

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 33

READT 055/13 and 058/13

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

BETWEEN **MICHAEL EMERY**
Appellant (55/13)
Second respondent (58/13)

AND **REAL ESTATE AGENTS
AUTHORITY (CAC20002)**

First respondent

AND **ABIGAIL COOK**
Second respondent (55/13)
Appellant (58/13)

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 12 February 2014

DATE OF THIS DECISION 1 May 2014

REPRESENTATION

Ms P M Fee and Mr L H Fraser, counsel for Mr M Emery the licensee
Mr R M A McCoubrey and Ms N Copeland, counsel for the Authority
Mr T Patty, as friend of Ms A Cook the complainant

DECISION OF THE TRIBUNAL

Introduction

[1] Mr Mike Emery (“the licensee”) appeals against a 10 June 2013 decision of Complaints Assessment Committee 20002 finding he had engaged in unsatisfactory conduct in respect of a complaint made by Ms Abigail Cook (“the complainant”) and outlined below. By its 17 September 2013 decision on consequential penalty, the Committee censured the licensee, fined him \$1,000, and ordered that he refund the complainant \$1,000 as a share of the marketing fees she had paid to Harcourts Eden in Auckland.

[2] Both the complainant and the licensee appeal the decisions of the Committee to us.

Background

[3] The complainant retained the licensee, and another licensee Mr James Marshall, as her agents when she listed her property at 31A Arabi Street, Sandringham, Auckland, with Charlton Realty Ltd t/a Harcourts Eden, Epsom.

[4] In her complaint to the Real Estate Agents Authority, the complainant outlined the following four concerns :

- [a] Alleged failure of the licensee to supply necessary documentation;
- [b] Alleged interference with the auction/sale process in relation to the advertised price bracket;
- [c] Alleged failure to follow up adequately with a prospective buyer; and
- [d] Accusations of manipulating data.

[5] However, the appeal hearing before us focussed on [b] above.

Necessary Documentation

[6] The complainant alleged that the licensee did not provide her with a copy of the REAA booklet and the listing agreement which included an agreement to reimburse her 50% of the marketing fees. The licensee believed the REAA booklet would have been supplied to the complainant as it is part of the listing presentation kit. However, the complainant did not acknowledge receiving the booklet on signing the listing agreement.

[7] The licensee also disputed the complainant's claim that she was not provided with a copy of the listing agreement. He believes that it was sent through to the complainant by her solicitor. The licensee further stated that he collected the listing agreement and noticed that there had been changes made to it by the complainant and her solicitor.

[8] The complainant raised the question of pages being missing from the listing agreement; these were only identified by the agency when the complainant asked for a copy of it. The licensees maintain that these pages were mixed up with other files and temporarily misplaced when they withdrew from the listing agreement to discuss the issue of the 50% refund and the complainant's demand to be released from the remainder of the agency period as explained below. This discussion occurred within the Harcourts office, and the pages were eventually located and copies provided to the complainant.

Price Bracket

[9] Further, the complainant alleges that the licensees advertised the property in the wrong price bracket on Harcourts' website, starting at \$700,000, when she was clear that the sale price had to be over \$900,000. She claims that advertising the property in this way affected the bids received at the auction of the property, and resulted in it being passed in.

[10] The licensee maintains that he was not responsible for the preparation and configuration of the website. However, he maintains that the complainant's property was not in the wrong price bracket.

Accusations of Manipulating Data

[11] The complainant also raised issues about emails to her being rude and accusing her of manipulating data. In her complaint, the complainant sets out that, on her lawyer's instruction, she took a screen shot (of the price bracket on the website) to send to the licensee.

Following up with a Prospective Purchaser

[12] The complainant also alleged that she passed on a prospective purchaser's details to the licensee but he did not adequately follow up on that. The licensee responds that, by telephone call or email, he followed up everyone who attended the open home.

The Committee's Decisions

[13] The Committee found that it was not possible to determine to the requisite standard of proof whether the complainant received the REAA booklet at the time of listing or not.

[14] The Committee found that the complainant's lawyer was in receipt of a copy of the listing agreement and that changes were subsequently made by the complainant. However, the Committee could not determine whether this was the final copy. The Committee consequently found that this part of the complaint must remain inconclusive in the absence of further evidence to support either party's claim.

[15] In relation to the missing pages of the listing agreement, the Committee found that this was just a case of human error inside the agency's office.

[16] The Committee found that the complainant had not provided sufficient evidence to support the claim of failure to adequately follow up a prospective buyer.

Price Bracket

[17] In relation to allegedly advertising the property in the incorrect "*price bracket*", the Committee considered that Mr Marshall (a director of the agency whose evidence is covered below) had admitted that the property was advertised, mistakenly, in an incorrect price bracket of \$700,000 to \$800,000 instead of \$850,000 to \$950,000. Consequently, the Committee found that, whether by mistake or not, the advertised price did not reflect the pricing expectations agreed with the complainant; and this had caused distress and unfair pressure on the complainant and was in breach of Rules 9.2 and 9.6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which read:

"9.2 A licensee must not engage in any conduct that would put a client, prospective client or customer under undue or unfair pressure.

...

9.6 An advertised price must clearly reflect the pricing expectations agreed with the client."

Issues on Appeal

[18] The licensee appeals on the basis that the Committee was under a significant misapprehension as to the facts of the complaint when it reached its unsatisfactory conduct decision, because the Committee erroneously confused the search criteria range on the internet with the property's price bracket.

[19] Further, counsel for the licensee contends that while the licensee cannot be sure whether he mistakenly admitted that the property had been listed at an incorrect price, in any event, it would be a statement made in error because the property was not advertised as being in any price bracket.

[20] The complainant also appeals the penalty decision on the basis that the Committee erred in finding that the complainant should be compensated for what she has gone through; e.g. her personal cost, her legal fees to date, and the potential loss of value to her property.

[21] The licensee submits that the Committee ought to have made a decision under s.80 to take no further action.

Summary of Evidence Adduced to us

Evidence from the Appellant Licensee

[22] The licensee states that the complainant asked him in about mid-August 2012 if he would appraise her property at 31 Arabi Street, Sandringham, Auckland. Accordingly, he went to it on 27 August 2012 and observed it to be a restored villa which had been moved onto a small freehold section. He advised the complainant that the way to obtain the best sale price would be to sell the property by auction and that he could give her an indication of value from auction prices for similar properties in the area. She said she wished to obtain \$980,000 approximately for the property. Because the licensee was unsure about achieving that price, he asked Mr Marshall, his colleague at the Epsom office of Harcourts, to give a second opinion. Mr Marshall confirmed the licensee's view that the property would be saleable in the range of the high \$800,000 bracket but that it might be possible to get to the \$900,000 level if there was competitive bidding. The licensee gave the complainant a market appraisal in the range of \$880,000 to \$980,000.

[23] The licensee then had some difficulty negotiating a fee with the complainant for the prospective sale. Eventually, they agreed on a flat fee of \$25,000 and also marketing costs were agreed at \$3,980 but with a 50% rebate to the complainant on the sale of the property. He also offered the complainant a free superior photograph upgrade valued at about \$400.

[24] The licensee then forwarded a listing agreement to the complainant. She returned that to him signed but with two more changes, namely, the 50% rebate clause on marketing costs would stand regardless of whether or not the property sold, and she had cut back the time of the agency to approximately one month after the auction date.

[25] The marketing campaign for auction then commenced in the usual way and the response to it was excellent. However, the feedback from prospective purchasers was that they felt the value of the property to be in the mid to high \$800,000 bracket,

although one person thought he might go to a maximum of \$900,000. The licensee interpreted such feedback as that the property was not worth much more than about \$900,000.

[26] The property went to auction on 26 September 2012. Minutes before the auction, the complainant increased the reserve value to \$1,080,000 (presumably from \$980,000 or, perhaps \$950,000). The property was passed in with bidding ending at \$880,000. The highest bidder was prepared to enter into negotiations at about \$900,000 but the complainant declined to enter into any such negotiations.

[27] The licensee said that he continued marketing the property and met with the complainant about two weeks after the auction at an open home for the property. He then states:

“Without a warning she ambushed me with a screen shot of her property advertised on the internet, claiming that we had listed her property in a lower price bracket to that which she had asked us to and accusing us of not marketing her property correctly. I was taken aback by what she said. I note that Ms Cook alleges I agreed that the property had been listed in a lower price bracket. I cannot recall this but, given my shock at being ambushed with the screen shot, I cannot be sure that I did not respond with a statement to that effect. In any event, any such statement is incorrect as the property was never listed with price search criteria of only \$700,000-\$800,000.”

[28] The licensee understood the complainant to be accusing him and his colleagues of being responsible for the property not reaching her reserve figure at the auction. Because the relationship between the licensee and his colleagues with the complainant had been so damaged, they agreed to release her from the agency agreement and, in terms of it, refunded her 50% of the marketing costs.

[29] With regard to the screen shot, the licensee understood that the complainant was alleging that a person searching for properties at the price level she sought would not be able to view her home as it was listed in the \$700,000-\$800,000 price bracket. The licensee asserts that to be incorrect. He put it as follows in his evidence-in-chief:

“30. It is industry practice to load a property within a certain price bracket. Generally, this price bracket is quite wide, in the vicinity of \$200,000, as this allows persons searching for a property within that region to view properties that are above their price search criteria and associated properties below their price search criteria. This is useful to the vendor as it allows a wider range of parties to view their home and can often generate interest in different price brackets from parties who originally had a lower or higher set price that they wished to spend.

31. In the case of Miss Cook, her property was listed with a price search criteria of \$750,000 to \$950,000. This price band covered the appraised value of the property. A copy of the Harcourts Audit Log is attached as annexure [Emery BOD Tab 1] showing the initial price search criteria and the modified price search criteria as requested by Miss Cook after the auction.

32. What this meant is that any price search which at either the higher or lower end fell between \$750,000 and \$950,000 would show Miss Cook’s

property. Therefore, a search for \$700,000 to \$800,000 properties would show Miss Cook's property as at the lower end her property was listed at \$750,000. This by no means indicates that the property is for sale within that bracket and rather purely serves to create interest from prospective buyers who would then contact the listing agency and the sale of the property could move from there.

33. *I wish also to stress that this is an auction, there is no public release of the reserve on these matters and being an auction there is no requirement to sell a property purely because it is shown in a price search.*
34. *I also wish to stress that in no circumstances was the property ever listed with price search criteria of \$700,000 to \$800,000.*
35. *Following auction and discussions with Miss Cook the price search criteria of the property was raised to a range of \$850,000 to \$990,000. This made little difference to the search results that would return Miss Cook's house rather, it would only remove those persons searching in the lower price bracket from seeing her property and becoming interested in it."*

The Evidence of Mr J R Marshall

[30] Mr Marshall is a licensee colleague of the licensee at the Epsom office of Harcourts Real Estate and he is a director of that business which has 22 sales staff. He said that the licensee was the salesperson handling the marketing of the complainant's property and his (Mr Marshall's) role was merely one of support.

[31] He corroborated the evidence of the licensee and stated that, following the appraisal of the property, he was of the view that it would likely sell in the region of \$900,000 but *"would require highly emotive competitive bidding to achieve a result heading towards the high \$900,000's"*. He has assisted with an internal investigation at Harcourts Epsom in relation to the complaints made by Miss Cook.

[32] Mr Marshall then proceeded to explain the online listing methodology which took place in marketing the complainant's property. The relevant material is collated by an office administrator into a website advertisement which is uploaded onto the Harcourts system and other public websites. The salesperson checks that it has been correctly loaded. Because the property was listed for auction under a *"no price"* campaign, it never had a price attached to it. It was loaded with an internal price search criteria range to capture a broad spectrum of buyers, including those who are looking to spend both more and less than the appraised market range. However, these search price parameters are not seen by the public on any of the real estate industry public websites.

[33] Mr Marshall then continued his evidence-in-chief as follows:

- "20. Price search criteria are not the price of the property and they have no bearing on the final value – their use is purely to assist prospective purchasers who might use price search criteria to assist in narrowing their search results. I also make the point that only a small sample of buyers indeed search for property using price search criteria. Rather my experience would suggest they are more intent on searching for property based on the key criteria of suburb and amenities such as bedrooms.*

21. *I am aware that initially the property was loaded on our website in a price search criteria range of \$750,000 to \$950,000.*
22. *When a prospective purchaser searches through the Harcourts website for a property they have the option to place a price range into the search box. From \$500,000 upwards their option is to select a price range in \$100,000 increments. Any price search criteria that is attached to a certain property which falls within the price range inputted into the website by the prospective purchaser will result in the property being populated in the search results.*
23. *Given Miss Cook's property price search criteria of \$750,000 to \$950,000 any search capturing this range at the lower or higher end of those figures would have populated Miss Cook's property in the search results.*
24. *To put this into context, a prospective purchaser searching within any one of the following price ranges would have seen the property appear on their search:*
 - (a) *\$600,000 to \$800,000*
 - (b) *\$700,000 to \$900,000*
 - (c) *\$900,000 to \$1,200,000*
25. *A property, as returned by the search, shows in the search results with confirmation that it is for auction and the date of the auction. No price is publically attached to the property that would lead purchasers to believe that it falls within a certain subsection of the price range.*
26. *The benefit of this methodology is that it makes the property available for viewing by a far greater range of potential purchasers ..."*

[34] Mr Marshall concluded his evidence-in-chief by recording that, after further discussions with the complainant post-auction, it was agreed that the property still not be advertised with an asking price, but the search price, criteria band was narrowed to \$850,000 to \$950,000. Mr Marshall asserts that at no time was the property ever listed or advertised in a price range of \$700,000 to \$800,000 as inferred by the complainant.

[35] Mr Marshall was extensively cross-examined but was not shaken from his evidence-in-chief. He particularly insisted that an online search of the property does not show up a ballpark figure to be sought by a vendor but, merely, has the property fall within the parameters entered by the searcher, if it does fall within them.

[36] He emphasised that the property details come within a broad price band, but there is no suggestion of an asking price.

[37] He seemed to be saying that prospective purchasers clearly understand that the advertising is within a very broad price band and would never have a price tag much under the top of that. He states that there is no inference that the property could be bought at the lowest price range or anywhere near that.

The Evidence of Mr J D Abbott for the Licensee

[38] Mr Abbott is a real estate auctioneer, industry consultant, and salesperson trainer of much experience. He gave evidence, as an expert, on the use of price search criteria (PSC) when listing properties in electronic formats. He also opined on whether or not that price search criteria can effect and influence the sales and listing process or the sale price of a property. His evidence was quite detailed but we set out extracts from it as follows:

"9. ... Generally, PSC is given as a range. Most online property websites have the option for a prospective purchaser to narrow the properties that they search for by selecting upper and lower price parameters as well as other 'filtering' criteria such as number of bedrooms etc. If any portion of the range of PSC allocated to a property is within the price search parameters selected by the prospective purchaser then the property will return as a result of the search.

...

11. For instance, I am aware that the Harcourts policy is to allow a maximum of a 40% upper search limit from a minimum search figure provided by the listing agent. This is the maximum range that the PSC can cover although the agent can narrow the range in certain circumstances if they believe it would be beneficial to the listing of the property.

11.1 For instance; The Listing Agent provides a 'Search Range' to the administrator of \$750,000 to \$950,000 that is acceptable to the system as \$950,000 is within 40% of \$750,000. The property will then appear in any search range entered by a potential purchaser which 'overlaps' either above \$750,000 or below \$950,000.

12. ... Trademe applies a \$100,000 range either side of the valuation resulting in a \$200,000 PSC range.

...

14. As a further example, if a property was valued at \$800,000 and Trademe listed it with price search criteria from \$700,000 to \$900,000 then any search terms which had either a lower or a higher level between \$700,000 and \$900,000 inclusive would show the property in the return results. For instance, a search from \$1 to \$800,000 would show the property as would a search from \$800,000 to \$2m.

...

16. The benefit of PSC is that it allows the agent to ensure that the maximum number of prospective purchasers have been able to view the property. They are therefore able to ensure that the vendor gains the best possible price for their property, in the market, as it stands.

...

23. *Online advertisements of a property for auction contain no indication of the price as sought by the vendor. Likewise, PSC is only known to the listing agent and his/her firm.*
24. *I cannot emphasise enough that PSC is not a value or the price that the property will be sold for or could be sold for. It is merely a set of internal figures which allow a certain property to react to searches on a real estate website. [our emphasis]*
- ...
28. *To give a further example of PSC. If for instance a property is worth around the \$800,000 mark, a search by a prospective purchaser between \$300,000 and \$1 would return the \$800,000 property.*
29. *No purchaser would believe that the \$800,000 property was for sale or could be purchased at \$300,000.”*

The Stance of the Complainant

[39] The complainant believes that the marketing methods of the licensee have deprived her of achieving a proper sales price for her property. She feels that it now has a stigma attached to it because (she says) potential buyers who saw the house listed with the licensee are now asking her current agent why the property was taken off the market and have knowledge that it was passed in at auction for \$880,000. She believes that is creating a negative impact on her current marketing campaign and would not have happened “*had Harcourts not been negligent and unprofessional in the first place*”.

[40] The complainant believes that she has suffered both financially and “*in the time I have invested in pursuing this complaints process*”. She adds that, for personal reasons, she had particularly needed to sell the property in 2012. She seeks “*some sort of reparation*” from Harcourts to cover potential loss of value of the property, legal fees, and what she describes as her personal costs.

Submissions for the Authority

[41] Mr McCoubrey submits that the Committee’s core finding of unsatisfactory conduct was correct, irrespective of whether the licensee, or Mr Marshall, admitted that the property was mistakenly advertised in the incorrect price bracket.

[42] Mr McCoubrey notes that the Act is consumer protection legislation which is made clear in s.3 of the Act which reads:

“3 Purpose of Act

- (1) *The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work.”*

[43] Mr McCoubrey submits that the Act requires licensees to balance their duties to act in the best interests of his or her client, without misleading potential purchasers, and taking into account the client’s price expectations. It is very important, he submits, that licensees get that balance right and that potential purchasers are not

misled. We agree. Whether a licensee has balanced those competing duties appropriately in any given case will, of course, depend on the facts.

Price Banding

[44] Mr McCoubrey noted that the Commerce Commission actively scrutinised the practice of price banding in real estate advertising due to the ability of that to mislead potential purchasers as to the price of a particular property. He referred to *Commerce Commission v Bette Doreen Ireland* – DC Palmerston North CRN1054008002-07, 19 September 2002. In that case, Ms Ireland faced six charges of making a misleading misrepresentation concerning the price payable for land pursuant to s.14(1)(b) of the Fair Trading Act 1986. The allegation was that she advertised a property for sale between \$80,000-\$99,000, \$80,000-\$98,000; and \$70,000-\$98,000, when, at all times, the property was not for sale for under \$90,000. The listing price inserted into the marketing plan and sole agency agreement was \$90,000 to \$110,000. However, initially, the vendor told the licensee he wanted \$100,000 and he was not prepared to sell it for a lower figure. Counsel for Ms Ireland argued that the form of the advertisement, with the words “*Buyer Inquiry Range*”, and then the figures following was not a misleading representation. In finding Ms Ireland guilty, Judge G Ross stated at [32] – [34]:

“The sale, it was reiterated to me by her and by Mr Piling, would take place somewhere within the range. If the clear instruction and understanding of the vendor is that a sale could only eventuate in the top half of the range, what then is the purpose in extending the range downwards?”

If the vendors instruction is clear, what purpose is there in taking it down. The gap between the vendors expectation, which is based on a number of things, including his appraisal with the listing agent, the vendor’s agent’s advice, the Government Valuation, amongst other consideration and that the gap between that expectation and offers, which might be presented on the basis of the lower end of the range, is so great as to make the form of advertising meaningless.

That is to say meaningless to the vendor and the agent, but so far as a prospective purchaser is concerned, to such it is apt to mislead, or is misleading, it is not right, and cannot be right. This when such an offer could not possibly succeed.

Commerce Commission v Whitehead – [2007] 11 TCLR 923

[45] The advertising in this case concerned the use of the phrase “*Buyer Enquiry over \$380,000*” or “*BEO \$380,000*” in marketing a house for sale. The seller did not instruct the licensee that her expected price (not less than \$400,000 net of commissions) was also her bottom line. The District Court held that the advertising was not misleading because the BEO price was within 90% of an expected sale price.

[46] On appeal, the High Court found that there is no one test which applies to determine whether price guide advertising is misleading and that a BEO price, like any other representation, may become misleading. At her para [24], Justice Mallon discussed a guide to the Trade Practices Act for the real estate industry prepared by the Real Estate Institute of Australia and stated:

“The guidelines refer to the ACC’s concern about agents who have “underestimated the likely selling price of a property in order to generate interest from potential buyers”. Most relevantly the guidelines provide:

13.2 Advertising or quoting a property at a price significantly less than the agent’s estimated selling price, the reasonable market appraisal or the prices that the seller has indicated he or she is likely to accept constitutes misleading or deceptive conduct;

13.3 Agents must ensure that the use of price range marketing does not mislead or deceive consumers as to the price at which the sellers of the property are actually prepared to sell the property; the price at which the sellers of the property have instructed the agent to sell the property; or the price which the agent believes the property will be sold for or the estimated market price of the property;”

[47] While acknowledging those guidelines did not have the force of law, Mallon J considered they were useful in identifying what is considered to be misleading by the enforcement body which prosecutes licensees for misleading advertising. In relation to the use of a 90% test, Mallon J found that rather than apply a test, an inquiry into the facts must be made in determining whether an advertisement is misleading. The relevant facts include, Her Honour put it:

“... the seller’s instructions (this will be direct evidence of whether the representation was misleading at the time it was made) and any response made by the seller to an offer at or over the BEO price (this may be evidence from which it can be inferred that the representation was false at the time it was made). Where the instructions from the seller do not include a bottom line and/or the seller acknowledges they will have to meet the market, the agent’s estimate or view about the selling price will be relevant.

(This is consistent with the guidelines in Australia and Gary Peer).”

[48] In light of the above findings of Mallon J, the case was remitted back to the District Court for determination.

Further Submissions for Authority Regarding this Case before Us

[49] Mr McCoubrey notes that counsel for the licensee has submitted that a price bracket is an indication of what the vendor’s price expectation is and can be communicated to interested parties. There is no dispute that such an indication must not mislead.

[50] Mr McCoubrey puts it that counsel for the licensees are arguing that we are merely dealing with a price search criteria, which is a *“marketing tool”* used widely across the real estate industry.

[51] Mr McCoubrey also submits that while the cases above are not concerned with search tools in online advertising, and relate to prosecutions under the Fair Trading Act 1986, the principles as they relate to price banding are relevant here. He referred to the Commerce Commission having noted in an article entitled *“Price banding by another name?, Communique”* (online ed NZ, issue 3, September 2003) at para 3:

“Irrespective of how a buyer range is worded, if the impression given by an advertisement is that a vendor is willing to consider selling a property at a certain price level when the vendor has no intention of selling at that level, potential buyers can be misled”.

[52] For the Authority, Mr McCoubrey submits that, regardless of form, the search criteria on online listings are, at least implicitly, an indication of price. He puts it that average New Zealand purchaser, searching on an online forum, would be misled into believing that the property was available for sale between \$700,000 to \$800,000, or that at the very least, they had a chance (albeit, possibly slim) at purchasing the property within that price range. He also puts it that the present complainant made it clear that she would not sell the property below \$900,000 which is \$200,000 more than the lowest search range; and that the licensee knew the complainant’s *“bottom line”*, having increased the saleable value from the high \$800,000s to low \$900,000s, to \$880,000 to \$980,000, in the formal market appraisal to reflect the price sought by the complainant.

[53] Mr McCoubrey submits that, therefore, the Committee was correct to find *“whether by mistake or not, the reality is that the advertised price did not reflect the pricing expectation agreed with the complainant and expected by her, which is in breach of Rules 9.6 and 9.2 ...”* and subject to, perhaps, changing the words *“advertised price”* to *“indicated price range”*. He submits it is also misleading and, therefore, in breach of Rule 9.7 of the Rules which reads:

“9.7 A licensee must not mislead customers as to the price expectations of the client.”

[54] Further, Mr McCoubrey put it as also relevant that, despite the formal market appraisal, the property’s search range criteria both internally (within Harcourts) and online was \$750,000 to \$950,000; despite the fact that the marketing appraisal was between \$880,000 and \$980,000; and that the complainant reiterated that the sale price would have to be over \$900,000.

Submissions for the Authority on Penalty

[55] Mr McCoubrey noted that in *Quin v REAA* [2012] NZHC 3557, the High Court held that Committees cannot order licensees to pay complainants money as compensation for errors or omissions in respect of pure market or economic loss (compensatory damages). Instead, licensees can only be ordered to do something or take action to rectify or *“put right”* an error or omission in terms of s.93(1)(f)(i); and, if the licensee can no longer *“put right”* the error or omission, he or she can be ordered to do something towards providing relief (in whole or in part) from the consequences of the error or omission – refer s.93(1)(f)(ii).

[56] Mr McCoubrey submits that, having ordered the licensee to refund the complainant \$1,000 (being a share of the marketing fees), it was open to the Committee to reject the complainant’s submission for compensation. Further, Mr McCoubrey submits that, having found the licensee guilty of unsatisfactory conduct, it was open to the Committee to make the orders it did.

The Stance of the Licensee

[57] Ms Fee refers to the Committee having stated at para 4.3 of its decision: *“Mr Marshall however has admitted that the property was advertised, mistakenly in*

an incorrect price bracket of \$700,000 to \$800,000 instead of \$850,000 to \$950,000". She puts it that finding is incorrect and that there was no advertised price. She notes that the Committee was provided with a Harcourts' internal audit log showing the price search criteria applied to the property when listed on the Harcourts website. It shows that the property was listed with price search criteria range of \$750,000 to \$950,000.

[58] Ms Fee notes in its para 4.3, the Committee had contended that the correct price bracket was \$850,000 to \$950,000; whereas (she puts it) that was a search criteria range within the property's price bracket. She puts it that the latter is an indication of what the vendor's price expectation is for communication to interested parties, but the price search criteria is a term given to the undisclosed value range which is applied to online property listings; and that has the effect that a price search which, at either or both ends, falls within the price search criteria applied to a certain property will return that property. She put it that the price search criteria as applied to the property covered the market appraisal range of \$850,000 to \$950,000, but was specified with a lower end value between that range to encourage purchasers to become interested in the property when looking at properties below that price range.

[59] Ms Fee strongly asserts that the price search, as provided by the complainant, does not demonstrate in any way that the property was advertised for sale at that price range. The price search criteria for the property was known only to a limited number of staff at Harcourts and, because the property was to be sold by auction, there was never a publicly disclosed sale price for it.

[60] Accordingly, Ms Fee submits that the Committee should not have found that the licensee had published incorrect information as no advertising published by the licensee or Harcourts advertised the property for sale at a value contrary to the pricing expectations of the complainant. Ms Fee also submits that all information was correct and in the best interests of the complainant; so that there could have been no breach of a duty of care by the licensee. She puts it that the marketing method in issue is a way of filtering information available on the internet without reference to an asking price; and that there is no suggestion that any property can be purchased within the range provided by a search criteria engine.

[61] She submits that we should quash the finding of unsatisfactory conduct and dismiss the complaint. She puts it that the licensee should not be blamed for an inadequate industry practice on how price guidelines are loaded into websites. She submits that the licensee did not depart from expected standards. She observed that an agent must decide the range of the band input into the internet in terms of a good marketing strategy so as to attract buyers broadly interested in a price range – especially where the vendor might have unrealistic price expectations. Obviously, there is no point in making the band too wide as people who could not nearly afford a property might express interest.

[62] in terms of penalty, Ms Fee submits that there was a lack of any prejudice to the complainant as a result of any action by the licensee; that the licensee has an unblemished record; and that the complainant has received a significant value from the marketing of the licensee and by Harcourts, much of which was paid for by Harcourts.

The Final Oral Submissions

[63] Mr McCoubrey puts it that the price range provided by the licensee and Harcourts in this case was misleading, as is the said system, because the property will only sell near the top of that price range which is therefore unrealistic. He also puts it that a searcher should be obtaining a good indication of a likely price and that should be the purpose of the criteria inputted by the agent into the web.

[64] He submits that, generally speaking, there was no prospect of a vendor accepting an offer within the above range, but only at the top of it, so that the marketing is misleading and yet purports to be a guide to a prospective purchaser and that a reasonable such person is misled.

[65] Mr McCoubrey put it that the system is either a realistic guide to a prospective purchaser or it is not; and, if the latter, he asks: what is the point of it?

[66] He submits that there is a wide issue in this case relating to industry practice rather than merely the conduct of the licensee.

[67] The response of Ms Fee seemed to be that this form of marketing is not a guide to price but a filtering mechanism to attract the interest of prospective purchasers from property criteria.

Our View

[68] We do not think that the licensee has breached his duties or obligations as a licensee in any way. He used a method of internet advertising in what has become a standard manner and, in good faith, to achieve a wide market coverage for his then client, the present complainant. However, the system of advertising by way of the price search criteria does seem somewhat unsophisticated and in need of refinement.

[69] It seems to us that a licensee and/or agency needs to be very thoughtful about formulating the appropriate price range for online advertising of a property, lest their efforts be misleading. We do not think that the stance of the Authority is in any way fanciful. It is proper that the Authority be concerned about this method of advertising as it is now formulated. A feature of this method of advertising a property as for sale, certainly when to be sold by auction, is that no price is disclosed to prospective purchasers.

[70] We consider that the above concerns expressed by Mr McCoubrey on behalf of the Authority have much merit conceptually. Maybe, best practice for a licensee is to have the vendor approve the price band to be used for online advertising and that added into the listing agreement. Perhaps in such situations (other than auctions), the online advertising should also give some type of price guide.

[71] We have heard much more evidence and argument than was available to the Committee. In terms of our above reasoning, we quash the finding of unsatisfactory conduct and the penalties are revoked. We find that no further action is to be taken against the licensee.

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

Judge P F Barber
Chairperson

Mr J Gaukrodger
Member

Ms C Sandelin
Member