

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2013] NZREADT 90

READT 076/12

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

BETWEEN **DEBBIE AND DAVE TONG**

Appellants

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

First Respondent

AND **PATRICK REGAN, MARY CURNOW, LISA HOPEWELL, WARREN EADE**

Second Respondents

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 22 August 2013

DATE OF DECISION 17 October 2013

COUNSEL

The appellant's on their own behalf
Ms J F MacGibbon, Counsel for the Authority
The second respondents on their own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] Dave and Debbie Tong (*“the appellants”*) appeal against the Complaints Assessment Committee 20006 decision to take no further action on their complaints (detailed below) against Patrick Regan, Mary Curnow and Lisa Hopewell, all licensees.

[2] A finding of unsatisfactory conduct was made against the licensee Warren Eade, and a penalty order was made censuring him. Mr Eade has not appealed that decision, but the appellants have.

[3] This appeal is factually complex.

Factual Background

[4] Warren Eade holds a salesperson's licence and works for Waiheke Real Estate. Patrick Regan, Cathy Cameron and Lisa Hopewell respectively hold a salespersons licence and work for Bayleys, Waiheke. Mrs Curnow is the principal agent at that agency.

[5] The appellants were joint directors and shareholders of Tong Trust Holdings Ltd (TTHL). TTHL owned 29 and 31 Waikare Road, Oneroa, Waiheke Island, and 29 Waikare included land, a building, and the business "Lure Cafe".

[6] On 28 August 2008, TTHL entered into a sole agency agreement for 29 and 31 Waikare Road with Waiheke Real Estate. This agreement expired on 31 November 2008 and, thereafter, became a general agency agreement. The appellants allege that they verbally cancelled this general agency agreement in December 2008. Warren Eade states that Waiheke Real Estate records show that the property was formally withdrawn from its listing on 10 September 2009.

[7] The appellants allege that in July 2009 a woman named "Kimberley" expressed interest in buying or leasing the Lure Cafe business which was operated out of 29 Waikare Road. The appellants state that Kimberly told them that she had approached real estate agencies in relation to her interest.

[8] The appellants temporarily separated in October 2009.

[9] On 18 January 2010, Lawton Valuers, provided the appellants with a valuation of \$1,100,000 for 31 Waikare Road. On 19 January 2010 a valuation was provided for 29 Waikare Road at \$1,450,000.

[10] In March 2010, the appellants asked Bayleys Waiheke, Waiheke Real Estate, and Kelland's to provide proposals and appraisals for the sale of their two properties. The appraisal of Bayleys Waiheke was dated 23 March 2010.

[11] On 30 April 2010, TTHL signed sole agency agreements for both properties with Bayleys Waiheke and Patrick Regan as their listing agent. Those sole agency agreements expired on 20 July 2010 and, thereafter, became general listing agreements.

[12] On 22 May 2010, Bayleys advised the appellants to cancel any existing listing agreement with Waiheke Real Estate and this is confirmed in an email from Mrs Debbie Tong to Waiheke Real Estate that day.

[13] The business of Lure Cafe (part of 29 Waikare Road) was owned by Ddteez Ltd as the lessee of TTHL. The directors and shareholders of Ddteez Ltd are the appellants (as they also are of TTHL). No separate agency or listing agreement was signed with Ddteez Ltd. Patrick Regan stated that he was unaware that the Lure Cafe was owned by a different entity from TTHL. On 14 May 2010, the appellants

provided a cash flow report regarding Lure Cafe showing its owner as Ddteez Ltd. Patrick Regan states that soon after that was the first time he discovered the different ownership of the cafe. This was confirmed in an email to him on 14 June 2010.

29 Waikare Road, Waiheke

[14] The appellants originally raised the issue that Patrick Regan had failed to take into account a valuation they had for their cafe business (held by their company Ddteez Ltd). On 4 June 2010, the appellant's chartered accountant, David Bluett, emailed the appellants stating that he had spoken to Patrick Regan about the valuation of the business and that Patrick Regan had said that he did not want to know what the valuation was. However, there is an email from Patrick Regan dated 24 June 2010 requesting the valuation as he had only just found out about it.

[15] According to Patrick Regan, it was agreed with the appellants prior to auction that 29 Waikare Road would be marketed as one entity rather than marketing the sale of Lure Cafe separately. David Tong was happy to prioritise selling the cafe and felt that could be sold separately from the land and buildings at No. 29. For Debbie Tong, selling the freehold land (and buildings) at No. 29 was the primary concern.

[16] A prospective purchaser, Mr Appleford, indicated to Lisa Hopwell his interest in the building and land at 29 Waikare but not the cafe. Post-auction (at which the properties were not sold) it was made clear to him that the vendor was adamant that only a deal including the total assets at No. 29 would be considered.

[17] An issue developed about the boundaries of the two properties. A Mr Bart Haub, of Haven Waiheke Ltd, confirmed that he was asked to go to 31 Waikare Road the day before the auction and meet with a client of his and the agent Cathy Cameron to inspect the property. Some title information and an aerial photograph were provided with boundary lines overlaid. Mr Haub says he noticed that the soffit of the neighbouring property at No. 29 seemed to overhang the boundary of 31 Waikare Road and pointed this out to Ms Cameron and her client. This information went back to the office of Bayleys Waiheke and Patrick Regan then contacted Mrs Tong's solicitor with a suggested clause to be read out at auction to cover that issue. A clause was agreed and read out the next day at auction to cover the possibility of an encroachment. Mr Tong had agreed with this condition.

[18] The auction date was 23 June 2010. The reserve set for the auction by the appellants for 29 Waikare Road was \$1,300,000 and the top bid at auction was \$1,010,000. The reserve set for 31 Waikare Road was \$900,000 and the top bid at auction was \$805,000. Both properties were passed in.

[19] On 25 June 2010, Patrick Regan went to 29 Waikare Road with a sale and purchase agreement for land and buildings at \$1,105,000. Debbie Tong stated to Patrick Regan that she would agree to \$1,150,000 for the land and buildings (i.e. excluding the cafe business, which was to be subject to a separate agreement). This was signed by David Tong and David Pederson on behalf of Debbie Tong as a vendor.

[20] About this time, Mrs Tong left for Europe and, in her absence, her solicitor (Brendan Lawler) and her brother (David Pedersen) represented her interests. Murray Jordan, solicitor, acted for Mr Tong.

[21] Accordingly, on 28 June 2010 an unconditional sale and purchase agreement was signed between TTHL and Stephen Appleford and/or nominee for land and buildings at 29 Waikare Road at a sale price of \$1,105,000.

[22] On 8 July 2010, the solicitor for David Tong raised an issue as to the price being only \$1,105,000 rather than \$1,150,000. Debbie Tong had stated that she had not agreed to the \$1,105,000 price. She raised that issue with her lawyer who stated that he had been advised that Patrick Regan had received a text from her confirming that price. Patrick Regan disputes that he received such a text. The agreement was signed by the said David Pedersen, Mr Tong and their lawyers.

[23] The sale of 29 Waikare Road was settled on 31 August 2010 and the property was later registered in the name "*Waikare29 Ltd*" which had been registered on 14 July 2010 with Stephen Appleford and Warren Eade as its two directors and both are shareholders.

[24] Patrick Regan received the listing fee and Lisa Hopewell received the sales commission. Stephen Appleford was never listed in the vendor reports from Patrick Regan as an enquirer.

[25] Also on 28 June 2010, a sale and purchase agreement for the Lure Cafe business was signed between Ddteez Ltd as vendor and Stephen Appleford and/or nominee as purchaser at a price of \$150,000. This was conditional on due diligence.

[26] In summary, the land and buildings sold for \$1,105,000 and the cafe for \$150,000 making a total sale of \$1.255 million for 29 Waikare Road.

[27] On 1 July 2010 a sale and purchase agreement for the Lure Cafe business was signed between Stephen Appleford and/or nominee (as vendors) and Kimberly Alford & Noyan Atamer and/or nominee (as purchasers) at a price of \$155,000. Patrick Regan was the selling agent on this transaction.

[28] On 23 October 2010, a Penelope Saxton-Beer signed a sale and purchase agreement by private treaty with Waikare 29 Ltd for the land and buildings at 29 Waikare Road for \$1,400,000 and the settlement date was 13 December 2010. Warren Eade handled the sale and received a commission.

[29] Warren Eade and Stephen Appleford state that between their purchasing 29 Waikare Road and on-selling it to Penelope Saxton-Beer, they completed renovations including sound proofing, new ceilings, repairs and maintenance, and secured two long term tenants – a 12 year lease for the cafe and a one year fixed lease for the other building on the property. The extent of the repairs is disputed by the appellants.

[30] Accordingly, Messrs Eade and Appleford onsold the land, building, and cafe business at 29 Waikare Road for a total of \$1,555,000.

31 Waikare Road, Waiheke

[31] On 5 July 2010 a conditional sale and purchase agreement of 31 Waikare Road was signed between TTHL (vendor) and Halifax Trust No 2 (Rob and Patricia Vincent) (purchaser) for \$900,000 through Bayleys Waiheke.

[32] The contract eventually fell through as the purchaser was unable to meet the finance condition. During the due diligence phase, on 2 August 2010, Rob Vincent had some drawings done of a possible development at 31 Waikare Road to include two townhouses. These were later shown to Penelope Saxton-Beer, a prospective purchaser, by Mary Curnow and Patrick Regan on 4 August 2010. There is evidence from Penelope Saxton-Beer she indicated that she wanted to make an offer of \$990,000 for 31 Waikare Road but did not do that until the following day through a phone call to Patrick Regan. According to Patrick Regan and Mary Curnow, Ms Saxton-Beer never made the offer through them nor viewed the property.

[33] There is also an allegation from the appellants that Mary Curnow knew Rob Vincent personally and was involved with the Halifax Trust offer to ensure that any development on this site suited Bayleys Waiheke. Mary Curnow says that she knew Rob Vincent, but not personally. Also, she refutes the allegation that she was vetting potential purchasers but does not refute the contention that she did discuss tenancy options as she was interested in relocating Bayleys Waiheke to 31 Waikare Road. This was conveyed to the previous potential purchaser, Halifax Trust (Mr Vincent), although on what date has not been ascertained.

[34] On 4 August 2010, the Halifax Trust requested an extension of time to fulfil its due diligence. This was refused by Mr Tong and at this point he suggested to Patrick Regan that he (Mr Tong) would purchase Mrs Tong's share of the property instead. The possibility was later confirmed in a 14 September 2010 email from Mrs Tong to Patrick Regan.

[35] This listing was removed from Bayleys Waiheke on 6 August 2010 once Mr Tong confirmed that he had bought/or was going to buy the property from TTHL.

[36] In late September/early October 2010, Mary Curnow discussed the possibility of a joint venture with Mr Tong to develop 31 Waikare Road. According to Mary Curnow, Mr Tong stated that he may be interested and, on that basis, Mary Curnow and her accountant drew up a proposal for Mr Tong to consider. Mary Curnow stated that she did not hear from Mr Tong again until Christmas 2010 when he phoned her to say that Mrs Tong had broken into his home and taken some things, including the proposal document to develop 31 Waikare Road.

[37] Mr Tong says that he did not phone Mary Curnow but she phoned him. He said that he was not in a position to consider her proposal as he had not finalised some matrimonial issues with Mrs Tong. Mrs Tong states that she was not aware of the possibility of a joint venture.

[38] On 11 October 2010, Penelope Saxton-Beer made an offer of \$990,000 to purchase 31 Waikare Road through Warren Eade and Waiheke Real Estate, with TTHL as the vendor. This offer was not counter signed by the appellants or even opened. Mr Eade was not the listing agent.

[39] Mrs Tong returned from overseas in 2011 and reconciled with Mr Tong and they currently live at 31 Waikare Road.

The Complaints and the Committee's Findings

Insufficient or Unsatisfactory Conduct

[40] The appellant's allege that Mary Curnow and Patrick Regan did not satisfactorily or sufficiently communicate with them. They further state, that Mary Curnow took advantage of the fact that the appellants were separated at most material times.

[41] Mary Curnow and Patrick Regan state that, due to the acrimonious relationship split of the appellants, communicating with them was difficult. Further, Patrick Regan states that Mrs Tong left unexpectedly for Europe leaving her brother and her solicitor to represent her and that made any communication with her even more difficult. Mary Curnow stated that she was not directly involved in the selling and therefore had no direct communication with Mr and Mrs Tong.

[42] The Committee did not find any compelling evidence to support this complaint; and further found that Patrick Regan did all he could in difficult circumstances.

Low sale price for 29 Waikare Road

[43] The appellant's allege that 29 Waikare Road was undersold (on 28 June 2010) by \$45,000 contrary to their clear instruction to obtain a total of \$1.3 million and that the sale and purchase agreement had been altered without the approval of the appropriate signatories. David Pederson (as brother of and power of attorney for Mrs Tong) and her solicitor viewed the agreement. The first time that allegation was raised was in an email to Patrick Regan from Mrs Tong on 12 March 2011.

[44] The appellant's state that the sale price of \$1.255 m was not their intended sale price. The Committee did not find that this allegation substantiated and found that the misunderstanding about price was not the fault of Patrick Regan or Lisa Hopewell and that there was no intention to mislead.

Failure to Present all Potential Offers

[45] Patrick Regan states that he had known Kimberley Alford personally for many years and was aware that she was looking for a business to buy on Waiheke. However, he states that just prior to the auction, Mr Tong said that he wanted to sell the land, buildings, and cafe at No. 29 as one package.

[46] The Committee noted that the cafe was on-sold to Kimberley Alford for \$150,000 plus a nominal commission of \$5,000 to Bayleys Waiheke. According to Lisa Hopewell, Stephen Appleford was not keen to buy the buildings and business as one package and that is why she and Patrick Regan worked quickly to on-sell the cafe.

[47] In its decision, the Committee relied on the unsuccessful auction on 23 June and that a sale and purchase agreement was finalised on 28 June 2010. It preferred the evidence of Patrick Regan, confirmed by Mr Tong, that post-auction the vendor's instruction was to sell the property as a whole. As such, no breach of conduct was found.

Offer from Penelope Saxton-Beer

[48] The Committee accepted that Ms Saxton-Beer made an offer of \$950,000 for 31 Waikare Road through Warren Eade of Waiheke Real Estate on 11 October 2010 which was not accepted by the appellants. It found that the evidence as to whether she had made a previous verbal offer through Bayleys Waiheke is unclear, but that she did show interest and view the property on 4 August 2010. Mary Curnow was to accompany Patrick Regan to the meeting with Ms Saxton-Beer.

[49] The Committee accepted the licensee's evidence on this point that no verbal offer had been made.

Failure to disclose Warren Eade's involvement in the purchase of 29 Waikare Road

[50] The appellant's allege that there was an element of collusion and deceit by Mary Curnow and Patrick Regan in not disclosing Warren Eade's involvement as a part-purchaser of 29 Waikare Road.

[51] Stephen Appleford has stated that, at the time of making the offer to purchase No. 29, he did not know how he would structure the purchasing entity.

[52] The Committee found that Warren Eade was not required to disclose his interest, given that the listing with Waiheke Real Estate had been cancelled on 10 September 2009 and Warren Eade was in not in any way "related" to either listing agent or selling agent; and therefore, there was no breach by him of any of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 .

[53] The appellants allege that Patrick Regan specifically on-sold the property knowing at the time of purchase that there was profit to be made from reselling it later.

[54] Patrick Regan stated that he had no contact with Warren Eade before the auction on 23 June 2010. Warren Eade confirms this. Mr Appleford stated that he left the on-selling of the cafe to Lisa Hopwell and Bayleys Waiheke.

[55] The Committee did not find any compelling evidence to support this part of the complaint.

Failure to disclose to Mrs Tong that Mary Curnow had proposed to enter a joint venture for 31 Waikare Road

[56] The appellant's allege that, by showing Ms Saxton-Beer the Halifax Trust's development plans, the licensees were trying to vet potential purchasers and only encourage those who would work with Mary Curnow on a joint venture and at a lower price than sought by the vendor company. Mrs Tong also states that in disclosing this to Mr Tong but not Mrs Tong, Mary Curnow was a breach of her obligations.

[57] Mary Curnow states that she was under the impression, which was confirmed by the withdrawal of the listing, that Mr Tong had purchased Mrs Tong's share of the property sometime after 6 August 2010; and, on that basis, she approached Mr Tong with the joint venture. She points out that Bayleys Waiheke did not then have the listing.

[58] The Committee found that there was nothing to support the complaint that Mary Curnow had compromised the sale of 31 Waikare Road to the Halifax Trust.

Misled Bidders at Auction Regarding the Overhanging Eaves

[59] Evidence put before the Committee from an unsuccessful prospective purchaser, Barbara Palmer and her builder Bert Haub, confirmed that they raised the issue of over hanging eaves with Cathy Cameron (another Bayleys licensee) the day before the auction. Mrs Tong's solicitor then approved the cover-all clause which was read out at the auction.

[60] The Committee found that Patrick Regan had acted in a prudent and reasonable manner given the late notification of the possible "defect". The Committee again found no breach.

That Warren Eade had no Authority to Present an Offer on 31 Waikare Road

[61] The appellants state that Warren Eade had no authority to present an offer to Mr Tong from Ms Saxton-Beer in late August 2010. Warren Eade accepted that Waiheke Real Estate did not then have a formal listing for 31 Waikare Road but submitted that his understanding was that Mr Tong would sign a formal agency agreement if an offer was produced.

[62] The Committee found that this was contrary to Rule 9.5 (the need for a written appraisal and pricing) of the said Rules and as such found unsatisfactory conduct by Mr Eade on this complaint. As indicated above, Mr Eade has not appealed that finding; but the appellants have.

[63] The Committee determined that the presentation of the offer on the property by Warren Eade without a listing authority was at the lower end of the scale and, as such, censured him.

This Appeal

[64] Although there are a variety of allegations, the key issues are as follows and all involve factual determinations.

Issues on appeal in relation to 29 Waikare Road

[65] For misconduct or unsatisfactory conduct to be substantiated, the complainant/appellants need to show that Patrick Regan:

- [a] Knew that Kimberley Alford was interested in the cafe agreement prior to the sale of No. 29 to Mr Appleford on 28 June 2010;
- [b] Did not present an offer or other relevant interest to the appellants; and
- [c] Used this information to assist in the sale of the cafe to Warren Eade and Steve Appleford on 1 July 2010.

[66] It is noted that Patrick Regan was also the listing agent for the sale, on behalf of Waikare29 Ltd, of the cafe to Kimberley Alford

[67] In relation to the complaint about on-selling to Penelope Saxton-Beer, it would need to be shown that:

- [a] Ms Saxton-Beer had shown an interest in the property, prior to the unconditional sale and purchase agreement;
- [b] That this was conveyed to Patrick Regan;
- [c] That he did not disclose this to the appellants; and
- [d] Planned to on-sell the property to her in collusion with Warren Eade.

[68] A difficulty with this allegation is that Warren Eade was not the listing agent for 29 Waikare Road when he made the offer. Patrick Regan was. When the property was sold to Ms Saxton-Beer, Warren Eade was the listing agent, not Patrick Regan.

[69] Therefore, for a breach of the Act to be found, the appellants need to show that there was a private arrangement for a share in the profits because Patrick Regan did not derive a second commission from the sale to Ms Saxton-Beer. It is not clear who alerted Ms Saxton-Beer to the availability of the property.

Issues on appeal in relation to 31 Waikare Road

[70] For Ms Curnow's involvement in the attempted sale of the property to be a breach of her duty, it would need to be shown that she:

- [a] Was interested in relocating Bayleys Waiheke to 31 Waikare Road;
- [b] That was conveyed to the prospective purchaser (Rob Vincent) before the listing agreement with Ms Curnow's agency was cancelled; and
- [c] That was not disclosed to the appellants.

[71] For Mr Regan's involvement in the sale of the property to be unsatisfactory, it needs to be shown:

- [a] that Penelope Saxton-Beer had wished to make an offer on the property prior to the cancellation of the listing; and
- [b] that he did not convey this to the Tongs.

[72] For such a breach to be found, it needs to be established that Ms Saxton-Beer had conveyed a desire to make an offer, rather than her merely showing a possible interest in the property. Further, the sale and purchase agreement with the Halifax Trust was conditional and, therefore, it would have been necessary for the licensee to have put forward a back-up offer.

Discussion

[73] A fundamental issue is whether the licensees have breached their fiduciary duties to the appellants as vendor clients. Have they breached Rule 6.1 which provides: "*An agent must comply with the fiduciary obligations to his or her client arising as an agent*"?

[74] If the allegations of breach of fiduciary duty are established, then the licensees' conduct could be misconduct under s.73(a) of the Real Estate Agents Act 2008 as "disgraceful". Similarly if the allegations in respect of the "on-selling" are established.

[75] In context the nature of the other allegations lend themselves to unsatisfactory conduct as a breach of the Rules under s.72(b) of the Act or as negligence under s.72(c) of the Act.

[76] Is there evidence which points towards collusion? The onus is on the appellants to prove this. Ms MacGibbon submits that, on the evidence before the Committee, the Committee's decision was correct.

[77] We agree with the Committee that the following Rules might apply:

- "6.1 An agent must comply with the fiduciary obligations to his or her client arising as an agent.*
- 6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.*
- 6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.*
- 6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.*
- "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.*
- 9.3 A licensee must not take advantage of a client's, prospective client's or customer's inability to understand relevant documents, where such inability is reasonably apparent.*
- 9.4 A licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest.*
- 9.13 A licensee must submit to the client **all** offers concerning the sale, purchase, or other disposal of any land or business, provided that such offers are in writing.*
- 9.15 Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.*
- 9.23 A licensee must not use information that is confidential to a client, for the benefit of any other person or of the licensee."*

[78] The material put to us details fact and submissions often mixed together. Mr and Mrs Tong are complaining about the conduct of the respondents and in particular, about Messrs W Eade and P Regan.

[79] When we stand back and focus on the propriety of the conduct of the licensees in this case, we can agree with Mr and Mrs Tong that the communication lines with them became rather haphazard, seemingly, due to Mrs Tong going overseas for much of the material time and apparently being estranged for a time from Mr Tong. However, not only was she represented by her brother and her lawyer in New Zealand but she could have been contacted overseas readily enough. Nevertheless, to be fair to the licensees, Mr Tong seemed to be calling the tune over these properties.

[80] There has been much confusion of thought arising from the evidence and submissions to us from both the complainants and the licensees. It does seem that the latter did their best to market Nos. 29 and 31 as described above, but there could have been a better line of communication with both Mr and Mrs Tong. However, we do not think that Mr and Mrs Tong needed to be told of every possible interest from prospective purchasers especially when, in the experience of the licensees, particular prospective purchasers could not possibly fund a purchase.

[81] Having said all that, we are concerned that the licensee Mr Regan did not seem to understand that TTHL owned the freehold of each property, and of course that included buildings, but that an area in a building on No. 29 had been leased by TTHL to Ddteez Ltd so that the cafe business was owned by Ddteez Ltd and not by TTHL.

[82] Accordingly, when Mr Appleford wished to buy No. 29 but not the cafe business, he merely needed to acquire it in the usual way subject to the lease to Ddteez Ltd. This would have meant that he (or his company) became the lessor of the cafe premises leased to Ddteez Ltd which would sell the cafe business to Ms Alford and Mr Atamer. Ddteez Ltd would thereby have been paid \$155,000 for the business but would have been liable for commission on that. TTHL would have paid commission on a correspondingly lower price for the sale of No. 29 to Mr Appleford (or his company).

[83] The injection of Mr Appleford as purchaser of the cafe business and then his onsale of it to Ms Alford and Mr Atamer was confusing and unnecessary and was unsatisfactory conduct on the part of Mr Regan.

[84] We do not think that any of the other complaints of Mr and Mrs Tong have substance and they have not been proven against any of the second respondents on the balance of probabilities. However, we can see that circumstances became confused for Mrs Tong at a time of stress in her life and she formed various suspicions referred to above. It may well have been that if No. 29 had been sold to Mr Appleford without adding in the cafe for onsale, then Mr Appleford might have paid more for No. 29. Also, it is puzzling that his price seemed to change from \$1.15 m to \$1.05 m without sensible explanation.

[85] In general we come to the same conclusions as the committee has so thoroughly covered. Virtually all complaints have not been proved. We observe that the sale prices obtained by Mr and Mrs Tong's companies were either approved by them or their agents.

[86] Frankly, for all that was adduced before us there is little that has been proven on the balance of probabilities; just a lot of suspicion, confusion, and anxiety of vendors not getting their desired sale price.

[87] We find unsatisfactory conduct proven against Mr Regan for injecting a purchase and resale of the cafe unnecessarily. As did the Committee, we find unsatisfactory conduct by Mr Eade for the reasons given by the Committee as set out above.

[88] Mr Regan and the appellants are entitled to a separate hearing regarding penalty. In the usual way we direct the registrar to arrange a telephone conference to timetable that. Generally speaking, we have confirmed the findings of the Committee which censured Mr Eade, and we see no reason to alter that. We

consider Mr Regan's offending to be at the low end of the scale and deserving of censure or a modest fine. Perhaps penalty can be dealt with by written submissions rather than by a further hearing.

[89] 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.

Judge P F Barber
Chairperson

Mr J Gaukrodger
Member

Ms N Dangen
Member