BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 2

READT 026/12 & READT 009/13

IN THE MATTER OF	appeals under s.111 of the Real Estate Agents Act 2008
BETWEEN	**EARL HENTON**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (CAC 20003)**
	First Respondent
AND	**BARFOOT AND THOMPSON LTD & DEBBIE-LEE WALLACE**
	Second Respondents

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 25 November 2013

DATE OF DECISION 16 January 2014

REPRESENTATION

The appellant on his own behalf
Mr L J Clancy and Ms N Copeland, counsel for the Authority
Mr T D Rea, counsel for the second respondents

DECISION OF THE TRIBUNAL

Introduction

[1] Earl Henton (the appellant) appeals against two decisions of Complaints Assessment Committee No. 20003 which took no further action on complaints he had made against Max House and Barfoot & Thompson Ltd (READT 26/12) and against Debbie-Lee Wallace (READT 9/13). As a result of the High Court's decision in *House and Barfoot & Thompson Ltd. V REAA and Henton* [2013] NZHC 1619, Mr House is no longer subject to this appeal.

[2] The complaint about Barfoot & Thompson Ltd (Barfoot's) relates to the way in which Mr Henton's concerns (as a vendor) about the conduct its salesperson Ms Wallace (the licensee) were dealt with. The complaint against Ms Wallace relates to her disclosure to purchasers of information about a property she had sold to them on behalf of the appellant's family.

Factual background

[3] In November 2011, the owners, including the appellant, of a property at 5B Ranier Street, Ellerslie, engaged the services of Barfoot's to sell the property and the licensee was the listing salesperson.

[4] The agency agreement included the notation "*clients objecting to possible day care in local area*".

[5] On 9 December 2011, the vendors entered into an agreement for sale and purchase for the property with Robin Hulford and/or nominee. That agreement became unconditional on 16 December 2011.

[6] On 19 December 2011, Ms Wallace received an e-mail from the tenants of a neighbouring property at 1 Ranier Street, Ellerslie advising that they would be opening a childcare centre at the property and advising that a 2 metre high acoustic fence was to be constructed on its boundary. We now set out that e-mail in full as it shows that the operators of the Childcare Centre sought to fit in with neighbours. The e-mail (from Tessa Apa, one of the tenants) reads:

> *"Hi Debbie Lee (sorry hope this is your name ☺*
>
> *We are the tenants at 1 Ranier Street. We will be opening a Childcare Centre there in the New Year.*
>
> *Can you please confirm whether the new owners of 5b Ranier Street are aware of this.*
>
> *The main issue is that we are required by Council to build a 2m high solid timber acoustic fence on that boundary. This will be viewed by 5b Ranier Street from their small balcony and lounge area. We are happy to propose three options depending on what suits them best. We can build the fence, not build the fence or plant some hedging on the boundary. The other neighbours have objected to having a 2m high fence as they do not wish to look at it in the evenings and on weekends etc (this is when the Kindy will be closed and the car park empty, and is their social time etc). The other neighbours were of the opinion they would rather look at the trees. In both cases the trees are on the 1 Ranier Street property, and to fence them would mean they are hidden from 5b Ranier Street view.*
>
> *We would like to give the new owners the same options – however we would need to get an answer today or tomorrow morning by 10 am. I am sorry about this time pressure however I didn't know the property was sold until 2 days ago.*
>
> *The only way we can offer to NOT build the fence is if the owners sign an affected party form, indicating they are aware of the activity and that to <u>not build</u> the fence will result in an increase of car noise (during working hours only). It is also worth noting that the area of car park adjacent to 5b Ranier Street is for staff parking only which means there will only be activity twice a day (when they arrive and when they leave).*
>
> *Can you please confirm receipt of this e-mail. I am also more than happy to chat to them and would appreciate the opportunity to get to know them as we will be neighbours ☺"*

[7] That same day, the licensee forwarded the e-mail to the purchaser who expressed concerns and attempted to cancel the sale and purchase agreement. The vendors' lawyers refuted the purchasers' right to cancel the agreement and, ultimately, the transaction settled on 11 January 2012.

[8] Mr Henton states that, on behalf of the vendors, he telephoned Kevin Lowe of Barfoot's, Greenlane, on 20 December 2011 advising him of a letter from the purchaser's solicitors stating the purchaser's intention to terminate the contract. Allegedly, Mr Lowe agreed that Barfoot's would provide a statement to the vendors' solicitors the same day but it did not and Mr Henton states that he left a voicemail for Mr Lowe asking why he had not received such a statement.

[9] Mr Henton states that he called Mr Lowe again on 21 December 2011, when he was told that Barfoot's had been too busy to send the document but would do so sometime that day. He states he informed Mr Lowe of his intention to escalate the complaint to Barfoot's' head office and alleged that Mr Lowe responded. "*They won't do anything*" and immediately hung up the phone.

[10] Mr Henton further states that he called Barfoot's' head office later than day but was told that the person in charge of complaints was away on leave. Mr Henton says the Barfoot's representative to whom he spoke failed to escalate the matter at his request. He called Barfoot's several times later that afternoon and did not receive a return call.

[11] Mr Henton states that he called Barfoot's several times again on 22 December 2011, again to no avail. He asserts that Barfoot's did not return any of his calls; that he then called at least six times on 23 December 2011, all of which calls went unanswered.

[12] Mr Henton states that, on 28 December 2011, he contacted the head office of Barfoot's and outlined his concerns to Sharon O'Brien, particularly in relation to additional legal costs and other expenses he considered he would incur as a result of Ms Wallace's actions. Ms O'Brien sent Mr Henton a letter dated 28 December 2011 (on behalf of Mr House) attaching a copy of a form setting out Barfoot's' in-house complaints process.

[13] On 2 January 2012, Mr Henton set out his complaint concerning Ms Wallace by way of a detailed e-mail to Barfoot's in which he also requested solutions from Barfoot's, including the recovery of extra costs by reduced commission or other means.

[14] On 12 January 2012, Mr Henton contacted Mr Barfoot directly, having received no response to his e-mail of 2 January 2012. Mr Barfoot later e-mailed Mr Henton, referring to the earlier phone call, and advising that Mr House would deal with Mr Henton's concerns on his return from vacation. Mr Barfoot also confirmed that the deposit would be held in Barfoot's' trust account until the end of the month.

[15] On 24 January 2012, Mr House sent an e-mail to Mr Henton advising that Ms Wallace had done nothing wrong by disclosing information to the purchasers about the proposed childcare centre, and that such disclosure was in fact required by Rule 6.4 (set out below) of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009.

[16] Mr Henton responded to this e-mail the same day expressing dissatisfaction with the response and requesting a formal response by way of letter.

[17] On 25 January 2012, Mr House replied to Mr Henton advising that the matter had been addressed in accordance with Barfoot's' internal investigation process and that, consequently, the file was to be closed.

The Committee's decision

[18] In deciding to take no further action against Ms Wallace, the Committee found that the licensee:

(a) had an obligation to pass the information on to the purchasers regardless of whether that information was available on the Local Authority file;

(b) Had no choice but to forward on the e-mail to the purchasers, and acted correctly in doing so; and

(c) was in receipt of information which clearly fell within the ambit of Rule 6.4 and the licensee would have been open to a complaint by the purchasers had she not passed it on.

[19] In deciding to take no further action against Max House and Barfoot & Thompson Ltd, the Committee found that the conduct complained of did not constitute "*real estate agency work".* In a decision of 22 February 2013 [2013] NZREADT 18, we found, *inter alia*, that the alleged conduct of the second respondents (then including Mr House) is capable of falling within the definition of "*real estate agency work*" in s 4 of the Real Estate Agents Act 2008 and so capable of amounting to unsatisfactory conduct. On appeal from our threshold decision, the High Court confirmed that, in the circumstances, Barfoot's conduct in responding to Mr Henton's concerns could amount to real estate agency work, but held that Mr House's conduct did not (because the transaction had settled by the time he become involved in Mr Henton's complaints). The Court noted that, in the period 20 December 2011 to early January 2012, Mr Henton was concerned about the possibility that the agreement would not be completed by the purchasers and settled, and that the assistance he sought from Barfoot's was related, at least indirectly, to the bringing about of the transaction.

Issues now on appeal to us

[20] In relation to Ms Wallace, counsel for the second respondents identifies the issues arising out of Mr Henton's original complaint as follows:

(a) The information contained in the 19 December 2011 e-mail from Tessa Apa did not need to be disclosed to the purchaser as it was available through the local Council;

(b) Ms Wallace should have communicated with Mr Henton or his solicitor before forwarding the e-mail to the purchasers;

(c) The purchasers were not told of the childcare centre development and would not have made an offer had they known; and

(d) It was inappropriate for Ms Wallace to simply deal with such issues by e-mail.

[21] In relation to Barfoot's, counsel for the second respondents identifies the original issues as follows:

(a) Kevin Lowe, Barfoot's branch manager at Greenlane, was not sufficiently receptive to Mr Henton's request for "*solutions*";

(b) Various further attempts by Mr Henton to obtain solutions from Barfoot's' head office prior to Christmas 2011 were unsuccessful;

(c) Mr Henton "*used the opportunity to chase Barfoot's to recover [his] extra legal costs*" but was subjected to a "*rant*" by Mr Garth Barfoot; and

(d) E-mail correspondence from Max House allegedly told Mr Henton nothing, and neither Garth Barfoot nor Max House "*provided a solution to [Mr Henton's] additional costs*".

Purported new points on appeal

[22] In addition to the issues set out above, Mr Henton also raised several new points dealing with the listing documentation; an initial agreement for sale and purchase (with a Cheung Hiang) which did not proceed; misinformation; withdrawal of Trust funds with known claims; full detail of costs, including market costs prepaid; and failure to disclose to auditors a claim on Barfoot's Trust account and outstanding issues.

[23] In *Wyatt v REAA* and *Barfoot & Thompson Ltd,* [2012] NZHC 2550, Woodhouse J considered our jurisdiction to consider, on appeal, an issue raised by a complainant which had not been raised (before he was then unaware of it) in the original complaint. His Honour concluded, in respect of that issue:

> *"[64] There was no determination of a Committee, which means a Complaints Assessment Committee, in respect of which the Tribunal could entertain an appeal. For Barfoot & Thompson, Mr Hern referred to s 105(1) of the Act which provides that the Tribunal may regulate its procedure as it thinks fit. However, this is not a provision enabling the Tribunal to give itself a jurisdiction it does not have.*
>
> *[65] There is no doubt that the parties engaged with the issue in the [appeal] hearing before the Tribunal. However, having regard to the carefully prescribed statutory procedures for the bringing of a complaint, with investigation and determination by a Complaints Assessment Committee, and the wording of s 111 in respect of appeals, I am not persuaded that jurisdiction could effectively be granted by agreement. But if I am wrong in that regard there is a second consideration which satisfies me that the Tribunal's determination should be set aside. This is the clear statement by Mr Wyatt, in his written submissions following the hearing, that he did not seek a determination of this issue. Even if his raising of the matter with the Tribunal could be regarded as a complaint, which I doubt, as the complainant he was entitled to withdraw it."*

[24] While, on an appeal under s 111, we should confine any findings to such matters as can fairly be said to be within the scope of the original complaint, we accept that the complaint must be considered broadly, and in light of the consumer protection purpose of the Act, taking into account that most complainants are lay consumers. We addressed this issue in *Graves v REAA (CAC 20003) & Langdon,*

[2012] NZREADT 66, in which we confirmed that a complaint form should not be construed too narrowly and should not be viewed as akin to a formal pleading in civil proceedings.

[25] In the present case, the Authority submits that certain appeal topics set out above are outside the ambit of the original complaint, even when the approach in *Graves* is taken. Consequently, the Authority respectfully submits that our focus should be on the issues identified by counsel for the second respondents set out above. We agree.

A summary of relevant evidence

The evidence of the appellant

[26] Mr Henton put it that his solicitor and Barfoot's were advised by the purchaser's solicitor's letter of 19 December 2011 that the purchaser purported to cancel the contract of sale by Mr Henton's family. His solicitor instructed him to contact Barfoot's management and obtain a signed statement from the agent (Ms Wallace) and to do this urgently as there were only two or three realistic working days from the Christmas closedown.

[27] Accordingly, soon after 9.00 am on 19 December 2011 the appellant contacted Mr K Lowe at Barfoot's who advised that he had seen the letter from the purchaser's solicitor but had not yet taken much action. It was agreed that Ms Wallace would provide a response by lunchtime that day to be sent to the appellant's solicitor, but as nothing had happened by 5.00 pm that day the appellant phoned Mr Lowe that evening but could not contact him so left a message. He made phone contact with Mr Lowe the next morning, 20 December 2011 and was told by Mr Lowe that the agency had not got around to the matter yesterday as they had other pressures and, in terms of solutions sought by the appellant, that Mr Lowe was not sure if Barfoot's were at fault and would be contacting their solicitor but not until the New Year. The appellant demanded a signed response from Mr Lowe by 12.00 pm that day and was told "*we will have a look at it*". The appellant's solicitor received such a response at about 1.00 pm that day. Understandably, the appellant wanted a "*path forward"* to be agreed upon through his solicitor, i.e. the vendors to accept the cancellation or respond to the purchaser's solicitor's letter of cancellation and resist cancellation; and, in fact, they took the latter course.

[28] *Inter alia* the appellant offered to sell the property direct to Barfoot's "*so they could sort matters out themselves in their own time*". He also advised Mr Lowe that he intended to escalate his issues to Barfoot's head office and says he received a curt response and that Mr Lowe then hung up.

[29] Simply put, the stance of the appellant is that Ms Wallace should never have passed on to the purchaser the 19 December 2011 e-mail communication she had received from the neighbours about the childcare centre, and he alleges that Barfoot's were thoroughly unhelpful in this situation of crisis for him when he felt he was losing a sale but was liable for commission nevertheless. He emphasises the many phone calls he made to Barfoot's requesting, as he puts it, "*support, advice and ownership to remedy a situation of their making*" and maintains that there was inaction on the part of Barfoot's.

[30] As it happened the appellant's solicitor referred him to another legal firm to handle this matter; and a more aggressive stance was taken on behalf of the appellant with the purchaser's solicitor.

[31] The above scenario was developed by the appellant before us in great detail. That included a narrative of his dealings with Mr Garth Barfoot. The appellant advised Mr Barfoot that the $20,000 deposit should stay in the Barfoot's Trust account until matters were resolved. Eventually, he was told that the deposit would stay there until the end of the month, i.e. until 31 January 2012.

[32] Having also observed the appellant add to his evidence-in-chief orally, and be thoroughly cross examined by counsel, we accept that the above scenario caused him massive frustration and anxiety. Overall, his concern seemed to be that he was liable for a $20,000 commission fee to Barfoot's but had not achieved an enforceable sale.

[33] As things worked out, settlement of the sale took place on 12 January 2012 rather than the due date of 9 January 2012, but he incurred quite substantial sums in legal advice and support to achieve that. He blames his situation on the said disclosure by Ms Wallace of the 19 December 2011 e-mail and alleged inaction on the part of Barfoot's. The appellant is an accountant so understood the commercial aspects of the situation. He feels that Barfoot's created a mess of his sale transaction and then "*ran away from it*". He puts the catalyst as that Ms Wallace unilaterally passed on the e-mail from the neighbours to the purchaser when she should have conferred with him, the appellant, as the representative of the vendors.

[34] In cross examination, the appellant acknowledged that Ms Wallace must have received the e-mail from the neighbours about the childcare centre at 1.22 pm on 20 December 2011 when she was driving in her car dealing with other business. Receiving the e-mail caused her to pull over to the side of the road and, realising there was little time to keep the sale transaction proceeding smoothly due to the Christmas/New Year vacation, she simply on-e-mailed that e-mail on to the purchaser, and that caused the purchaser to endeavour to cancel the purchase contract.

[35] Under careful cross examination from Mr Rea, *inter alia*, the appellant insisted that it was untrue that he did not wish the purchaser to know about the childcare centre being established next door to the property but, he felt, that Ms Wallace should have conferred with him first before there was a communication to the purchaser about the matter raised by Tessa from the childcare centre.

[36] Still under cross examination, the appellant made it clear that he felt there was inaction from Barfoot's over his predicament before the Christmas legal break and a far too slow reaction in the New Year of 2012. *Inter alia* Mr Rea put it to him that surely Barfoot's were not at fault and that he was seeking merely to recover money from them, particularly, with regard to the unexpected cost of his further legal advice to deal with the purchaser endeavouring to cancel the contract. The appellant rejected these concepts.

Witnesses for the second respondents

Ms Wallace

[37] Ms Wallace has been a real estate salesperson since 1996 without being the subject of any disciplinary issue until now. On 26 April 2012 she provided a signed statement to the Authority which she confirms. She covered that upon listing the property for the vendors and dealing with Mr Henton on their behalf, she asked whether anything in particular should be disclosed to a potential purchaser. The appellant responded that there was the likelihood of a childcare centre being established next door to the property so, as a precaution she noted that on the listing agreement.

[38] Ms Wallace says that she is an open and honest person and therefore recorded what Mr Henton had told her about the proposed childcare centre. She understood there was to be openness about that with prospective purchasers. Accordingly, when she received the 19 December 2011 e-mail in question from the proprietor of the childcare centre, she did not think to call the appellant because she understood that the prospect of the childcare centre was an open issue. She said she had made a point of disclosing the childcare centre aspect to any prospective purchaser.

[39] Under careful cross examination from Mr Clancy, Ms Wallace said that she knew that Mr Henton had objected to the establishment of the childcare centre but, because she had discussed the matter with him on listing, she did not think she needed to confer with him prior to her passing on to the purchaser the 19 December 2011 e-mail. She now accepts that, with hindsight, it would have been best for her to have done that. She said that, in any case, the purchaser knew about the proposal for the childcare centre from previous discussions with her. She felt that the 19 December 2011 e-mail from the tenants of that property was the best information about the current situation (that they would be opening such a childcare centre and contemplated building a 2 metre high acoustic fence on the boundary). It had never been made clear to Ms Wallace that the childcentre was to be next door to the vendor's property and she had told interested prospective purchasers that it would be "*nearby".*

[40] Ms Wallace seemed to us to be an honest and credible witness, as seemed to be all other witnesses including the appellant.

Mr Lowe

[41] Mr K Lowe gave evidence as the branch manager at Greenlane, Auckland, for Barfoot's at material times. He is a very experienced real estate salesperson and manager over 28 years and is responsible for the salespeople at the Greenlane branch office of the agency, one of whom is Ms Wallace.

[42] Mr Lowe feels that all his dealings with the appellant were courteous on his part. He feels that all his discussions with the appellant were "*businesslike and reasonable*". He was always of the view that Ms Wallace had acted correctly and appropriately. He felt it was an unusual request put to him by the appellant that Barfoot's buy the property because the purchaser was endeavouring to cancel the purchase contract. He also felt that the appellant only raised solutions involving financial payments from the agency to the appellant. He insisted that he would never have hung up the phone on the appellant. Mr Lowe felt that he responded promptly to the requests of the appellant but he needed to take legal advice on behalf of Barfoot's and, as he put it, "*to get to the bottom of it*" before responding. Under firm

cross examination from the appellant, Mr Lowe insisted that he was not trying to cover himself or his firm but simply to get to the bottom of matters.

Mr House

[43] Finally, there was evidence from Mr M House as the Customer Relations Manager for Barfoot's. He is based at that company's head office in Auckland and is responsible for investigating internal and external complaints and has held that position since July 2004. He is also a licensed real estate agent.

[44] Mr House confirmed Barfoot's view, and his own view, as that they unreservedly support Ms Wallace and believe she acted entirely appropriately in the circumstances described above.

[45] As it happens, Mr House was on leave at all material times until the end of January 2012 when he involved himself in the appellant's said complaints. He observes that Barfoot's has never considered there to be a basis for it paying compensation to the appellant or refunding commission; nor that it would ever have agreed to buy the vendors' property from them. He also clarified that, at the time the appellant demanded Barfoot's to not disburse commission, the deposit had been paid out to that company because the agreement for sale and purchase of the property was unconditional and Barfoot's had held the deposit for more than 10 days in terms of s 123 of the Act.

[46] Under cross examination from Mr Clancy, Mr House opined that the appellant was a little unreasonable in his demands for responses from Barfoot's in all the circumstances. He noted that a contractual issue had arisen between vendor and purchaser over a busy Christmas period and it was necessary for Barfoot's to obtain a full background. He put it "*we couldn't do anything regarding the existing contract*". He realised that the appellant wanted "*solutions*" to be proposed by Barfoot's.

[47] Mr House felt that his company could not have responded faster than it did in all the circumstances. He thought that legal advice was required and that the sale contract held by the vendors seemed watertight from their point of view and that options did not need to be discussed until that sale collapsed "*if it did*".

[48] It was put to Mr House that, with hindsight, the best practice would have been for Barfoot's to have responded to the appellant and discussed his options with him. Mr House felt that his company had done the best it could at the material time. It was put to Mr House that his company should have responded well before 12 January 2012 and Mr House remarked "it involved a contract issue with judgement calls to be made by us". It was put to Mr House that surely it was understandable that the appellant wished to speak to his real estate agent? Mr House responded:

> *"Well it was an unfolding issue … We had decided we were powerless until we knew whether the sale transaction would collapse or not. Maybe with hindsight we should have acted more definitively but I can't see that anything would have been gained".*

[49] Mr House was cross examined by the appellant, *inter alia*, on the issue whether there was a basis for compensation from Barfoot's to the appellant in that Ms Wallace had simply passed on to the buyer of the property the 19 December 2011 e-mail from the operator of the childcare centre without reference to him and this had led to an expensive legal dispute for the appellant. Mr House's response

was that the appellant knew the childcare centre was going ahead and the e-mail contained nothing of additional consequence so that Ms Wallace was acting properly in not referring back to the appellant and simply sending the e-mail on to the purchaser.

[50] Mr House did seem to be conceding that, with hindsight, Barfoot's should have responded sooner to Mr Henton than they in fact did.

[51] Mr Henton advised us that he had incurred legal fees of $4,200 from his lawyers in order to have the sale contract adhered to by the purchaser. Also, he admitted to us that he only had the threat of a cancelled contract but that, to him as an accountant, he thought that was a cancellation in reality but it did not happen.

The stance of the appellant

[52] The concern of the appellant, as already apparent, is that he felt he was losing his sale contract but was liable for commission, had incurred $4,200 in legal fees to enforce his sale contract, and felt that he was totally unsupported by his real estate agents who did not communicate with him between 23 December 2011 and 12 January 2012, by which time settlement had taken place. He feels they ignored him at a time when he needed them (as agents for the vendors) to mediate or discuss options with him in order to preserve the sale. He feels they messed him around and did not respond at all adequately. He also feels that they took his deposit as their commission at the earliest possible date thereby weakening his arguing stance with the purchaser.

[53] Simply put, the appellant seems to be saying that Barfoot's should have looked into his practical and legal position and given him support; and that he simply wanted discussions with them as to his options and strategy and, preferably, that they mediate with the purchaser.

[54] Mr Henton puts it that he has pursued these proceedings because, as a consumer, he needs to "*speak up so that real estate agents learn*" and that, as a customer, he was "*left hanging and unanswered*".

Submissions for the Authority

Re Ms Wallace

[55] Rule 6.4 of the 2009 Rules (and of the 2012 Rules) provided:

> *"A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.*"

[56] "*Customer*" was defined in r 4.1 to include potential purchasers. The Authority (and Mr Rea, counsel for the respondents) submits, therefore, that r 6.4 was engaged in the present case and that Ms Wallace did have a duty to disclose the e-mail to the purchasers. We agree. The purchaser needed to consider the options for fencing between the purchased property and the childcare centre.

[57] Licensees are required by the Rules to balance duties of disclosure to purchasers with duties owed to vendor clients. That balance may not always be straightforward in practice. For example, where a client directs that information which

should be disclosed to a purchaser be withheld, the licensee must not continue to act for that client.

[58] In the present case Mr Clancy, puts it that we may feel that Ms Wallace could have handled the issue of disclosure better. While the Rules required that she disclose the 19 December 2011 e-mail to the purchaser, she would have been well advised to discuss the issue with the vendors before she did so to ensure they understood her obligations, and to have discussed ways in which any concerns of the purchaser might be managed. Many of Mr Henton's concerns appear to stem from the fact that the vendors were not consulted before the e-mail was disclosed.

[59] While Ms Wallace's actions may not have conformed to best practice, in all the circumstances, the Authority submits the Committee's decision to take no further action against her was open to it and should be upheld by us on appeal.

Barfoot's

[60] Both at the preliminary hearing before us, and on appeal from that to the High Court, the Authority was supportive of the appellant's argument that the actions of Barfoot's, in responding to his complaint, could amount to real estate agency work (and, potentially, unsatisfactory conduct).

[61] Again, while Barfoot's could have handled things differently and could perhaps have offered Mr Henton more assistance and reassurance, Mr Clancy submits that, in all the circumstances, the Committee's decision to take no further action was open to it on the merits.

The stance of the second respondents

[62] Mr Rea, helpfully covered the issues and the facts in detail. Essentially, he submits that there is no merit to Mr Henton's underlying complaint regarding the conduct of Ms Wallace, and he put it:

> *"Therefore, to the extent that Mr Henton's demands for solutions by Barfoot & Thompson included the possibility of paying him compensation, reducing all foregoing commission, or even buying his house from him, the demands were without justification."*

[63] Mr Rea particularly submitted that Ms Wallace's conduct did not fall short of good practice in any way. He emphasised that, from the outset, she had advised Mr Henton that there must be disclosure to prospective purchasers of the likelihood of the establishment of the childcare centre and that she was open about that, as she should have been, and Mr Henton accepts that. Mr Rea stressed that the purchasers knew of the likelihood of the childcare centre and that the e-mail of 19 December 2011 said nothing more than that except with reference to the erection of the fence. Mr Rea put it that it was absolutely appropriate that Ms Wallace forward that e-mail to the purchaser of the property without needing to check with the vendor because a sale contract then existed.

[64] *Inter alia*, Mr Rea noted the common theme of Mr Henton that Barfoot's were insufficiently responsive, and their responses uninformative and discourteous; but submits that we should find that Mr Henton's demands and expectations were unreasonable and unduly emotive. With regard to the allegations against Barfoot's, Mr Rea simply put it that Mr Lowe needed to look into the situation and, in fact,

responded promptly, i.e. the next day, at a very busy time of the year. Mr Rea also put it that the thrust of the appellant is to somehow extract money from that company and that, overall, the appellant's attitude was outrageous and, in any case, he was dealt with promptly and courteously in all the circumstances.

Our views

[65] Despite the overall conclusions we come to as set out below, we feel that, at least with hindsight, Ms Wallace as the vendors' agent could have been expected to have first contacted Mr Henton before passing the e-mail on to the purchaser. However, we find that, in all the circumstances, her failure to do so does not meet the threshold of unsatisfactory conduct as defined in s 72 of the Act; nor does it breach any rule in the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. It would have been a breach of R 6.4 if she had not passed on to the purchaser the content of the 19 December 2011 e-mail because that comprised information urgently needed by the purchaser. Nevertheless, she would have been wise to at least have told Mr Henton of the content of the e-mail before she passed it on to the purchaser and, preferably, to have conferred with Mr Henton before doing so.

[66] Ms Wallace should not have assumed that Mr Henton had left it to her to pass on to the purchaser information coming to hand about the proposed childcare centre. Nevertheless, we understand that, in all the particular circumstances covered above, she saw nothing untoward or sinister in her disclosure of that 19 December 2011 e-mail. At that stage, there was an unconditional contract for sale and purchase of the property in existence and any issue arising should have been handled by the lawyers for the respective parties, rather than by real estate agents.

[67] The complaint of Mr Henton against Barfoot's is that it did not offer appropriate assistance to him while the sale transaction was under threat. It is a complaint about an alleged omission to provide services on his behalf for the purpose of bringing about the transaction. Here again there is some merit in that complaint as Barfoot's, with hindsight, now seem to admit. Having said that, Barfoot's did respond quickly at the outset but, then, the Christmas/New Year break took place and Barfoot's seemed to have been awaiting advice from its legal advisors and to regard the enforcement of the sale and purchase agreement as a matter for the parties and their respective legal advisors. That is not an unreasonable stance for Barfoot's to have taken in all the circumstances, although it could have been more pro-active and supportive for Mr Henton as its client or principal, in terms of the principal/agent relationship between vendor and real estate agent.

[68] Having said all that, we can sympathise with the appellant who, as a layman rather than a lawyer (and indeed as an accountant who could see possible issues of concern), felt his sale was evaporating but he would still have liability for about $20,000 in real estate commission to Barfoot's and that he was incurring substantial legal fees to enforce his sale contract while being quite unsure of a successful outcome. Understandably, he felt that he needed more support from his real estate agents, even though they had achieved an unconditional contract for the sale of his property. In many ways, the appellant is to be commended for standing up for his perception of his rights.

The Committee's decision to take no further action was open to it on the merits of this case. We consider that Mr Henton's appeal, both in respect of Ms Wallace and Barfoot's, must be dismissed. We agree with and affirm the Committee's decision to take no further action on Mr Henton's complaints; so that these appeals are hereby dismissed.

[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.

____
Judge P F Barber
Chairperson

____
Mr G Denley
Member

____
Mr J Gaukrodger
Member