompson Ltd had completed a thorough investigation of the situation and Mr House again reported by email to the complainant.

[82] As Mr Rea put it at the outset, the broad issue on appeal is whether the appellants ought to have been found guilty of unsatisfactory conduct. We do not find any such unsatisfactory conduct as defined in the Act.

[83] In terms of narrower issues put by Mr Rea, we do not think it has been established that Mr Law's actions breached Rules 5.1 and/or 9.5; nor that Mr Elton's actions breached s.50 of the Act; nor that Mr House's actions breached Rule 6.3, nor that Mr Thompson's actions breached Rule 6.3 and nor was there any personal responsibility on Mr Thompson as "*principal officer*" of Barfoot & Thompson for the actions of others within that company in terms of the Act. We do consider that the actions of Messrs House and Thompson in relation to the Mr Adams' complaint fall within "*real estate agency work*" as defined in s.4 of the Act, but that aspect is quite academic in terms of our overall findings of no failure in the conduct of the appellants or any of them.

[84] The Committee's finding against Mr Thompson seems to have been made on the basis that Barfoot & Thompson Ltd had failed to deal with the complaint in a timely manner and with appropriate urgency given that the complainant felt he had seen his own home for sale; and that there should have at least been an apology to the complainant from Mr Thompson as the principal officer of Barfoot & Thompson

Ltd. However, it seems to us that the complaint was handled quite speedily and efficiently and, as we have said, the complaint is not particularly credible even in the context of the quite complex agreement for sale and purchase between the complainant and Ms Yu.

[85] The concerns alleged against Mr Law seem to be that he failed to ascertain the correct addresses of the properties, or to provide a written market appraisal for them and that he failed to take reasonable care in the preparation of the agency agreement between Ms Yu in those respects. However, he did ascertain the correct addresses of the properties and he did provide a written market appraisal for the properties which seems to have been quite adequate in the circumstances. Mr Law knew that Ms Yu was not the registered proprietor of the land but that she had entitlements under her agreement for sale and purchase with the complainant. There is nothing particularly novel about a purchaser under an agreement for sale and purchase selling her contingent interest subject to subdivisional work in the usual way.

[86] We do not find that Mr Elton failed to adequately supervise Mr Law. We have already found that there is no particular reason to criticise Mr Law's conduct in any case. We do not think that Mr Law failed to make adequate checks before listing and advertising the property. Before listing the properties, he verified with the Council the information received from Ms Yu regarding the street addresses.

[87] The concern about Mr House seemed to be that he and Barfoot & Thompson Ltd had not dealt with the complaint with sufficient urgency or grace, but we consider that the complaint was dealt with efficiently and satisfactorily and, in all the circumstances in a timely manner. We do not think there was any undue delay between the making of the complaint, the withdrawal of the listing by Barfoot & Thompson Ltd, and the advice to the complainant of that.

[88] It seems to us that the agreement for sale and purchase between the complainant and Ms Yu was quite complex and the respective duties and obligations on each party arising from it merit quite some argument from a legal point of view. We do not think that the licensees can be criticised for, perhaps, not comprehending the nuances of that. Having said that, we think it was unwise of the firm and the relevant agents to proceed in all the circumstances on only the instructions of Ms Yu. It should have been obviously prudent for them to have sought Ms Yu's approval to involve the complainant (as registered proprietor of the land) into the proposed marketing of some of that land by Ms Yu. Had that been done, this appeal and its prior complaint would not have arisen. Nevertheless, we do not think that such a failure in the particular circumstances of this case amounts to "*unsatisfactory conduct*" as defined in the Act. Also, technically, Ms Yu had a marketable interest in the land regardless of any stance from the complainant (as its registered proprietor over material times).

[89] As already indicated, we do not think there was any reasonable basis for the complainant, Mr Adams, to be concerned that his home had been listed for sale. He must have become confused as to the effect of the agreement for sale and purchase he had entered into with Ms Yu (through her agent).

[90] In effect, Ms Yu was endeavouring to have her agreement for sale and purchase with Mr Adams marketed, and Mr Adams was never at risk of having his remaining interest in the land dealt with because of that.



[91] For all the prudent steps which could have been taken by the licensees, and referred to by us above, "*unsatisfactory conduct*", as defined in the Act, has not been established against any of them.

[92] Accordingly, we quash all the findings of the Committee, and allow the appeal, and we determine that no further action be taken.

[93] 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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Mr J Gaukrodger  
Member