

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2014] NZREADT 26

READT 035/13

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

**BETWEEN** **KIMBALL GRAHAM McINTYRE**  
of Kumeu, Real Estate Agent

Appellant

**AND** **REAL ESTATE AGENTS**  
**AUTHORITY (CAC 20003)**

First respondent

**AND** **KELLIE ANNE FIELDING** of  
Kumeu, Property Manager

Second respondent

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson  
Mr J Gaukrodger - Member  
Ms C Sandelin - Member

**HEARD** at AUCKLAND on 10 February 2014

**DATE OF THIS DECISION** 9 April 2014

**REPRESENTATION**

Mr C G Donswan, counsel for appellant  
Ms S M Earl, counsel for the Authority  
The second respondent complainant on her own behalf

**DECISION OF THE TRIBUNAL**

***Introduction***

[1] This appeal is about listings which were not deleted from YouTube and, particularly, the ongoing advertising of a property at 167 Taha Road, Waimauku.

[2] The appellant licensee, Kimball Graham McIntyre, is the principal officer of the real estate agency Country Living Realty Ltd which, at the relevant time, traded as L J Hooker Kumeu. The second respondent complainant, Kellie-Anne Fielding, is an ex-employee of that company.

[3] The complaint about the licensee's conduct was originally made on 3 March 2011. The Complaints Assessment Committee 10068 dismissed it on 8 March 2011 under s.79(2)(a) of the Real Estate Agents Act 2008 ("the Act") because it found that

the issues raised in the complaint fell outside the scope of “*real estate agency work*”, being matters arising from an employment dispute, and could not otherwise constitute misconduct. The complainant appealed that finding to us; and in a 29 March 2012 decision we modified Committee 10068’s decision, determining that it should enquire into the complaint. This is because it related to unauthorised continuation of listings on websites and other media when authority no longer existed to advertise the properties, and where Ms Fielding’s name was associated with the advertisements after she had left the agency.

[4] Accordingly, the Authority undertook a further investigation into the complainant. In the course of dealing with that, the Committee investigated 11 other properties.

[5] On 8 March 2013 the Committee issued a decision in which it found that the licensee had engaged in unsatisfactory conduct. On 17 May 2013, the Committee censured the licensee and fined him \$500.

[6] The complainant’s main current focus is on one aspect of her original complaint, namely, that the licensee had continued to list her name, and that of L J Hooker, on the internet for properties no longer listed for sale by the agency company. The complainant made specific reference to the ongoing advertising of a property at 167 Taha Road Waimauku.

### ***Background***

[7] The property at 167 Taha Road, Waimauku was originally listed with the agency for sale in 2008. However, a new exclusive agency was signed by the licensee and the owners of that property on 7 September 2010, effective until 1 November 2010, when the agency became a general agency until cancelled by notice in writing.

[8] At the end of the exclusive agency period the property was advertised by the company as a rental property with the complainant as the contact person. The complainant terminated her employment with the agency on 30 November 2010. On 13 January 2011 she contacted the licensee to request removal of her contact details from listings on various websites as she was still receiving telephone calls relating to the property. In July 2011, the owners of the property contacted the complainant to advise that their property was still being advertised for sale on YouTube.

[9] As noted above, the Committee investigated 11 other properties listed by the licensee between 14 April 2009 and 30 March 2012. Nine of those properties were sold between February and May of 2012 and two were unsold. However, YouTube advertising for all properties continued and remained active as of 23 January 2013. Ultimately, the licensee changed the YouTube advertisement for all 11 properties to show that they were sold.

[10] The licensee’s response to the Committee was that the properties in question were all still under a general agency with his company and that he had not been served with any written cancellation of those agency agreements.

### ***The Committee’s Decision of 8 March 2013***

[11] After conducting an inquiry into the complaint, the Committee held a hearing on the papers and made a determination on the basis of the written material before it. It found:

- [a] In respect of 167 Taha Road, the owners had specifically asked the licensee to remove advertising for their property at the end of the exclusive agency period but this was not done. When the request was repeated, the licensee responded “Done”. The Committee found that this request had amounted to clear instructions to the licensee to remove the advertising. The fact that there had not been written cancellation of the general agency did not give the licensee authority to go against the express instructions of his clients. Further, it was misleading to offer the property for sale to prospective customers where the property had been withdrawn from the market.
- [b] In respect of the 11 other properties investigated by the Committee:
- [i] Nine properties had been advertised on YouTube well after their respective sale dates. The agency contracts on those properties had effectively been discharged. The licensee was misleading the public into believing that he and his company held a greater share of the market; and that was a breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 and of s.72(a) of the Act.
  - [ii] In respect of the other two properties, the Committee accepted that the licensee held a valid general agency but that those properties were still owned by the listing clients so that, by changing these YouTube advertisements to say “sold”, the complainant had shown a lack of skill and care.

[12] Accordingly, the Committee found specific breaches of Rules 6.4 and 9.15 (which are set out below) and that, in addition, the conduct showed a lack of skill and care and a poor knowledge of the framework within which a licensee must operate. The Committee therefore determined that the licensee had engaged in unsatisfactory conduct. It is helpful to absorb the clear and thoughtful reasoning of the Committee which reads as follows:

#### **“4. Discussion**

- 4.1 *This Committee received a written response from the Licensee which stated that the properties in question were all still under a general agency with his company. The Licensee enclosed copies of agency agreements for each property. Those agreements required cancellation of the general agency to be made in writing.*
- 4.2 *The Licensee states that he has not been served with a cancellation notice for any of the properties in question.*
- 4.3 *In the case of 167 Taha Road, the Gilbertsons have stated that they asked the Licensee to remove advertising for their property at the end of the exclusive agency period. When this was not done they contacted the Licensee again and requested the advertising be removed. They say that the Licensee’s response was “Done”. The Gilbertsons state that the Licensee continued to market their property on YouTube without their consent.*

- 4.4 *The Committee finds that the Licensee was given clear instructions in regards to removing the advertising for this property. It appears that the Licensee did not explain the requirement for written cancellation to the Gilbertsons and so the fact that written cancellation of the general agency did not occur did not give the Licensee authority to go against the express instructions of his clients. Further, it is misleading to offer property for sale to prospective customers where that property has been withdrawn from the market.*
- 4.5 *The Committee was concerned that this promotion of property that was either sold or withdrawn from the market was a pattern for this Licensee. This is illustrated by the YouTube advertising of nine properties well after their prospective sale dates. The Licensee is misleading the public into believing that he and his company hold a greater share of the market – which is a breach of the rules mentioned above and of section 72(a) of the Act.*
- 4.6 *The Committee accepts that the Licensee held a valid general agency on the two unsold properties but in relation to the nine which were sold, the agency contracts had effectively been discharged.*
- 4.7 *After receiving this complaint the Licensee changed the YouTube advertisements to show that they are all now sold. However, our investigations show that two of the properties are still owned by the clients who signed the agencies. This lack of skill and care has not improved the view of the Committee in regard to this Licensee’s conduct and we would hope that this finding gives him a clear understanding of his duties to his clients and to members of the public in future.*
- 4.8 *In conclusion, the Committee believes that the pattern of behaviour shown by the Licensee falls well within the umbrella of unsatisfactory conduct. There was a specific breach of Rule 6.4 and 9.15, but in addition the conduct showed a lack of skill and care, and a poor knowledge of the framework in which a Licensee must operate. The Committee trusts that this finding will give the Licensee a clear appreciation of his duties to his clients and members of the public in future.”*

## **A Summary of the Evidence before Us**

### **Evidence of the Appellant**

[13] The appellant is the proprietor of the agency which, as a marketing tool, offered YouTube advertising to all vendors at no cost. That was based on the use of a “URL link” placed on relevant property websites such as “realestate.co.nz” and “Trademe.co.nz”. This allowed prospective purchasers to search those property websites and click on the relevant “URL link” which then took them to the YouTube advertisement. The appellant emphasises that the prospective purchasers would not search YouTube directly for one of the properties listed by his agency. He added: “the YouTube advertisements were not easily accessible through YouTube directly, unless one held a unique access key being “mrlj Hooker”.

[14] The appellant then added:

*“5. While the Complaints Assessment Committee and Mr and Mrs Gilbertson were able to view the YouTube advertisement through YouTube, that would only have been possible because they were supplied with the specific access key. A prospective purchaser or general member of the public would have unlikely been able to view the advertisements directly through YouTube, and since the “url links” had been severed from the relevant websites, it was also unlikely that they would have been able to view the properties for sale at all”.*

[15] Also, in his formal evidence-in-chief, the appellant stated:

- “7. Document “A” shows the withdrawal dates of the advertising material from the relevant websites, which in turn also severed the YouTube links.*
- 8. I also note that the last relationship that existed on the property was engaged by Ms Fielding herself with Leigh Gilbertson in respect of a property management authority and letting arrangement. This was advertised under LJ Hooker Kumeu but fulfilled by Ms Fielding under her own company Kiwi Coast Maintenance and Property Management.*

***Original Residential Listing Authority***

- 9. Finally, I note that the listing authority relating to the property at 167 Taha Road, Waimauku that was in effect at the time of the original complaint by Ms Fielding was dated 9 August 2008 (Document B).*
- 10. This listing authority pre-dates the date that the Real Estate Agents Act 2008 came into effect, being 17 November 2009.”*

[16] The appellant was extensively cross-examined by Ms Earl and, briefly so, by the complainant. We deal with some of that cross-examination of the appellant who impressed us as a credible witness and efficient licensee. However it became clear that, at material times, he did not understand social media on the internet including YouTube.

[17] The appellant thought that he and his staff had set up a limited access file in YouTube requiring a URL link whereby prospective purchasers could view properties of interest to them listed by his agency. At material times he was not being assisted by Mr McGregor, whose expert evidence we refer to below, and he and two of his staff simply posted videos of some properties onto YouTube having first discussed such a matter with the owners and obtained their permission to so advertise. This method of advertising was not used for every listing but seemed to us to be used where particular aspects of a property were felt to need clarity.

[18] The appellant and his staff thought that, unless a prospective viewer had a specific reference (a URL link) provided by the appellant’s agency, these clips were not accessible. The appellant now realises he was naïve in thinking that but he at material times thought there was secure and limited access to those videos requiring a URL link for access.

[19] This method of marketing was provided to the agency's vendors at no cost and on the appellant's understanding that it was simply a marketing tool which could not be accessed by the public without him providing an access code. He and his staff simply did not realise that it was possible for the public to access that data directly through YouTube.

[20] The appellant also seemed to be saying that when a property was sold it was withdrawn from the main websites and the appellant thought that would lead to cancelling the connection to YouTube. He now realises that his video clips existed on YouTube independently of his URL link and that in reality he had little basis for thinking that there was limited access to that advertising. He also seemed to be saying that he was careful not to remove the internet advertising of a property until not only had settlement taken place but also until it was clear that the purchaser had settled happily into the property so that any advertising must be terminated. It does seem that the appellant was tardy to terminate the YouTube advertising, although he was under the impression that it was barely accessible.

### ***The Evidence of Mr J D McGregor***

[21] Mr J D McGregor is the managing director of Web Wonks Ltd, a digital advertising company trading as a Google certified company with a particular focus on transparent data collection. Web Wonks operates numerous "YouTube" channels on behalf of its clients. Mr McGregor had built the appellant's website in about 2010.

[22] Mr McGregor stated that the use of the "mrlj Hooker" YouTube channel seems to have been very minimal and to have been primarily used on third party websites and not accessed (i.e. searched) directly on YouTube. He opines that most traffic will have come from links back to the channel but it could not gain access to the channel's analytics. He says that the relevant links to the properties marketed by the appellant will have come by way of embedding them on third party websites such as "realestate.co.nz" and "trademe.co.nz". He then continued:

- "11. The low view numbers (between 150 and 200 per video) indicate that the videos are not appearing in any search results within YouTube. Further to this, the videos themselves have poor ranking elements, which would preclude them from appearing in general searches on YouTube. In other words, in order to access the properties directly through YouTube (rather than the third party websites), one would need a specific unique identifier number that only the relevant advertiser would hold.*
- 12. Accordingly, it is likely that almost all traffic to these YouTube videos would have ceased as soon as the links on the third party sites had been severed.*
- 13. Essentially, everything lies in the data. If the data can be accessed, a high degree of certainty around the use of these YouTube videos in a marketing context can be established.*
- 14. I understand that it is no longer possible to view the YouTube videos on third party sites. My above views are therefore provided based on my experience in this industry and how such YouTube channels operate in practice."*

[23] In his cross-examination by Ms Earl, Mr McGregor explained, inter alia, that YouTube is a public access website and channels are created by uploading a video and people may subscribe to the channel to which the owner of the channel will keep uploading material. The owner, or account holder, of a channel may remove the material on the channel and may create restrictions to the viewing of the channel. Apparently for the agency's channel, one needed an access code to some accounts on it but, otherwise, the channel could be accessed by anyone on an unrestricted basis, without the need for codes, by simply searching "L J Hooker" on YouTube. If a person simply enters the address of a particular property that will very likely provide a reference to the agency's video on that property through an URL to be clicked on. We understood that, generally, the videos about properties for sale are available for public access although they can be made private or restricted. There are methods of removing the videos from YouTube.

[24] Mr McGregor emphasised that, once the agency stops advertising a property, any relevant unremoved videos are simply not watched by anyone, presumably, because they are no longer linked to a particular property advertisement.

[25] The complainant was content with the cross-examination of Mr McGregor conducted by Ms Earl.

### ***The Evidence of Ms F Fagasoia -Mead***

[26] Ms F Fagasoia-Mead, the investigator of the Authority assigned to this matter, gave helpful evidence about the accessibility of advertisements placed on YouTube by the licensee for L J Hooker Kumeu. In that respect she stated as follows:

#### ***"2. YouTube Advertising***

*2.1 As part of my investigation, in November 2012 I looked at a number of advertisements uploaded by the licensee on YouTube.*

*2.2 The steps I took to view the advertisements are as follows –*

- (a) I went on to the YouTube website, keyed the words L J Hooker Kumeu into the search panel and pressed 'enter'. The results revealed several video clips of advertisements uploaded by the licensee. I watched a video clip of the licensee talking about a property in Kumeu for sale.*
- (b) The advertisements show the property address on the title, a video clip, date the video was uploaded or published, a brief description of the property although some advertisements had the words "no description available". There was no indication that the properties had been sold.*
- (c) Below the video clip is a link to Mr L J Hooker and photo profile of the licensee, this enabled me to access the Mr L J Hooker channel where I watched other video clips of properties for sale.*
- (d) I could access the same advertisements on the main YouTube website without having to go through Mr L J Hooker channel.*

- (e) *I did not need a key to access the Mr L J Hooker channel or receive any information from the licensee on how to locate the advertisements.*
- 2.3 *The video recordings were downloaded onto a disk. I compiled print outs of the YouTube advertisements and property reports from Terralink International for each property. There were 11 properties in total.*
- 2.4 *This information was submitted to the Complaints Assessment Committee (CAC) together with a spreadsheet. The documentation showed key dates of when the advertisement was uploaded on YouTube, when each property was listed on the market, withdrawn or sold and the date I viewed the advertisement on YouTube. This information was disclosed to the licensee and complainant. The spreadsheet that I prepared is contained in the bundle of documents at page 253.*
- 2.5 *Having considered the material, the CAC issued further instructions for the investigator to obtain agency agreements for each property. I wrote to the licensee to request copies of the agency agreements and forwarded the agreements to the CAC.*
- 2.6 *As part of preparing this brief of evidence I conducted the same exercise mentioned under para 2.2. I was able to view the same advertisements of properties that I had previously investigated. However, I note that the property description changed to “sold” for each property. Attached to this brief are print outs from YouTube of the search results page, the Mr L J Hooker channel as at today’s date and, by way of example, advertisements for three property.*
- 2.7 *I believe any member of the public could conduct the same exercise and get the same results.”*

[27] Ms Fagasoia-Mead was carefully cross-examined by Mr Donswan about the practical way of entering YouTube to gain information on properties available from time to time at L J Hooker, Kumeu. It seems that one merely needed to know the address of a particular property having entered “Mr L J Hooker Kumeu”.

### **Statutory Context**

[28] Section 72 of the Act provides:

#### **“72 Unsatisfactory conduct**

*For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—*

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
- (c) is incompetent or negligent; or*
- (d) would reasonably be regarded by agents of good standing as being unacceptable.”*



[29] The relevant provisions of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 in force at the time of the Committee's decision were as follows:

**“5 Standards of professional competence**

5.1 *A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.*

5.2 *A licensee must have a sound knowledge of the Act, regulations made pursuant to the Act, rules issued by the Authority (including these rules) and other legislation relevant to real estate agency work.*

**6 Standards of professional conduct**

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 Client care and dealing with customers**

*Advertising and marketing*

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.”*

***The Stance of the Appellant***

[30] Mr Donswan acknowledged that the focus is the issue of residual advertising of properties on YouTube at material times to the present complaint. Twelve properties including the above property were listed by the agency on YouTube.

[31] However, Mr Donswan emphasises that YouTube was not used in the present case as a direct method of advertising but indirectly through URL links from other websites such as “*realestate.co.nz*”; and that the appellant licensee severed those URL links from the relevant websites but did not realise that did not prevent such advertisements being accessed directly through YouTube.

[32] Mr Donswan put it that residual advertising on YouTube appears to be occurring on a widespread basis in the real estate industry.

[33] With regard to the particular complaint from the second respondent, Mr Donswan notes that the appellant licensee held the requisite authority for the property (and for the said other 12 properties) advertised on YouTube in terms of the complaint; and that he corrected the advertising on YouTube immediately he was made aware of the situation by the complainant, an ex employee of his who (it was put) left that employment under some tension between them.

[34] The thrust of Mr Donswan's submissions is that if we find there has been a breach of the Act and/or its regulations, such breach is of a technical nature and has arisen inadvertently due to the appellant not appreciating the technical nature of URL links and how YouTube operated at material times.

[35] He then submitted that we should not find unsatisfactory conduct or, at least, we should find that no further action is warranted or that there be name suppression of the appellant licensee.

[36] Essentially, the case for the appellant is that, upon properties being sold, he severed them from the various websites he used for marketing properties but did not realise that, if a member of the public went to his website directly through YouTube, there could be access to this out-of-date advertising.

[37] It is put that YouTube was not used by him as a direct marketing medium and that, in any case, the viewing numbers have been low. Counsel particularly emphasised that the matter complained about by the second respondent arose due to the appellant himself not understanding the effect of URL links on YouTube. Simply put, he did not realise that, when various advertising site links were severed in that the appellant's advertising with them was deleted, there was still that advertising in the YouTube ether which could, perhaps, be accessed; so that property would seem to be still advertised when it had been sold.

### ***The Stance of the Second Respondent Complainant***

[38] Ms Fielding's stance is covered by us when we deal with the approach of the Authority. However, she emphasised that her complaint was made well after she had left the appellant's employment and she considers that she left that employment on good terms with the appellant. The appellant maintains that she left his employment to compete against him with a focus on property management rather than property sales.

[39] It seems to annoy the complainant that, through YouTube, the public are able to access, properties for sale showing her as the salesperson when she is no longer in that industry but has her own property management business. It concerns her that, in her view, there is illegal advertising of real estate properties with her name attached to that.

[40] Ms Fielding put it that this case is not merely about using YouTube for marketing real estate but that she believed the appellant had been too casual generally, in removing sold properties from his listings.

### ***The Stance of the Authority***

[41] Ms Earl refers to the appellant's claim that there is no evidence he was asked by the owners of 167 Taha Road to remove the YouTube advertising, and submits:

- [a] there is evidence from the owners that they emailed the licensee to advise that they wanted him to cease advertising. This email was sent before the owners left New Zealand for Australia in December 2010. The request must be taken to refer to all advertising, including that on YouTube;
- [b] the same evidence suggests that the owners had made it clear that the property was no longer for sale (indeed, it had been listed as a rental with the agency company);
- [c] the owners state that they had to repeat their request to remove advertising;
- [d] the licensee does not dispute receiving those requests, rather, he argues that the request did not specify YouTube advertising.

[42] It is submitted for the Authority that there was no ongoing authority to advertise the property in any form by July 2011, when the YouTube advertising still remained active; that there were clear instructions from the owners for all advertising to cease around the time that the exclusive agency ended; that the Committee was correct to find that any ongoing general agency (if it existed) did not give the licensee authority to go against the express instructions of his client; and that even if the general agency had not been cancelled in writing, the licensee was clearly aware (from early November 2010) that the property was no longer for sale and to advertise it as such was in any event misleading.

[43] The appellant's evidence relating to the nature of YouTube advertising was not before the Committee when its decision was issued. The argument put to us that prospective purchasers are unlikely to access YouTube advertisements is new. Before the Committee the appellant relied on the argument that he had ongoing general agencies for the properties in question. In respect of the nine sold properties, Ms Earl submits that the Committee was clearly right to find that those agencies had been discharged.

[44] There has been evidence about the accessibility of the YouTube advertisements. Mr Earl notes that it is a factual matter for us whether the retention of advertisements on YouTube, after a property has sold, is a breach of the Rules and therefore of s.72 of the Act. The Authority draws our attention to the specific wording of Rule 9.15 set out above.

[45] Mr Earl observed that the appellant refers to the fact that the listing authority for 167 Taha Road pre-dates the commencement of the Act i.e. 17 November 2009. Ms Earl notes that, if the intended effect of this statement is to suggest that there was no jurisdiction to hear the complaint, the relevant question is when the conduct occurred, not when the agency agreement was entered into; and that, even then, conduct pre-dating commencement of the Act can be considered by the Committee subject to certain provisos. In this case the conduct occurred after commencement of the Act.

[46] In her final oral submissions Ms Earl emphasised that rule 9.15 is clear that there is to be no advertising by a licensee on any website without the authority of a vendor. She submits that the issue is one of strict liability so that absence of fault is irrelevant in terms of s.72. She also submits that it is misleading for an agent to show property as listed when it has been sold and that, in any case, there is no vendor authority to continue advertising in such circumstances.

### ***Discussion***

[47] The first ground of appeal relates to whether the licensee had authority to continue advertising 167 Taha Road, Waimauku from early November 2010. The appellant says that the company held two listing authorities on the property. He argues that specific requirements regarding "*cancellation and information withdrawal*" were not followed and that there is no evidence that the owners gave clear written instruction to remove the YouTube clip.

[48] The second ground of appeal relates to the nature of YouTube advertising. The evidence for the appellant focussed on this issue. This ground of appeal can be summarised as follows:

- [a] links to the YouTube advertisements were placed on property websites such as trademe.co.nz;
- [b] when the website advertising is removed upon termination of a listing, the link to the YouTube advertisement “falls off” or is “severed”;
- [c] when the website advertising is withdrawn, the administrator goes into the YouTube channel and “updates accordingly”;
- [d] the investigator was able to view the YouTube advertisements because she had the “channel keyword” and “specific access ability”; but this is not how the public generally connect to the site.

[49] The licensee asserts that YouTube advertisements were not easily accessible on YouTube unless one held a unique access key, being “mrjhooker”; and that a prospective purchaser would have been unlikely to be able to view the advertisements directly through YouTube.

[50] Mr Jeffrey McGregor, managing director of Web Wonks Ltd, states that it appears that the use of the “mrjhooker” YouTube channel has been very minimal and that most traffic will have come from links back to the channel (from other websites). He states that the videos are not appearing in search results within YouTube and that, in order to access the properties directly through the site, one would need a “specific unique identifier number that only the relevant advertiser would hold”. Some of Ms Fagasoia-Mead’s evidence is inconsistent with that.

In summary, the appellant’s position is that the retention of advertising on YouTube does not, in realistic terms, amount to ongoing marketing of that property.

### **Our Views**

[51] As Ms Earl put it, Rule 9.15 is clear that there is to be no advertising on any website without the authority of the vendor. She submits to breach that is a strict liability offence under s.72 of the Act which defines “unsatisfactory conduct” so that (she puts it), strictly, it is irrelevant that there was an absence of fault or knowledge or intent on behalf of the appellant. We agree that once a property has been sold, all the agency’s advertising for that property must be terminated. Inter alia, it is misleading to the public to imply that an agent or agency has a portfolio of properties when many of them are not available as having been sold.

[52] There was quite some reference by counsel to *Law v REAA and Lewis* [2012] NZREADT 49 issued by us on 1 August 2012 because we stated there as follows:

*“[10] We find that an agent who advertises in print media is still carrying out real estate agency work in terms of s 4. We agree with the REAA submission that the exclusion is designed to exclude from real estate agency work those businesses who place or design advertisements. We agree with Mr Clancy that if agents were not caught by the provisions of the Act when placing advertisements then it could lead to unusual results which were potentially harmful to the public.*

*[11] We find that Mr Law did not have a current listing for the properties when he moved to his own business. What then are his obligations as an agent? His obligations as an agent are to ensure that properties are not listed even as a*

*general agency on his website or other websites at his request without having an authority to do so. We accept what the Tribunal said in Handisides NZREADT [2011] NZREADT 36 at 21 and following. Mr Law was therefore carrying on real estate agency work by placing or keeping an advertisement on his website without a signed agency agreement and therefore was in breach of Rule 9.15. However we accept that an agent who can show that [there has been] a technical breach of this rule because of inadvertence (or other matters) is not guilty of unsatisfactory conduct.”*

[53] For present purposes, we note that in *Law* we were prepared to bend any interpretation of Rule 9.15 as comprising strict liability in the sense that an absence of fault or knowledge or intent is not to be taken into account. We consider that it cannot be that breach of Rule 9.15 must always be treated as a strict liability offence. In the present case, the licensee had thought that advertising details of sold properties were no longer accessible on YouTube and he had taken (somewhat tardily) what he thought were adequate steps to achieve that. With regard to the properties where he had been tardy at proceeding to terminate advertising, he must have known that it was misleading to continue including in his portfolio of properties for sale a number which had been sold some time previously. It is no excuse that a vendor had not directed such removal of advertising. That type of failure is a breach not only of Rule 9.15 but of Rules 5.1, and 6.4 (as referred to above) and a number of the other rules e.g. 6.2, and 6.3.

[54] The complainant's concern does seem to magnify failures on the part of the appellant and we infer that there is some type of silly vendetta between the complainant and the licensee. However, the issue does highlight that agents must efficiently terminate advertising of properties which have been sold; and need to better understand the workings of the internet so as to terminate out of date advertising information from floating on in the ether.

[55] We do not find incompetence on the part of the appellant, although he has been rather casual or careless in cancelling advertising when his listed properties have sold; but this case also exposes a modern practical problem regarding internet advertising in terms of the application of Rule 9.15 and s.72 of the Act.

[56] Simply put, when a listing comes to an end it is a professional responsibility of the licensee to tidy up and cancel or sever all his advertising in any form. In this case, the licensee has been too slow in cancelling advertising. It is no excuse that he may not have received a formal written instruction from a vendor to do so. If a property has been sold, it follows that advertising it for sale must cease and it is the licensee's responsibility in most cases to effect that. That failure is unsatisfactory but in the present case, was not a high level of offending.

[57] In situations such as YouTube advertising where the agent may lack knowledge to so cancel effectively, there is an onus on the agent to obtain skilled advice. Otherwise, the agent will be in breach of Rule 9.15 and therefore of s.72 of the Act.

[58] On the facts of this particular case, we find fairly technical breaches as, indeed, the appellant has virtually admitted. We understand the concerned view taken by the Committee on the papers. We have heard extensive evidence from all parties. We gave serious consideration to rescinding the Committee's finding on penalty and ordering that no further action be taken; but when we stand back and absorb the evidence and argument, we find unsatisfactory conduct at a fairly low level as we have explained above and the sentencing by the Committee reflects that.

[59] Accordingly, the appeal is dismissed and, in all the circumstances and in terms of open justice, we would expect to firmly decline any formal application for name suppression.

[60] Pursuant to s.113 of the Act, we record that any person affected by this decision may appeal against it to the High Court by virtue of s.116 of the Act.

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Judge P F Barber  
Chairperson

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Mr J Gaukrodger  
Member

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Ms C Sandelin  
Member