BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 20

READT 041/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**WARATAH TRUST LTD**
	Appellant
AND	**REAL ESTATE AGENTS AUTHORITY (CAC 20004)**
	First respondent
AND	**JEREMY PRYOR**
	Second respondent
AND	**SUCCESS REALTY LTD**
	Third respondent

MEMBERS OF TRIBUNAL

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

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION 18 March 2014

COUNSEL

Mr G Brittain, barrister for appellant
Ms J Pridgeon, counsel for the Authority
Mr S M Hunter, counsel for second and third respondents

DECISION OF THE TRIBUNAL

Introduction

[1] Waratah Trust Ltd ("the appellant") appeals the 9 July 2013 penalty determination of Complaints Assessment Committee 20004 against Jeremy Pryor ("the salesperson") and Success Realty Ltd ("the agency"). That was consequent to findings of *"unsatisfactory conduct"* against them, pursuant to s.72 of the Real Estate Agents Act 2008 ("the Act"), on 7 May 2013 for publishing misleading marketing material along the lines that the property had private Wairoa river frontage implying ownership of such river frontage.

[2] Following submissions from the licensee, agency, and complainant on penalty, the Committee ordered the following:

[a] Both the licensee and agency were censured;

[b] The licensee was fined $3,500;

[c] The agency was fined $15,000; and

[d] The liability and penalty decisions were to be published.

[3] We emphasise that the appellant now appeals against the penalty decision only.

Background

[4] In November 2011 the appellant purchased a 157.7 hectare farm ("the property") for $3.625 million at auction with settlement on 1 June 2012. The property was sold to the appellant through the agency. The salesperson dealt with the appellant during the agency's marketing of the property.

[5] The appellant made three complaints regarding the marketing of the property in respect of:

[a] Statements made about access to a waterfall;

[b] Statements made about the farm's historic production of deer velvet;

[c] Statements made about the property's river frontage.

The Committee's findings

[6] Only the third of the above complaints was upheld by the Committee's 9 May 2013 decision finding unsatisfactory conduct which included the following determinations:

[a] The marketing material contained the following representation:

"... 1.7km of private river frontage on one of the most picturesque rivers in the area, yet so close to town, must surely be a huge attraction for any prospective purchaser". The 'town' referred to is the city of Tauranga.

[b] *"The Committee considers that it was incorrect for the agency to describe the property in its marketing material as having 1.7 km of "private" river frontage, when 20 metres of that river frontage was reserved to the Crown. The use of the word "private" in the marketing material suggests that the purchaser will have exclusive rights over the river frontage. That representation was wrong. Public access to 20 metres of river frontage is guaranteed by the provisions of the Conservation Act. The adjoining landowner does not have the right to fence off the marginal strips; or, for instance, to plant it out in pine trees."*

[c] *"In the Committee's view, the representation by the agency in its marketing material that the river frontage was "private" was a continuing representation which was left uncorrected by the licensee* [Jeremy Pryor]

when he showed Mr McDougall through the property on his own in October; and together with Mr Hickson the day before the auction".

[d] *"Applying the principles in* ***LB and QB v The Real Estate Agents Authority [2011] NZREADT 39****, the Committee considers that the agency and the licensee* [Jeremy Pryor] *each had a responsibility to investigate whether the representation that the land adjoining the river was "private river frontage" was one that could be properly made in this case."*

[7] Further, the Committee made a finding that the following evidence on behalf of Waratah Trust was not disputed:

"(a) "Mr McDougall says that, to make matters worse, when he was first shown round the property, the tour included the part of the property from where the Wairoa River is best accessed. He says he was told that the sellers had used this area for camping and water activities for family and other groups. This may have reinforced the representation that "private ownership" meant that owners of the land adjacent to the river itself would belong to the purchasers".

(b) "Mr McDougall says that when Mr Hickson and Mr Pryor took them down to the Wairoa River edge where the trees and the fire pit were, the day before the auction, they told Mr McDougall and his group that it was a lovely area for camping, and that there was private access to the Wairoa River. He says they were told that there was 1.7 km of frontage onto the river, and there weren't many places like that left".

(c) "In the 17 October 2012 reply by the agency and by Mr Pryor, those statements by Mr McDougall are not disputed."

[8] The Committee dismissed the first two issues which the appellant had raised (see para [5] above), but upheld the last. On this issue, the Committee found that the agency was incorrect to describe the property as having 1.7 kilometres of *"private"* river frontage when, in fact, 20 metres of that river frontage was reserved to the Crown. It found that the word *"private"* implied that purchasers would have exclusive rights over the river frontage when this was not true; and, therefore, the agency's representation was wrong and amounted to unsatisfactory conduct.

[9] As to the licensee's liability, the Committee recognised that he was not responsible for preparing the marketing material. However, he was nevertheless liable because he failed to correct the misrepresentation when he showed a representative of the appellant through the property in October 2011 and, again, the day before the auction.

[10] Before the Committee, the appellant had submitted that the property did not meet its needs and that it had suffered significant financial loss. However, there was no evidence of actual diminution of value before the Committee.

[11] The appellant said to the CAC that it wanted to sell the property and sought interim orders that the licensee and agency act as its agents on the sale of the property. The appellant also sought leave to make further submissions to the Committee regarding final orders should it choose not to appoint the agency as the appellant's agent, or should the agency be terminated for any reason. In addition, the appellant sought orders that the agency meet the marketing, auctioning and

conveyancing costs of the sale, and act for no commission. The appellant also sought $3,290.55 for reimbursement of legal fees, $1,000 further for legal costs in respect of its submissions, and that a fine be imposed.

[12] On behalf of the licensee and agency, it was submitted to the CAC that there was no evidence to support the submission that the property did not meet the appellant's needs or that the appellant had suffered significant financial loss. Further, it was submitted that the proposed interim orders represented a penalty disproportionate to their conduct, would leave liability at large, that the complaint would remain undetermined if the proposed orders were adopted, and finality would be prevented. The license and agency also submitted that the unsatisfactory conduct was at the lower end of the scale as they had no intention to mislead.

[13] In reaching its decision, the Committee recognised that a penalty in these cases primarily serves to promote and protect consumer and public interests by providing accountability, and ensuring maintenance of professional standards. It also recognised that there is an element of punishments in professional discipline cases. It is also important, the Committee said, to ensure that rehabilitation of the professional is considered. The Committee noted that the appellant had advised that it intended to take its compensation claim to the High Court.

[14] The Committee declined to make orders as sought by the appellant and was of the view that finality needed to be reached; it went on to say:

> *"[3.22] ... Whether or not we have jurisdiction to do so, the Committee would be reluctant to impose agency obligations on the licensees, particularly against the background of this complaint, and threatened High Court action. Inevitably, there is a lack of trust between the parties. That is not a good basis for the parties to work together on the future sale of the property. If the complainant wishes to sell the property, and recover its marketing costs as part of its High Court damages claim, that is up to the complainant."*

[15] As against the agency, the Committee ordered that it be censured. The Committee did not see any merit in ordering an apology be made given the background between the parties. Further, the Committee did not order commission to be refunded as this would amount to a windfall to the vendors, who were not involved in the complaint. In addition, the Committee said that this was not an appropriate case for an order under s.93(1)(f), or any interim order. As shown above the Committee did, however, think that a fine was appropriate, and imposed a $15,000 fine against the agency.

[16] The Committee declined to make an order that the licensee and agency contribute $2,288.50 towards legal costs as it did not consider this was justified in this case. It felt that as the complaint process under the Act was intended to be consumer-friendly, an order to contribute towards legal costs would only be justified in exceptional cases where engagement of a lawyer was justified. In this case, however, the Committee had not been provided with time and attendance records, and it was unclear what work counsel for the appellants did in relation to the complaint.

[17] As also covered above , the Committee thought it appropriate to censure the licensee and fine him $3,500.

[18] In that written decision dated 9 July 2013, the Committee made the orders set out above and declined to make orders:

[a] Under s.93(1)(f), of the Act requiring the agent to act as agent of Waratah Trust in respect of the on-sale of the property; and

[b] Under s.93(1)(i) reimbursing Waratah Trust for legal costs incurred during the complaint process.

Purpose of this Appeal

[19] The appellant now seeks penalty orders to the effect that the agency act as the agent of the appellant for the sale of the property on the following terms:

[a] The agency undertakes a marketing and auction programme of the same scope and extent as conducted when the appellant purchased the property; and all costs in respect of that marketing and auction programme be met by the agency;

[b] If the appellant enters into a contract to sell the property at auction or to any purchaser introduced by the agency or during the period of the agency or within three months of the date of the auction, then the agency shall pay the reasonable conveyancing costs of the appellant in respect of that transaction but not to exceed $3,000 plus GST; and no commission shall be payable by the appellant which shall have the right to terminate the agency at any time by written notice to the agency. Otherwise, the terms of the marketing agency shall be on the standard terms used by the agency for appointment as agent to conduct an auction but subject to the above terms.

Relevant Law

[20] The thrust of this appeal is that the Committee erred in its approach to penalty in exercising its discretion under s.93(1)(f). This is an appeal against the exercise of discretion. The approach to be taken on appeal was confirmed by the Supreme Court in *Kacem v Bashir* [2011] 2 NZLR 1 at [32] where the Court (per Tipping J) stated:

> *"... the important point arising from Austin, Nichols is that those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion involves an assessment of fact and degree and entails a value judgment. In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong" ....*

Section 93(1)(f) of the Act

[21] This subsection provides:

> *"**93. Power of Committee to make orders***
>
> *(1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:*
>
> *...*
>
> *[f] order the licensee –*
>
> *(i) to rectify, at his or her or its own expense, any error or omission; or*
>
> *(ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission."*

[22] This sub-subsection was considered in *Quin v REAA* [2012] NZHC 3557 where, at [44], the High Court (per Brewer J) summarised the purpose of the 2008 Act as *"... the regulation of the real estate industry so as to promote and protect the interest of the consumers. This includes conferring on regulators powers to grant consumers relief from harm, resulting from licensees acting contrary to the standards required of them".* Justice Brewer further held that:

> *"[58] In my view, the wording of ss 93 and 100 makes it clear that a limited jurisdiction is conferred. Section 93(1)(f) does not empower a Committee to order a licensee to make payments in the nature of compensatory damages. That is a power which is given to the Tribunal under s 110, but to a limit of $100,000.*
>
> *[59] Section 93(1)(f) empowers a Committee to make orders directed at the taking of actions. So, a Committee may order a licensee "to rectify, at his or her or its own expense, any error or omission". Rectify means to put right or to correct. That is the focus of the provision. It is, in my view, a power to order a licensee to do something to put right or correct an error or omission by the licensee, at the licensee's expense.*
>
> *[60] Similarly, s 93(1)(f)(ii) is focused on the taking of action to provide relief from the consequences of an error or omission where rectification is not practicable. This is clear from the framing of the power to order a licensee "to take steps to provide" relief "in whole or in part". The inclusion in the power of the ability that this be done at the licensee's expense is a necessary incident of the power to direct the taking of steps."*

[23] Brewer J discussed the potential application of s.93(1)(f) to the facts of that case and said:

> *"[69] In this case the error or omission was the failure to properly put the second respondents on their guard about the location of the boundary. The consequence was that they purchased a property which, on their evidence, they would not have purchased had they known the true location of the boundary.*

[70] It was then too late for the licensee to rectify (put right or correct) the error or omission. But there were steps she could have taken to provide relief, in part, from its consequence. Those steps would have related to putting the property back on the market and re-selling it. The costs of marketing the property and conveying it to the new purchasers would have fallen on the licensee. If there were other consequential costs to the second respondents then, depending on reasonableness, they could also fall on the licensee.

[71] However, if the property sold for a price less than that paid for it by the second respondents, that loss would not fall to the account of the licensee, at least not under s 93(1)(f) of the 2008 Act. The second respondents would still have their rights under the general law, of course."

The Stance of the Appellant

[24] Mr Brittain submits for the appellant that the Committee erred in its approach and put it that the appellant seeks exactly the type of orders under s.93(1)(f) which were approved in principle in *Quin*'s case. He also puts it that the Committee proceeded on the basis that it was uncertain whether it had jurisdiction to grant the orders sought by the appellant but that jurisdiction did exist, as confirmed in *Quin*'s case.

[25] Mr Brittain noted that the Committee was heavily influenced by what it perceived as *"a lack of trust between the parties"*. He submits that, in doing so, the Committee took into account an irrelevant consideration, and made an error of principle because (he puts it) there is no evidence to support a finding that the appellant does not trust the agent and, on the contrary, the appellant seeks the appointment of the agent, by an order under s.93. He submits that any apparent "lack of trust" would be irrelevant in any event. The duties owed by the principal to the agent are governed by well established law. If an agency relationship is created by an order under s.93, it will be governed by the usual legal principles that apply to the relationship. Mr Brittain put it therefore that the parties do not have to like each other.

[26] Mr Brittain then put it that the Committee failed to give sufficient weight to accountability; and that the orders now sought by the appellant have the direct effect of holding the agent accountable for the consequences of its misconduct i.e. the appellant owns a property which it does not want, and which it only purchased because of misrepresentation by the agency and the salesperson.

[27] Mr Brittain submits that the Committee was wrong to reject the proposed orders on the basis of a lack of finality and submits that s.93(1)(f) clearly contemplates orders which are prospective in nature. He also submits *Quin* confirms that the type of relief which can be ordered is broad, can involve the agent taking steps beyond payment of money, and may require the agent to take steps in the future; and that such relief might include exactly the type of relief sought in this case.

[28] Mr Brittain then raised the issue of breach of natural justice by stating:

"25. The Committee's reasoning regarding finality appears to have stemmed from submissions made on behalf of the agent and salesperson. Waratah Trust was not provided with a copy of those submissions, or given any chance to comment on them. That is a breach of natural justice. If that opportunity had been afforded to Waratah Trust, then those parts of the

orders sought which were perceived as open ended could have been amended."

[29] Mr Brittain then added:

"27. The Committee found as a fact that Waratah Trust took legal advice before purchasing the property at auction, and took that into account in determining penalty. There was no basis for that finding."

[30] Finally, Mr Brittain dealt with costs as follows:

"Costs

29. Section 93(1)(i) of the Act expressly empowers the Committee to order the licensee to pay the complainant's costs or expenses incurred in respect of an inquiry, investigation, or hearing by the Committee.

30. The Committee declined to order that the agent and the licensee pay Waratah Trust's costs incurred in respect of formulating and prosecuting the complaint, holding that such an order could only be made in exceptional cases. That approach is wrong in law:

(a) There is no such fetter on the power conferred by s.93(1)(i).

(b) Complainants and licensees regularly engage solicitors to assist them in dealing with the complaints procedure.

(c) Licensees are invariably legally represented, and the Committee is influenced by submissions made by counsel on behalf of licensees. That is evident in this case. Complainants are well advised to take their own legal advice, and to obtain legal assistance in preparing evidence and submissions for the Committee.

(d) If the Committee was concerned regarding the scope of the work completed by Waratah Trust's solicitors in respect of the complaint, and required time records to confirm the work undertaken, then those records should have been requested from Waratah Trust. The Committee did not request any further records, but rather rejected the possibility of a costs order out of hand.

(e) The Harris Tate invoice (page 130, bundle of documents) confirms that the invoiced work was in respect of "Real Estate Claim".

[31] Mr Brittain submits that sufficient information was provided to support a modest award of costs, and that we should make such an order.

The Stance of the Authority

[32] Ms Pridgeon, counsel for the Authority, submits that the appeal should be dismissed because the Committee did not make an error of law or principle, did not take into account irrelevant considerations, took into account all relevant considerations, and was not plainly wrong. She addressed the appellant's submissions as follows.

Committee's Failure to Impose Agency Order

[33] It is submitted for the Authority that the Committee did not err in law and was not uncertain about its jurisdiction to grant the orders sought. Apart from stating *"[w]hether or not we have jurisdiction to do so"*, the Committee did not consider its jurisdiction because it did not reach the point of needing to. It did not think it appropriate to make the orders sought given the background to the complaint and the appellant's threatened High Court action. It did not think this was a good basis upon which the parties could work together on a future sale of the property.

[34] Ms Pridgeon also put it that the ability of the parties to work together, the appellant's threatened High Court action, and the inevitable *"lack of trust between the parties"* were relevant considerations to take into account in any orders the Committee imposed; and that Committee also recognised the appellant's ability to recover its marketing costs as part of its High Court claim, and this was a factor that the Committee was entitled to take into account.

[35] Ms Pridgeon submitted that the Committee took into account relevant considerations in making a lawful decision not to grant the orders sought. She noted that the likely inability of the parties to work together in the future was the overriding factor influencing the Committee's decision, not whether it had jurisdiction to make the agency order.

Committee's Failure to Give Sufficient Weight to Accountability

[36] It is submitted for the Authority that the Committee was very aware of the need to hold the agency and licensee accountable, and emphasised this in its decision. In the Committee's view, the penalties it imposed were sufficient to hold the agency and licensee accountable. Ms Pridgeon submitted this was a decision open to it; it is not an error of law or plainly wrong.

Committee was Wrong to Reject the Orders on the Basis of Finality

[37] As covered above, the appellant submits that s.93(1)(f) contemplates orders that are prospective in nature and that the Committee was wrong in rejecting the proposed interim orders on the basis of a lack of finality.

[38] Ms Pridgeon puts it that the issue before the Committee was the interim nature of the proposed orders i.e. that the agency and licensee be ordered to act on a re-sale of the property should they be called upon by the appellant. The appellant also sought leave to make further submissions regarding final orders should the appellant not elect to appoint the agency to conduct a re-sale or should the appellant terminate the agency. The Committee was clearly concerned that the proposed interim orders would leave liability at large, and would leave the agency and licensee in an uncertain position regarding what penalty was imposed; and this was not an irrelevant consideration or an error of law.

Failure to Provide Appellant with Agency's and Licensee's Submissions

[39] Ms Pridgeon submits that the Committee did not breach natural justice as penalty was to be dealt with on the papers, timetable orders made accordingly, and those orders were complied with. She noted that the appellant had no right of reply and put it that should the appellant's submission be accepted, it would lead to a

"merry-go-round" of replies every time a party makes a submission. She submits that the appellant had a fair opportunity to be heard on the issue of penalty.

Failure to Order the Agency and/or Licensee to Pay Appellant's Costs

[40] Section 93(1)(i) provides the Committee with a discretion to *"order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee"*. That this power is discretionary has been confirmed by us in *Wyatt v Real Estate Agents Authority* [2012] NZREADT 22.

[41] Ms Pridgeon referred to the appellant's submission that the Committee was wrong in law to hold that an order that the agent and licensee pay the appellant's costs incurred in respect of formulating and prosecuting the complaint could only be made in exceptional cases; that an order to pay costs would only be justified in exceptional cases where engagement of a lawyer is justified and in this case, an order for costs was not justified. Ms Pridgeon noted that, in particular, the Committee had not been provided with time and attendance records, and it was unclear what work counsel provided to the appellants. She then submitted the Committee's decision was one available to it and within its discretion, and it cannot be said to be plainly wrong or an error of law.

The Stance of the Second and Third Respondents

[42] Mr Hunter noted that the substance of the appellant's case to us is that the Committee should have exercised its discretion differently and imposed one of the remedies available to it (in order that the second and third respondents conduct a resale) rather than the remedies actually imposed (a censure and fine).

Error of Law

[43] With regard to the appellant's submission that the Committee made an error of law by stating that it was uncertain whether it had jurisdiction to impose agency obligations on the second and third respondents, Mr Hunter puts it that the Committee was plainly aware of the High Court's decision in *Quin* (supra) and that the decision holds that the Committee may order the licensee to conduct a resale, thus imposing an agency relationship.

[44] Mr Hunter also puts it that the Committee simply exercised its discretion not to impose this form of relief, having considered the background of the complaint, the appellant's threatened action against the respondents in the High Court, and the inevitable lack of trust between the parties. It recognised that if the appellant wished to sell the property, it could recover its marketing costs as part of any High Court claim it wished to pursue. Mr Hunter noted that the Committee also favoured the finality of a censure and fine, rather than requiring the licensee to carry out further work in the future. He submits that decision was not only within the discretion of the Committee but also correct and that the orders sought by the appellant, which would require the parties to work together in the future, are untenable in the context of the complaint leading to this appeal and given the prospect of future litigation.

Irrelevant Consideration

[45] Mr Hunter accepts that any lack of trust between the parties is relevant to the exercise of the Committee's discretion. He noted that the Committee considered that the background to the complaint and the appellant's threatened legal action were relevant factors in exercising its discretion against ordering the parties to work together on the future sale of the property. The Committee also pointed out that the appellant was free to sell the property and sue to recover its costs, a factor which the High Court considered relevant in *Quin*.

Insufficient Weight to Accountability

[46] Mr Hunter submits that the appellant's proposed orders are disproportionate to the offending and the range of available orders; and that the appellant seeks to have the second and third respondents meet the marketing costs (approximately $8,950 including GST), conveyancing and legal fees of the sale of the property, and forgo a commission of approximately $98,625 (excluding GST).

[47] Mr Hunter points out that the Committee found that there was no intention by the second or third respondent to mislead the appellant. The appellant took legal advice prior to purchasing the property, and the Committee also noted that the appellant's own solicitor was unaware of the marginal strip. The Committee also observed that the marketing material contained advice that it had been compiled primarily from information supplied by the vendor; that the third respondent was merely passing over that information; and that the vendors failed to advise the second or third respondent that the property was subject to the marginal strip.

[48] Mr Hunter submits that the Committee's finding of unsatisfactory conduct, the imposition of a censure and fine, and the publication of the decisions on breach and penalty are appropriate in terms of the purpose of the Act.

Finality

[49] Mr Hunter also submits that the appellant overstates the Committee's reliance on finality; and that the Committee's refusal to order the parties to work with one another in the future was plainly correct in the circumstances of this case and given the threat of further proceedings.

Breach of Natural Justice

[50] Mr Hunter referred to the appellant's submission that the Committee breached natural justice because it did not provide the appellant with a copy of the second and third respondent's submissions on penalty. Mr Hunter then puts it:

> *"27. The parties agree that the Committee's decision on penalty would be dealt with on the papers. The appellant had no right of reply. Furthermore, the only alleged effect of this failure is that the appellant lost the opportunity to amend the terms on which the licensees would be required to conduct a further sale of the property. It is clear from the Committee's decision that it did not consider it appropriate to impose such an order. Minor amendments to the order sought would not have changed this decision".*

Costs

[51] Mr Hunter submits that in declining an order for the second and third respondents to contribute to the appellant's legal costs, the Committee made a decision entirely within its discretion and it cannot be said to be *"plainly wrong"*. He also noted that this must be particularly so in the circumstances where the Committee had not been provided with the appellant counsel's time and attendance records, and where it was unclear from the narration of the invoices what work counsel for the appellant did in relation to the complaint.

General Submission for Second and Third Respondents

[52] In conclusion, Mr Hunter submitted that it is not the Committee's function to compensate the complainant, which retains all its usual remedies at law. He emphasised that the licensees do not agree with the penalties imposed and that they had argued before the Committee that a censure or, at most, a modest fine was appropriate. Nevertheless, they accept that the penalty ordered by the Committee was within the Committee's discretion and that there is no basis for an appeal by them. They invite us to confirm the Committee's decision and dismiss this appeal.

Mr Brittain's Final reply for the Appellant

[53] In a final reply for the appellant, Mr Brittain sees the essential point put forward on behalf of all the respondents as that the Committee was right to refuse to make an order appointing the third respondent to be the appellant's agent for an on-sale because of the Committee's assessment that the parties were unable to work together. Mr Brittain then refers to all the respondents acknowledging that the Committee had jurisdiction to make the order sought, as confirmed in *Quin*'s case, but then seeking to render that jurisdiction nugatory. He then put it:

> *"(a) The reality is that in every case where the jurisdiction might be exercised, there will be strained relations between the complainant and the agent. That is because there is only a need to consider the jurisdiction because there has been some unsatisfactory conduct by the agent.*
>
> *(b) There will always be a possibility of further civil litigation. The High Court has confirmed that the Committee cannot order compensatory damages. Complainants are now compelled to issue civil proceedings in addition to pursuing complaints.*
>
> *(c) If it is inappropriate for the Committee to make an agency type order, as contemplated in Quin's case, because there has been tension between complainant and agent, and where they may be litigation in the future, then the type of orders contemplated in Quin's case can never be made.*
>
> *(d) The decision sought from the Tribunal by the second and third respondents and the REAA would stand as a precedent which would enable agents to avoid the type of orders contemplated in Quin's case in nearly every situation."*

[54] Mr Brittain submits that the type of orders contemplated in *Quin*'s case may be inappropriate if there is evidence of some past conduct by a complainant which might lead a committee to conclude that a complainant will not fulfil its duties as principal (if

any agency order is made); but that is not the case here. He puts it that if a complainant is prepared to repose trust in an agent, and considering the general principles of agency law that will apply to the relationship, then it remains appropriate for orders of the type contemplated in *Quin*'s case to be made, notwithstanding that there may be some tension between a complainant and an agent.

[55] Mr Brittain considers that the *"finality"* argument has assumed less importance.

[56] With regard to all respondents noting that the Committee's timetable did not give the appellant a right of reply, Mr Brittain puts it that point might have some validity if there had been an order for simultaneous exchange of submissions but there was not; and the second and third respondents had the benefit of seeing the appellant's submissions, and responding to them, but the appellant did not receive the same right. He also puts it that where there is a sequential exchange of submissions, the convention is that the party which files first also has a right of reply; and if that right of reply had been given by the Committee, then the appellant would have had an opportunity to amend the draft sought, to assist in achieving finality, as has been done before us.

[57] Mr Brittain responded to all the respondents noting that the appellant did not adduce evidence before the Committee regarding financial loss by explaining that is because *Quin*'s case has confirmed that the Committee does not have jurisdiction to order compensatory damages; and there is no point in a complainant going to the great expense of preparing that type of evidence, where it serves no purpose.

[58] We note also that Mr Brittain states the second and third respondents did not take legal advice prior to purchasing the property, and that there is no evidence to support the submission that it did.

Discussion

[59] The Committee has held that the conduct of the agent and the conduct of the salesperson constituted *"unsatisfactory conduct"*, in breach of s.72(1)(a) and (d) of the Act. We must accept these findings as the basis for determining this appeal because this appeal is confined to penalty.

[60] Frankly, we regard it as, perhaps, rather borderline whether the relevant marketing material published by the agency and the licensee, as covered above, was particularly misleading. However, we accept the finding of the Committee that, on the balance of probabilities, it was sufficiently so as to amount to unsatisfactory conduct by the second and third respondents in terms of the definition of *"unsatisfactory conduct"* in s. 72 of the Act. In other words, we agree with the Committee that, all in all, the threshold of unsatisfactory conduct is overstepped, but not seriously so on the particular facts of this case.

[61] We are, of course, most appreciative of the detailed and thoughtful submissions from all counsel in this case so that we now succinctly set out our views on the particular submissions made.

[62] We do not think that there was any relevant uncertainty on the part of the Committee in dealing with the issues of this case nor has there been any breach of natural justice. In any case, both those issues would be well overcome from the extent and timetabling of the submissions put to us.

[63] We agree with Ms Pridgeon that the Committee has not erred in law or principle, nor taken into account irrelevant considerations, took into account all relevant considerations, and was not plainly wrong.

[64] If we needed to, we would be inclined to accept the submission of Mr Hunter (for the second and third respondents) that any lack of trust between the parties is a relevant factor to the exercise of the Committee's discretion on the issue of whether the agency and the licensee act as agents for the appellant on the resale of the property. However, we do not consider that the level of offending of the second and third respondents requires serious consideration of applying s.93(1)(f) of the Act. Put another way, we agree with Mr Hunter that the orders now sought by the appellant would be disproportionate to the offending.

[65] However, we think there is validity in Mr Brittain's submission for the appellant that there is no particular evidence to support a finding that the appellant does not trust the agency and the agent and that, in any case, the duties owed by a principal to an agent, and vice versa, are governed by well established law. As Mr Brittain also put it, *"the parties do not have to like each other"*. We also agree with him that s.93(1)(f) contemplates that orders may be made which are prospective in nature as they may require an agent to take steps for a complainant at a future time.

[66] We agree with Mr Brittain that there will frequently be strained relations between a complainant and an agent but, generally, that need not thwart the type of order sought by the appellant in this case.

[67] We consider it to be relevant that there was no intention by the second or third respondents to mislead the appellant in their marketing process.

[68] We can understand that non lawyers might not note that the river was subject to a marginal strip in terms of the Conservation Act 1987.

[69] It seems to us that a relevant factor for the Committee to take into account is the principle of seeking finality of litigation, subject to justice in all the circumstances.

[70] Because of our general view that the offending conduct of the second and third respondents is at a fairly low level of unsatisfactory conduct, we do not think it appropriate to address whether there should be an order of costs made in favour of the appellant.

[71] In terms of the particular property the subject of this case, we rather think that many people would consider that, in reality, public access to 20 metres of its river frontage as it runs throughout the appellant's estate, as guaranteed by the provisions of the Conservation Act 1987, does not necessarily mean that the owners of the property do not have a private river frontage in general terms.

[72] However, as indicated above, our approach to dealing with this appeal is that the offending of the second and third respondents is at a relatively low level, so that accountability is a less concerning sentencing factor than usual.

[73] All in all, we consider that the Committee's decision was one available to it and within its discretion. It cannot be said to be plainly wrong or involve a relevant error of law. Accordingly, we confirm the Committee's decision and dismiss this appeal.

[74] 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