BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 36

READT 056/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**DAPHNE WELLS and GRAEME MARSHALL** of Dunedin, Complainants
	Appellants
AND	**REAL ESTATE AGENTS AUTHORITY (CAC20007)**
	First respondent
AND	**SHANE ROBINSON** of Dunedin, Real Estate Agent
	Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms N Dangen - Member

HEARD at DUNEDIN on 27 March 2014

DATE OF THIS DECISION 19 May 2014

REPRESENTATION

The appellants on their own behalf
Mr L J Clancy, counsel for the Authority
Ms A M Cunninghame with Ms S McNeill, counsel for licensee

DECISION OF THE TRIBUNAL

Introduction

[1] Daphne Wells and Graeme Marshall ("the (vendor) complainants") appeal against the 12 September 2013 decision of the Complaints Assessment Committee 20007 to take no further action in respect of their complaint against Shane Robinson ("the licensee") who currently holds a salespersons licence. At the time of the alleged conduct, the licensee was working from Edinburgh Realty Ltd ("the agency") in Dunedin.

Background

[2] The complainants and Cook Allan Gibson Trustee Co Ltd were the vendors of 24a Gladstone Road, Mosgiel, Dunedin ("the property").

[3] The licensee with the listing salesperson, Mr Lee, was the selling salesperson for the property. They, along with the licensee's wife (Mrs J L Robinson), promote themselves as a team. The agency has a policy that once a contract has been entered into by a purchaser, only the selling salesperson will contact the purchaser and only the listing salesperson will deal with the vendor.

[4] On 6 September 2011, the complainants entered into a conditional agreement for the sale of the property at $399,000. The agreement provided for a deposit of $39,000 to be *"payable on confirmation to Edinburgh Realty Trust Account"*. The possession date was 30 September 2011.

[5] The licensee arranged for the purchase price to be reduced to $397,000 in recognition of the purchaser remedying a problem with rain water running across the footpath to a drain across the street. On 15 September 2011, the complainants' solicitor (Ms H Davidson) advised the purchaser's solicitor (Ms Collins) that the complainants were agreeable to that price reduction and the contract became unconditional.

[6] The complainants' solicitor then, mistakenly, faxed confirmation of the sale to the Mosgiel office of the agency and not to the Dunedin office from where the licensee and Mr Lee worked.

[7] After being advised verbally by the purchaser's solicitor that the agreement was to become unconditional on 15 September 2011, Mr Lee stated that he contacted the purchaser and advised her that the deposit was now payable. The purchaser said that was fine and she would pay the deposit.

[8] Mr Lee maintains that, during his multiple contacts with the purchaser, she appeared to understand what she was doing. She advised Mr Lee that she was getting finance from a family trust. Mr Lee also states that, in his dealings with the purchaser's solicitor up to the confirmation date, nothing was mentioned which might have alerted him that there was an issue with the purchaser's mental health or finances.

[9] On 17 September 2011, the complainants and Cook Allen Gibson Trustee Co. Ltd purchased a property at 23 Edna Street, Oceanview, Brighton, Dunedin, for $232,600 through Ray White Realty Estate Ltd.

[10] Both the licensee and Mr Lee stated that they received a copy of the confirmation of the sale and purchase agreement for the property on 19 September 2011. The complainants state that they contacted the licensee on 13 September 2011 to advise that they had confirmed the sale of the property for $397,000. The complainants submitted that the licensee congratulated them on the sale but did not mention the deposit.

[11] Mr Lee again contacted the purchaser about the payment of the deposit on 19 September 2011. He stated that the purchaser advised him that she was

organising the deposit but that it had not yet come from her family trust. She also said that she was having a little trouble arranging it.

[12] Mr Lee stated that on 20 September 2011 he called the purchaser numerous times chasing up the deposit. He did not get an answer and consequently emailed the purchaser's solicitor to ask if she had heard from the purchaser. Mr Lee stated that the solicitor told him she would call the purchaser, and he understands she did and left a message for the purchaser.

[13] Also on 20 September 2011, Mr Lee advised the licensee that the deposit had not been paid and the licensee said that he would contact the complainants. The licensee and the complainants dispute whether the complainants were then advised by the licensee that the agency was having difficulty in contacting the purchaser and that the deposit had not been paid.

[14] On 22 September 2011, the complainants' solicitor contacted the purchaser's solicitor requesting early release of the deposit to enable the complainants to pay the deposit on the purchase of the Edna Street property.

[15] On 26 September 2011, the purchaser's solicitor advised the complainants' solicitor that her firm was having trouble locating their purchaser client for instructions. The early release of the deposit request was not forwarded to the licensee or the agency. On the same day, the complainants' solicitor contacted the agency to inquire about the deposit and was advised that no deposit had been received. She requested that the agency follow up payment of the deposit.

[16] On settlement day (30 September 2011), the purchaser's solicitors advised the complainants' solicitor that they were unable to locate the purchaser and they had no funds for settlement, so that they would not be able to settle. Accordingly, the complainants' solicitor (for the vendors) subsequently cancelled the contract.

[17] The complainants state that they were advised by their solicitor on 28 September 2011 that the deposit had not been paid. They allege they should have been made aware earlier that settlement may not be possible.

[18] The complainants took possession of their new property in Edna Street and arranged to rent it from that vendor until they were able to settle its purchase. The property (at Gladstone Road) was initially relisted with the agency by the complainants but that agency agreement was cancelled by them on 31 October 2011 when they relisted the property with another real estate company at a lesser price. It was eventually sold for $365,000, which is $32,000 less than the original price.

Issues

[19] The complainants submit that the licensee failed to complete his part of the contract with them by not collecting the deposit for 24A Gladstone Road and by not communicating with them or their lawyer in time for their lawyer to take legal action to obtain the deposit prior to settlement date.

[20] In its 12 September 2013, the Complaints Assessment Committee decision decided to take no further action with regard to the complaint. The complainants' appeal against this decision.

[21] The appellants submit that the total owing to them by the licensee is $243,984.69. This is particularised below in the appellants' submission.

The Committee's 12 September 2013 decision

[22] The Committee found that it is up to the parties to decide when the payment of the deposit will be due and payable, and it is not uncommon for the deposit to be paid on confirmation of the conditions of the sale and purchase agreement.

[23] In relation to the licensee not receiving a copy of the confirmation of the contract, the Committee found that it is good industry practice for a licensee to obtain written confirmation from both solicitors. However, it considered that in light of the other steps taken, this did not amount to a breach of the Real Estate Agents Act 2008 ("the Act") or the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 ("the Rules").

[24] Although the licensee and Mr Lee had not seen the written confirmation until 19 September 2011, the Committee found that Mr Lee fulfilled his obligations by trying to contact the purchaser about payment of the deposit and then advising the licensee on 20 September 2011 that he was having difficulty in contacting the purchaser in relation to the deposit and that the complainants should be informed.

[25] The Committee was of the view that, on the balance of probabilities, the licensee advised the complainants that the deposit had not been paid. The Committee accepted that the licensee did not contact the complainants' solicitor regarding the non-payment, because he believed that the purchaser's solicitor had already done so.

[26] The Committee accepted that the licensee Mr Lee, and the purchaser's solicitor were unaware that the purchaser was not going to be able to settle until settlement day; and that both the licensee, and Mr Lee, used their best endeavours to contact the purchaser regarding the deposit and there was not much else either could have done in the circumstances.

[27] The Committee found that the licensee did not breach the Act or rules and, therefore, decided to take no action.

Further Views Put to us for the Authority

[28] The Authority notes that the appellants seek $200,000 for the stress endured by them both in the said situation. The Authority submits that these damages are not recoverable under the Act and that compensatory damages are not available. Mr Clancy notes that in *Quin v Real Estate Agents Authority* [2013] NZHC 830, the High Court (per Brewer J) held that committees cannot order licensees to pay complainants money as compensation for errors or omission for 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 (s.93(1)(f)(i)). If the licensee can no longer *"put right"* the error or omission, they can be ordered to do something towards providing relief (in whole or in part) from the consequences of the error or omission (s.93(1)(f)(ii)).

[29] The Authority submits that the matters in issue must include the following key question: what did the appellants and the licensee understand the position to be as to when the deposit would be paid?

[30] Mr Clancy then made various helpful references to the evidence filed as follows:

[31] He noted that the appellants submit that the licensee failed to collect the deposit as they suggest he should have done when the contract became unconditional on 15 September 2011. The deposit is stated in the Agreement for Sale and Purchase as *"payable on confirmation",* and the date for possession was on or before 30 September 2011.

[32] The licensee received a text from the appellants on 13 September 2011 to state that they had confirmed a sale at $397,000. The licensee responded to that text saying *"congrats on a great result*".

[33] The appellants' solicitor states that once the contract became unconditional on 15 September 2011: *"as is the custom in Dunedin, the deposit became immediately payable. It was our expectation that the collection of the deposit would be the role of the agent*".

[34] The licensee states that once he discovered from Mr Lee, on or about 21 September 2011, that the full purchase price would be paid on settlement date (30 September 2011), he rang Ms Wells (one of the appellants) and told her that was his understanding. His position is that Ms Wells was then content to leave the matter in the hands of her lawyer and was not concerned by what she had just been told by the licensee.

[35] The licensee's firmly believes that all parties involved in the transaction were well aware that the price was to be paid in full by the purchaser on possession day (30 September 2011). His position is that nothing in his communications with Ms Wells suggested otherwise. Mr Lee's position is that he was advised that both parties had agreed that the full purchase price would be paid on the settlement date. He states that he advised the licensee of this on 21 September 2011.

[36] The other issues appear to be as follows:

[a] Did the licensee act in the appellants' best interests?

[b] Did the licensee put the appellants under undue pressure?

[c] Were the steps taken by the licensee sufficient to communicate the position to the appellants?

[37] These other issues appear to be dependent upon the answer to the central issue referred to above i.e. what did the appellants and the licensee understand the position to be as to when the deposit would be paid?

[38] The licensee also raises issues about the penalties and relief sought by the complainants. The licensee seeks a further hearing should we find his conduct to have been deficient. The Authority agrees that this would be an appropriate course.

[39] As stated above, the Authority submits that some of the losses claimed by the appellants would not be recoverable by orders available under s.93 of the Act.

A Summary of Material Evidence

The Evidence for the Appellants

[40] Ms Wells (one of the vendor-appellants) covered the basic facts set out above and emphasised that she had assumed that the licensee would collect the deposit which, she noted, was payable on confirmation (that conditions in the contract had been fulfilled) to the trust account of Edinburgh Realty Ltd. She simply stresses that, in her view, the licensee failed to do that.

[41] As often happens before us, her evidence was a combination of evidence and argument. She puts the appellants' view as that no one else was to collect the deposit other than the licensee, being the agent named on the sales contract as the salesperson responsible for the sale of the property. She refers to there being a suggestion that Mr Lee, as the selling agent, was also responsible for collecting the deposit and puts it that both the licensee and Mr Lee were part of a team headed by the licensee so that the licensee was ultimately responsible to collect the deposit. She referred to her solicitor's attempts to gain early release of the deposit and her solicitor's telephone call on 26 September 2011 to the solicitor for the purchaser *"looking for urgent payment of the deposit"*. Ms Wells states that at no point in that process did the licensee attempt to contact Ms Wells' solicitor (Ms Davidson) or either appellant to communicate his failure to collect the deposit.

[42] Ms Wells maintains that the appellants have lost much money due to the licensee's failure to collect that deposit and she sets that claim out as follows:

> *"<u>Expenses incurred by Daphne and Graeme up to 27 March 2014</u>*
>
> *Details of the extra costs incurred by us because of Shane Robinson's actions:*
>
> | | |
> |---|---|
> | *Penalty interest 6 days at $101.96* | *$611.76* |
> | *Advertising with Ray White* | *$477.26* |
> | *Additional lawyer's costs* | *$1,346.19* |
> | *Interest for Bridging Finance 5/10/11-23/11/11 48 days at $38.08* | *$1,827.84* |
> | *Interest on principal to be repaid from sale of 24A Gladstone Road*
- 30/9/11-23/11/22 54 days at $30.66 | *$1,655.64* |
> | *Difference between original agreement and eventual sale* | *$32,000* |
> | *Interest on $32,000 30/9/11-22/8/12 at 8.6% - 296 days at $7.82* | *$2,314.72* |
> | *23/8/12-27/3/14 at 5.45% - 569 days at $4.96* | *$2,822.24* |
> | *Insurance on Gladstone Road 30/9/11 to 23/11/11 54 days at $1.92* | *$103.68* |
> | *DCC Rates on Gladstone Road 54 days at $5.39* | *$291.06* |

ORC Rates on Gladstone Road 54 days at $0.45	*$24.30*
Cost of moving truck whilst waiting to gain access to Edna Street *- 4.25 hours at $120 per hour*	*$510.00*
Total owing to us at 27 March 2014	*$43,984.69*
Stress on Daphne	*$100,000*
Stress on Graeme	*$100,000*
Total if paid by 27 March 2014	*$243,984.69*

The total owing to us by Shane Robinson if paid by 27 March 2014 is $243,984.69 and thereafter it increased by $4.96 per day for ongoing interest as detailed above.

No amount can actually fully compensate for the stress incurred on us both by this situation, however, we feel $100,000 each is a token amount that should be paid to each of us by Shane in acknowledgement of the severe stress we incurred and are still living with as a result of his actions.

In actual fact the stress we have incurred and are still incurring financially, physically and emotionally is incredible."

[43] Ms Wells was extensively cross-examined by Ms Cunninghame and then by Mr Clancy. Inter alia, Ms Wells asserted to Ms Cunninghame that there was no such telephone call as the licensee asserts on 20 September 2011 and that she was never told that the deposit could not be collected. She put it that she is intelligent and would certainly remember if she had received such a telephone call on 20 September 2011 as the licensee maintains. She said that she did not know until 28 September 2011 that the deposit had not been paid and then it was too late to do much about it before settlement.

[44] It was put to Ms Wells that, if she was seeking earlier payment of the deposit, would she not have chased up the licensee and so become aware earlier that the deposit had not been paid? Her response seemed to be that she never agreed to the deposit being left for payment until settlement on 30 September 2011; and did not know it had not been paid immediately upon the contract becoming unconditional; and when she found out about the position on 29 September 2011 it was too late for a deposit cheque to be cleared, as she put it. She asserts that it was the licensee's job to let her know of the non collection of the deposit but that when he did it was too late to do much about it.

[45] In his cross-examination of Ms Wells, Mr Clancy also focused on whether there was a telephone call on 20 or 21 September 2011 from the licensee to Ms Wells when the licensee told her that the purchaser was unable to pay the deposit until settlement date. Her response was *"I don't recollect him saying that"*. She added that if she had been given such information then she would have been shocked and would have immediately rung her lawyer, Ms Davidson, *"to see what we should do about it"*.

[46] Mr Clancy also put it to Ms Wells that the licensee maintains that he understood that the lawyers for vendor and purchaser had agreed between themselves that the

deposit need not be paid until settlement date and that Ms Wells had agreed to that. She responded that was never put to her and that, surely, she would need to have consented before her lawyer could agree to such an arrangement.

The Evidence of Ms H I Davidson – Solicitor for Appellants

[47] Ms Davidson explained that the appellants sold the property in their capacity as trustees of the DB Wells Family Trust and the purchaser was a Ms M L Wallis. The contract was dated 6 September 2011 and settlement was due for 30 September 2011.

[48] Ms Davidson said that on 22 September 2011 the appellants requested an early release of the deposit from the agency, believing the licensee had collected it, as the appellants needed it for an on-purchase. She said that on 26 September 2011, which was four days before settlement, her firm telephoned the agency to enquire the whereabouts of the deposit and was told that no deposit had been received. Ms Davidson said: *"This was the first time since 15 September 2011 (when the deposit was due) we were made aware no deposit had been collected. We requested that they urgently follow up payment of the deposit as the balance of it was required for a contemporaneous purchase"*. That same day she requested of the purchaser's solicitor by email urgent payment of the deposit and approval for early release of it to the appellants. An email reply advised that the purchaser's solicitor was having trouble locating the purchaser and understood she may have gone to a funeral in the North Island.

[49] On the day of settlement, 30 September 2011, Ms Davidson's firm received a call from the solicitor for the purchaser to say they could not locate their client, had no funds for settlement, and warning that they might not be able to settle that day. Ms Davidson's firm then contacted the licensee who undertook to find out what he could. There were many calls between the parties that day but the solicitors for the purchaser simply had no funds to settle and could not locate the purchaser. The appellants (presumably as trustees) were obliged to complete an on-purchase that day and became in default of that because they did not have the funds from the sale of the property. They obtained bridging finance to complete that on-purchase and subsequently resold that Gladstone Road property at a loss of $32,000 in relation to the price which the purchaser, Ms M L Wallis, was due to have paid on 30 September 2011.

[50] Ms Davidson concluded her evidence-in-chief with the following:

> *"12. If, we and the trustees were warned the purchaser had disappeared or that the deposit was not going to be forthcoming, we could have used the provisions in para 2 of the Agreement for Sale and Purchase to require the deposit to be paid within 3 working days and then the contractual remedy available immediately thereafter".*

[51] Of course, Ms Davidson was carefully cross-examined by counsel and it was made clear that she had obtained no response from the solicitor for the purchaser to her 22 September 2011 request on behalf of the appellants for an early release of the deposit. Inter alia, she stated that there was never any agreement with her that payment of the deposit be deferred until settlement, nor did she know until 29 September 2011 that the deposit had not been paid. Also, she had been given no indication until the settlement date of 30 September 2011 that the purchaser's solicitor had, as she put it, *"simply lost their client"* and had no funds to effect

settlement. She added that the appellant vendors could never have agreed to defer payment of deposit until settlement as they needed it for their on-purchase and sought its early release if possible.

[52] Ms Davidson emphasised that if the licensee had told her earlier that he had been unable to collect the deposit, she would have adopted a different strategy on behalf of the appellant vendors, but that he did not.

The Evidence for the Licensee

Evidence from Mrs J L Robinson

[53] Mrs Robinson is the wife of the licensee and a member of his team at the agency. She simply confirmed the above basic facts and put it that the team had found a purchaser at the listing price sought by the appellants, which she considered was *"considerably above valuation"*. She put it that the agency had no reason to suspect that the settlement would fail on the part of the purchaser and that there were a number of conversations about the purchaser not having paid the deposit. She felt that the team did all they could to endeavour to collect it and she added *"and to make the parties aware of the situation"*. She concluded her evidence-in-chief as follows:

> *"5. I know through my experience in dealing with the file that both Ms Wells and Mr Marshall, and also Ms Wallis were both aware of their situations and obligations. Ms Wells and Mr Marshall were well aware that full payment for the property was to occur on settlement day and that no deposit would be paid prior"*.

[54] In the course of her cross-examination (by all parties), Mrs Robinson maintained to Mr Clancy that she knew that her husband had made the telephone call of 20 September 2011 advising Ms Wells that deposit could not be paid until settlement on 30 September 2011. She also confirmed to me that the deposit sum which the appellant vendors sought to be released to them early was the net deposit after deduction of real estate agent's commission.

Evidence from Licensee

[55] In the course of confirming the basic facts, the licensee emphasised that Ms Wells had not wanted an aggressive marketing campaign so that there was no signage at the property, viewing was by appointment only, and there were no open homes conducted until after the failed settlement. He said that made it more difficult to attract prospective buyers and that Ms Wells was firm in the price to be $399,000 which he considered high and approximately $15,000 above market value.

[56] He said that, throughout the selling process, he dealt with Ms Wells only and not with Mr Marshall or their solicitors. He spoke to Ms Wells regularly and, as well, saw her each week at a particular club meeting. He noted that the sale agreement to Ms Wallis was conditional on a satisfactory LIM and a building report and on her obtaining finance; those conditions were partly fulfilled on 13 September 2011 but a drainage problem had been identified which led to a price reduction; and the contract became unconditional on 15 September 2011.

[57] The licensee said that between 14 and 19 September 2011 he discussed the issue of confirmation of the contract with his colleague Mr Lee; and he accepts that it

is the responsibility of the real estate agent *"to get a sale to the unconditional stage, and we both knew we needed to follow matters up, which we did"*. He said that on 20 September 2011 Mr Lee told him that he had been in contact with the purchaser and she was having a little difficulty arranging the money she needed for the deposit. He said that on 21 September 2011 Mr Lee told him it had been agreed that the full purchase price be paid on settlement date of 30 September 2011 and he (Mr Lee) had been told this by the solicitor for the purchaser. He said that he then rang Ms Wells and told her that the lawyers for vendor and purchaser had agreed between them that the deposit be paid on settlement date. The licensee then said:

> *"Ms Wells said that she trusted Ms Davidson, who "knew what she was doing", and that she would "leave it to her to sort out". She was not concerned by what I said to her and did not ask any questions. I advised her to discuss this with her lawyer"*.

[58] Accordingly, the licensee says that he and Mr Lee felt that was nothing further required from them at that stage and there was no further need to seek to collect the deposit prior to settlement. He added *"I understood that the parties, and their lawyers, were all aware of the situation and that there were no concerns"*. He asserts that he firmly believed that all parties involved in the transaction were well aware that settlement was to be paid in full on possession day.

[59] The licensee also stated in his evidence-in-chief that, whereas Ms Davidson (as solicitor for the vendor appellants) contacted the solicitor for the purchaser on 22 September 2011 requesting an early release of the deposit, he knew nothing of that nor did he know about there being a further such request on 26 September 2011.

[60] The licensee stated that on 29 September 2011 he rang Ms Wells to check that everything was in place for settlement and possession the next day and made arrangements about the keys, but that at no stage did Ms Wells indicate that she was expecting the deposit to have been paid or that she had any concerns about the transaction.

[61] The licensee then covered to us that he was expecting settlement to occur on 30 September 2011 in terms of the contract but that it did not happen. He then went with his wife to see the appellants and discuss their predicament with a view to helping them and felt he did his best for them after that as he detailed to us.

[62] Inter alia, the licensee expressed his belief that the initial restricted advertising campaign affected the level of interest in the property and still had an effect at the time of its resale. We understood that he advised the appellants, as they were reselling, that he would not be seeking commission fees in relation to the collapsed sale to Ms Wallis although the considered that, legally, commission was payable. We understood that Edinburgh Realty Ltd reserved the right to claim a fee if Ms Wallis was successfully pursued by the appellants for the deposit which, at that stage, Ms Davidson indicated the appellants might do but, in fact, they have not.

[63] The cross-examination of the licensee was extensive from both other parties.

[64] The licensee strongly asserted that he did telephone Ms Wells on 20 or 21 September 2011 and advise her that the deposit could not be paid until settlement and the lawyers had agreed to that between themselves and Ms Wells had responded that she would leave it all to Ms Davidson in whom she had complete

trust. The licensee was particularly pressed in his evidence by Mr Clancy to whom he responded that he did not know until about 29 September 2011 that Ms Wells needed an early release of the deposit to purchase another property .

[65] The licensee again asserted to us that he clearly understood that by 21 September 2011 the lawyers for vendor and purchaser had taken over the matter of collection of deposit and deferred it until settlement day due to the purchaser being unable to fund payment of the deposit until then; so that there was nothing further that he, the licensee, needed to do about the deposit from then.

Evidence from Mr B P Lee

[66] At material times Mr Lee was a colleague of the licensee and his wife at Edinburgh Realty Ltd and he was the listing agent for the property.

[67] In his evidence-in-chief, Mr Lee confirmed that the licensee and his wife and the witness operated as a team assisting each other with all their listings. Ms Wallis had contacted him at the agency on 6 September 2011 and he showed her through the property on two occasions leading to her deciding to make an offer and telling him that she was obtaining the purchase money from a family trust. It was Mr Lee who prepared the agreement for sale and purchase and, from the outset, he dealt also with the prospective purchaser's solicitor, Ms Collins. He added that, on 9 September 2011, the latter told Mr Lee, inter alia, that she had been talking with Ms Wallis regarding paying the deposit.

[68] As indicated above the price was reduced by $2,000 on 14 September 2011. Mr Lee described how, on Friday, 16 September 2011 in one of his telephone communications with Ms Wallis, he congratulated her on her purchase because Ms Collins had told him that day that the agreement was to become unconditional and he reminded Ms Wallis that the deposit was then due and payable immediately. He said to us that she indicated that was fine and she would make the payment.

[69] On the Monday, 19 September 2011 Mr Lee again telephoned Ms Wallis to ask about the deposit and she replied that she was organising it but it had not yet come from her family trust and that she was having a little trouble arranging it. He telephone her again a number of times on 20 September 2011 to chase up the deposit but could not get an answer so he emailed Ms Collins, her solicitor, that day asking about the deposit. Ms Collins emailed him in reply to say she would ring Ms Wallis and shortly after she emailed Mr Lee again to say that she had left a message with Ms Wallis. However on that day 20 September 2011 he told the licensee that the deposit had not yet been paid as Ms Walls was having a little trouble arranging it and he says the licensee told him that he, the licensee, would contact Ms Wells. Mr Lee then said that *"after 20 September 2011 Ms Collins informed me that both parties had agreed that the full purchase price would be paid on the settlement date. I advised [the licensee] of this".*

[70] Accordingly, Mr Lee believed there was nothing further he needed to do to collect the deposit and that *"everything would occur"* on settlement date. On 26 September 2011 he emailed Ms Collins to confirm that everything was on track for settlement on 20 September 2011 and he also explained that he had tried to ring Ms Wallis but received no answer.

[71] Mr Lee emphasised that he was unaware that an early release of the deposit had been requested (presumably, by Ms Davidson for the appellants) of Ms Collins

on 22 September 2011; although the request could have come from Ms Wells. He added *"I was also not aware that on 26 September 2011 Webb Farry had been contacted regarding the deposit. I do not know why this information was not passed on to me"*.

[72] Mr Lee maintains that he took all steps to obtain the deposit and could have done nothing more and, as does the licensee, he sympathises with the appellants' predicament.

[73] In the course of Mr Lee's thorough cross-examination by Mr Clancy, there was focus on whether it was Ms Davidson or Ms Wells who had agreed with Ms Collins to defer payment of the deposit on 20 September 2011 until settlement on 30 September 2011. All parties accept that to be a crucial evidential issue. It was put to Mr Lee that he must have misunderstood what Ms Collins told him. He responded firmly that he had not so misunderstood and that there had never been any doubt or confusion in his mind about that.

[74] Ms Wells put it, inter alia, to Mr Lee that he ought to have obtained written confirmation from Ms Collins that there had been an agreement with her that the deposit need not be paid until settlement. Mr Lee responded that, because the deferral of deposit agreement had been made with Ms Davidson and all communications had been by telephone, email, or fax, he saw no need for that arrangement about payment of deposit on settlement to be recorded in writing.

Discussion

[75] All parties seem to accept that the issue is Mr Robinson's (as the licensee) state of mind at material times.

[76] We are conscious that the overall evidence shows that the necessary agency work, after the agreement for sale and purchase had been signed and then become unconditional, seemed to have been primarily handled by Mr Lee on behalf of the team of the licensee, his wife, and Mr Lee.

[77] Despite the conflicts in various important parts of the evidence, it does seem, overall, that the team, particularly Mr Lee and the licensee in this case, carried out the duties expected of a salesperson in the circumstances described above.

[78] The stance of Ms Wells is that there was never any agreement that payment of the deposit be deferred until settlement date. She asserts that the telephone call which the licensee described as having been made by him to her on either 20 or 21 September 2011, advising that Ms Wallis could not fund the deposit and that by agreement its payment was postponed for payment together with the balance of the purchase price on settlement date, never happened. She asserts that it is simply convenient of the licensee to now provide his explanations but that his job was to collect the deposit and, if it could not be paid, to have told her as vendor immediately once he knew that.

[79] We have covered Mr Clancy's stance on behalf of the Authority above but, as he emphasises, the issues are solely factual. A main issue is whether, on 20 September 2011 or the next day, the licensee passed on to Ms Wells that the purchaser could not fund the deposit until settlement and that deferral had been agreed to between the respective solicitors for vendor and purchaser. As Mr Clancy

put it, if the licensee did make such a telephone call then the Committee was correct to take no further action on the complaint.

[80] Indeed, Mr Clancy pointed out that because the onus of proof is upon the appellants, to the standard of proof of the balance of probabilities, if we cannot decide whether the licensee made that telephone call of 20 or 21 September 2011, then the Committee's approach must still be correct; although if we accept that there was no such telephone call we might find unsatisfactory conduct on the part of the licensee.

[81] As Mr Clancy also observes, if Ms Wells is correct that there was no proper arrangement/agreement for the deposit to be deferred until settlement, then how did the licensee come to understand that such an arrangement had been made between the respective solicitors for vendor and purchaser? There is no independent evidence of the telephone call from the licensee to Ms Wells described a number of times above of 20 or 21 September 2011. Mr Clancy notes that the licensee says he made that call to Ms Wells but he did not pass on the information to her solicitor Ms Davidson.

[82] Mr Clancy also noted that, in his evidence-in-chief, the licensee merely states that he had been told on 20 September 2011 that the purchaser Ms Wallis would not have the deposit available until settlement but, in his oral evidence to us, he adds that that had been agreed between the lawyers for vendor and purchaser.

[83] Mr Clancy also submits that Mr Lee is a pivotal witness but seemed a little confused and unconvincing under cross-examination.

[84] Ms Cunninghame, correctly, in our view, submits that the key factual issue is the licensee's state of mind once the agreement for sale and purchase had become unconditional. She submits that because the licensee believed that the parties were comfortable with payment of the deposit occurring on settlement, his actions thereafter were appropriate as he had discussed the new payment date, being the settlement date, with Ms Wells and was satisfied that she understood the implications of this deferral and that she was content to leave the matter in the hands of her lawyer Ms Davidson. She puts it that when the licensee learned there was to be a delay in payment of the deposit he advised Ms Wells (on 20 or 21 September 2011 by telephone) and understood she was happy to leave the matter in the hands of her lawyer, Ms Davidson, whom she greatly trusted.

[85] The hearing before us focused on the alleged failure of the licensee to collect the deposit and his alleged failure to notify the complainants or their lawyer, Ms Davidson, that the deposit had not been paid. The other allegations of Ms Wells, namely, failure to act in the best interests of the appellants and putting them under undue pressure are consequential to the deposit issue.

[86] Obviously, the licensee could not uplift the deposit because the purchaser did not have funds to pay it. There is a conflict of evidence as to whether the parties agreed that deferral of the deposit would be made to settlement date when full payment of the purchase price would happen. We agree with Ms Cunninghame that any failure to collect the deposit did not result in the failed settlement. That happened because the purchaser could not obtain funds and, indeed, seems to have vanished from Dunedin as from settlement date or a little earlier than that.

[87] The licensee's evidence is that he did inform the complainants on or about 20 September 2011 that the deposit would be paid on settlement and there were no concerns about that and such an issue was left from the complainants' point of view to their solicitor Ms Davidson. We have no compelling reason to disbelieve the licensee's evidence that he did make the telephone call with its contents, as explained above, to Ms Wells on 20 or 21 September 2011; but the issue is his overall conduct as a salesperson having responsibility for the sale of the said property for the complainants.

[88] We certainly accept that if Ms Davidson had known earlier than 26 September 2011 that the deposit had not been paid and that the purchaser was unable to fund it, then she would have composed a different strategy in the interests of the appellant complainants. We observe that it is unlikely that any new strategy would have achieved payment because the prospective purchaser, Ms Wallis, seemed to be a person of straw. Presumably, that is why the appellants have not sued her for the deposit.

[89] A relevant factor, as put by Ms Cunninghame, is that the licensee was at all material times aware that the appellants were represented by an able solicitor whose professional duty it was to protect their interests. It must be rare that a purchaser flees his or her commitment. As Ms Cunninghame has also submitted, this sale did not fail because a deposit was not collected. She submits that the licensee did all that was reasonably required of him to collect the deposit and in relation to the transaction generally. We have observed above that Mr Lee seemed to have undertaken all necessary steps or, certainly, he and Mr Robinson between them did.

[90] Ms Cunninghame also observed that, if we had power to award costs as does a civil Court, she would have sought costs against the appellants should the licensee be successful. We do not currently have such power and can only, in appropriate circumstances, order costs against a licensee.

[91] The overall submission for the licensee is that, at all material times, he acted in a professional manner and did all he could to represent the interests of the appellant complainants; so that we should dismiss this appeal.

[92] Ms Wells (on behalf of Mr Marshall and herself as appellants) made quite detailed references to the Act and its Rules; but her stance can be encapsulated in the following paragraph from her submissions namely:

> *""Daphne and Graeme submit that having listed, sold and confirmed the sale of 24A Gladstone Road with Shane he then failed to complete his part of the contract by not collecting the deposit and by not communicating with us or our lawyer in time for her to take legal action to obtain the deposit prior to settlement date. We submit that this is serious misconduct and must be disciplined as such."*

[93] In a final statement to us Ms Wells puts it that the licensee's story *"has changed throughout time to suit his needs"* and she emphasises that the appellants consider they need to be compensated for the licensee's conduct (as set out above) and they look to us to award that.

[94] We are very conscious of the conflict in evidence on the pivotal issue of whether or not the licensee advised Ms Wells by telephone on 20 or 21 September 2011 that Ms Wallis, as then unconditional purchaser of the property, had advised she could

not fund payment of the deposit and the solicitors for each party had agreed that payment could be deferred until settlement. We are satisfied that, on the balance of probabilities, the licensee seems to have done that and Ms Wells must have become hazy in her recollection of the sequence of relevant events.

[95] There was also the issue whether the licensee and his colleague, Mr Lee, could reasonably have believed that the lawyers had come to such an agreement in the circumstances. We accept that they did.

[96] There is also a question whether the licensee should have been more involved in the transaction and had left too much of the necessary real estate salespersons conduct to his staff and to Mr Lee. It seems to us that, because Mr Lee and the licensee between them covered the necessary ground, that aspect is not a realistic issue.

Our Conclusions

[97] When we stand back and analyse the evidential detail we have set out above, we conclude that it has not been proven, even on the balance of probabilities, that the licensee has failed in his duties as a real estate salesperson in any way.

[98] We are dealing with the conduct of the licensee. However, it does seem to us that between the agency and its team of three involved in this case, namely, the licensee, his wife and Mr Lee, there must have been some type of failure because Ms Davidson should have been told well before 26 September 2011 (and, seemingly, on 20 September 2011) that the purchaser, Ms Wallis, was in breach of contract. At the very least, there was an issue of penalty interest seemingly due by the purchaser and the need for consideration of remedies then available to the vendor-appellant-complainants and also, perhaps, the need for the vendor's solicitor to formulate an appropriate strategy in a concerning position.

[99] It might have been better for the appellants' complaint to have been laid against the agency or to have included Mr Lee also; although we have no reason to disbelieve his evidence that he carried out appropriate duties in a proper manner. However, there seems to have been a failure by someone to check whether Ms Davidson had agreed to deferral of payment of the deposit or even knew of the problem.

[100] Any agent involved in a sale transaction on behalf of a vendor must ensure that the deposit is collected promptly and report any problems immediately not only to the vendor but also to the vendor's solicitor. Also, such an agent should not let up on endeavouring to collect the deposit unless he or she has it made clear to them by the vendor (or the vendor's solicitor) that the vendor's solicitor has taken over that task of collecting the deposit.

[101] We realise that, in some agencies, matters such as the collection of the deposit and various other administrative matters are taken over from salespeople by administrative staff. We find such an arrangement to be in order, but any failure remains the responsibility of the salesperson agent and can also be sheeted home to the agency and to any other agent involved in the transaction. However, these matters will always depend on the precise facts of the case.

[102] Simply put, a listing agent, and/or sales agents, will not necessarily be exonerated from their obligations by having administrative staff in the agency take over various duties.

[103] Having said all that, we consider that it has not been proved to us on the balance of probabilities that the licensee has failed in any way. Accordingly, this appeal is dismissed or, to put it another way, we agree with the Committee that no further action be taken.

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

_____
Ms N Dangen
Member