

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 55

READT 045/13

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

BETWEEN **DAMIEN HENAGHAN AND GRANT HENDERSON**

Appellants

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 20002)**

First respondent

AND **BRUCE AND JANE McDONALD**

Second respondents

READT 047/13

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

BETWEEN **BRUCE AND JANE McDONALD**

Appellants

AND **THE REAL ESTATE AGENTS AUTHORITY (CAC 20002)**

First respondent

AND **DAMIEN HENAGHAN AND GRANT HENDERSON**

Second respondents

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 5 May 2014

DATE OF THIS DECISION 15 July 2014

COUNSEL

Ms E Harrison for the licensees
Ms J MacGibbon for the Authority
Mr R Mulgan for the complainant vendors

DECISION OF THE TRIBUNAL

Introduction

[1] Damian Henaghan and Grant Henderson (“the licensees”) appeal against the determination of a Complaints Assessment Committee finding them guilty of unsatisfactory conduct. This was on a complaint made by Bruce and Jane McDonald (“the complainants”).

[2] The complainants have also appealed against the penalty decision made by the Committee to censure the licensees. Although initially seeking an order of rectification under s.93(1)(f) of the Real Estate Agents Act 2008 (“the Act”), it now appears that the complainants are seeking monetary orders under ss.93(1)(e) (a commission refund) and (i) (legal costs) of the Act.

Factual Background

[3] On 10 July 2011 the complainants listed 31 Maritime Terrace, Birkenhead, Auckland with Harcourts Milford for an auction set for 7 August 2011 unless sold prior. Mr Henaghan was the listing agent and Mr Henderson was his sales manager.

[4] On 27 July 2011, Ze Shen Wu (Ms Wu) viewed the property with the selling agent, Matty Ma, and registered for the auction. According to Mr Henderson, she had indicated to the complainants that she had a budget of \$2.3 million to spend on a home.

[5] On 1 August 2011, Wenjie Mao (Ms Mao) completed a written offer for the property for a purchase price of \$2.1 million. This was later verbally increased to \$2.25 million with settlement to be 14 days later and the offer was eventually initialled. Later that day, a letter of intent was received from Ms Mao’s accountant stating that the pre-auction offer was open until midnight 2 August 2011. Ms Mao told Mr Henderson that she was interested in purchasing the property but was not prepared to go to auction.

[6] The complainants state that they were never presented with the written offer from Ms Mao. Mr Henaghan was initially unsure with the REAA Investigator as to whether the written offer was sent to the complainants. In his brief to us, he states he did present them with a copy of the written offer.

[7] In consultation with Andrew North, the then auction manager and one of the directors of the Agency, and with Mr Henderson, Mr Henaghan says he presented a variety of options to the complainant vendors about what to do once the offer was received from Ms Mao, namely: reject the offer and proceed to auction; accept the offer without a deposit cheque; negotiate with Ms Mao to accept the offer conditional on payment of the 10% deposit cheque; or call off the auction and invite competing offers from interested parties.

[8] At midday on 2 August 2011, Mr Henderson emailed Ms Mao's accountant seeking confirmation that a 10% deposit would be made to the Harcourt's trust account by midday on 3 August 2011 and advising that the sale and purchase agreement would be terminated if that was not received as stipulated.

[9] This email was forwarded to the complainants on 2 August 2011 with a message asking confirmation of instructions. The email stated that the property was to be withdrawn from sale by auction due to an unconditional offer being presented and that all interested parties had to make an offer on an unconditional basis prior to 6.00 pm on that same date. If no other offer was received then Ms Mao's offer would be accepted. The complainants replied agreeing to that but stating that the successful contract would be subject to a 10% bank-cleared cheque by 5.00 pm on Wednesday 3 August 2011.

[10] The complainants have stated that they were never provided with multiple options but were instead told that they could not accept the offer until other parties had an opportunity to make an offer. The licensees deny that they ever stated that the complainants could not accept the pre-auction offer from Ms Mao. The licensees assert that they provided a number of options to the complainants who instructed them to proceed in the way they did.

[11] Accordingly, Mr Henderson called Ms Ma, the licensee who had been dealing with Ms Wu, and advised her of the pre-auction offer and the proposals to cancel the auction and invite competing offers. Ms Ma advised that her client was not interested in making a pre-auction offer. When she registered her interest, Ms Wu had stated that she was not interested in making a pre-auction offer.

[12] At 2.03 pm on 2 August 2011, Ms Mao withdrew her offer in the belief that the auction was being brought forward to 6.00 pm that day 2 August 2011. It is not clear why she thought that, as the licensees state that they did not inform her of the offer situation. Mr Henaghan has stated that he contacted Ms Mao's accountant and advised that the auction had not in fact been brought forward, but she maintained that she said she was not interested in proceeding.

[13] The property was subsequently passed in at the auction on 7 August 2011 but was sold later that day to Ms Wu for \$2.2 million.

The Committee's Decisions

[14] The Committee found that the licensees had not fully explained to the complainants the consequences of the intended approach of seeking other offers. Further, it found that the complainants were not made aware that they could seek legal advice, and that the signed offer was not put in front of the complainants. It found unsatisfactory conduct against both Messrs Henderson and Henaghan and censured them both. It declined to order any compensation.

[15] The Committee had focused on the question whether the licensees failed to present a pre-auction offer to Mr McDonald and prevent him signing it. In the usual way the Committee heard the complaint on the papers. Some of its sensible reasoning is in the following extracts from its decision of 26 April 2013:

"4.7 The Committee noted that the Licensees believed that they were acting in the Complainant's best interest by introducing a multi offer process

resulting in interested parties being invited to present an unconditional offer for the property by 6.00 pm on 2 August 2011. Nevertheless the reality was that in this situation the use of the term multi offer was incorrect. The term multi offer implies that there are signed offers from more than one buyer at the same point in time. Further a multi offer requires a procedure whereby all parties, vendor and buyers, sign off on how a multi offer situation will be handled, addressing the rights and obligations of all parties that enter into that multi offer situation.

...

- 4.11 *It would appear that whilst the Complainant was kept informed little consultation was made with him to ensure (a) that he fully understood the risks of changing the marketing course that had been embarked upon in the manner proposed. This included the fact that Ms Mao had already signalled that her offer would expire at a certain time if not accepted and that she would not attend an auction which should have alerted the Licensees to the risk of her “walking away”, and (b) there is no evidence that his instructions were sought as to how he wanted to proceed with either the existing offer (which he clearly intended to accept) and the possibility of another offer coming in from Ms Karen Wu through Licensee Matty Ma which in fact didn’t occur. Whilst Ms Wu did eventually purchase the property she had already indicated that she was not interested in making an offer before the auction.*
- 4.12 *The Committee is of the view that Mr Damien Henaghan and Mr Grant Henderson by representing to the Complainant that it was now a ‘multi offer’ situation have led him to believe that by doing so he would have the option of more than one offer. In reality there was only one signed offer and another party who had clearly stated that she would not be making an offer prior to the auction. The Committee is of the view that the plan which was developed by the Licensees to seek offers by 6 pm on 2 August 2011 was (a) not clearly understood by the Complainant i.e. there is no evidence to show that the potential consequences of this approach were clearly explained to Mr McDonald, (b) the complainant was not advised by the Licensees to seek advice from his solicitor i.e. Mr Robert Benton has confirmed that he was not consulted before or during the signing of the agreement by the Complainant or Harcourts, and (c) the Complainant is quite clear that the signed offer from Ms Mao was ‘not put in front of him’, could be considered negligent in their duty to their client.*
- 4.13 *The Committee has concluded that both Licensees have breached Rule 9.1 A licensee must act in the best interests of a client and act in accordance with the client’s instructions unless to do so would be contrary to law.”*

[16] We have had the benefit of hearing viva voce evidence with cross-examination.

A Summary of Relevant Evidence Adduced to us

[17] The evidence before us was rather detailed and much of it only semi-relevant. Also from standing back and absorbing all that has been put to us, we have formed fairly clear views as we cover later below.

The Evidence of Mr D Henaghan

[18] Mr Henaghan detailed how, on 1 August 2011 at his agency, a Ms Mao signed a written offer to purchase the property for \$2.1 million. She indicated that she could increase that to \$2.25 million, subject to her accountant's approval and advice. Mr Henaghan emphasised how, at all stages material to this case, he was taking advice from his manager, Mr G Henderson, and their auction manager, Mr A North, to ensure they always acted in the best interests of the vendors.

[19] Mr Henaghan says that he took that offer of Ms Mao to the husband vendor (Mr B McDonald) and there were discussions between them and Mr McDonald rejected the \$2.1 million offer, seemingly, because Mr Henaghan felt he could have Ms Mao increase her offer up to \$2.25 million, and they knew that another agent in the agency (Ms Ma) had another interested prospective purchaser.

[20] Later that day, Ms Mao's accountant orally advised that she would increase her offer to \$2.25 million and that offer was open until midnight 2 August 2011 but it would be withdrawn if the auction date was brought forward from 7 August 2011. Indeed there was an email letter to that effect from the accountant to Mr Henaghan with a form of contract attached showing the previous offer of \$2.1 million crossed out and replaced with \$2.25 million, but there was no accompanying cheque for the required 10% deposit. This meant that if the deposit was not received within the three working days provided for that to be done in the contract, the vendors could not cancel the agreement for non-payment of the deposit until after the scheduled auction date of 7 August 2011.

[21] Mr Henaghan met with Mr McDonald at the property at about 7.00 pm that evening and, he asserts, had that sale and purchase agreement with him to show to Mr McDonald who advised that he would not sign it unless a bank cheque for the 10% deposit could be cleared by midday on 3 August 2011.

[22] Mr Henaghan says he also explained to Mr McDonald that Harcourts' general pre-auction offer protocol is to advise interested parties of a pre-auction offer and enable them to do the same. There is no dispute that another interested party was Ms Wu, who was the client of the said Ms Ma another agent at Harcourts who seemed to be very successful and influential, so that the agency did not want to ruffle her in any way in terms of handling negotiations for the sale of the property.

[23] In terms of allegations made by Mr McDonald, which we again refer to below when dealing with his evidence to us, Mr Henaghan emphasised that Mr McDonald had never said to him that he wanted to sign that offer from Ms Mao and he particularly asserted that he, Mr Henaghan, had never told Mr McDonald that he could not sign it due to Harcourt protocols in such a situation. Mr Henaghan put it

“The vendor is the boss: I would never overrule their instructions to me. This is especially so in the case of Mr McDonald who often referred to his previous experience in, and extensive knowledge of real estate.”

[24] Mr Henderson recorded that, understandably, Mr McDonald had said he would not sign Ms Mao's offer without a 10% deposit and, in any case, was reluctant to because he expected that Ms Wu might make a higher offer.

[25] There is detailed evidence from the licensee's that, throughout these material times, there was constant communication by them with Mr and Mrs McDonald as to their best strategy and options. There were many communications with the interested parties.

[26] Shortly after 2.00 pm on 3 August 2011, Ms Mao's accountant withdrew her offer, seemingly, because Ms Mao thought the auction was being brought forward.

[27] The auction proceeded as planned on 7 August 2011 and, despite the efforts of the licensees, neither Ms Mao nor her accountant attended the auction. The property was passed in, but there were negotiations with Ms Wu and the vendors accepted an offer from her at \$2.2 million, so that the sale was concluded.

[28] Under cross-examination, Mr Henaghan was pressed over his above evidence. He considered that the vendors really sought a price of \$2.5 million but would take \$2.25 million with equanimity and that, in particular, Mr McDonald was not in any way confused as to how negotiations should be handled. Mr Henaghan asserted that he was fully guided by the vendors in all his actions and in particular put it, under cross-examination from Mr Mulgan, that Mr McDonald made it clear that he was very experienced as a former real estate agent and knew what he was doing.

[29] Mr Henaghan was pressed by Mr Mulgan as to why Harcourts converted the one pre-auction offer into their multi-offer process or procedure. There seems confusion over that because there was not a complete offer from Ms Mao due to there being no deposit. Also, there was a certain vagueness as to whether there was another prospective buyer in the frame. However, Mr Henaghan said that he set up a multi-offer process thinking that was required by Harcourts protocols and in terms of the best interests of the vendors.

[30] Mr Henaghan was pressed to confirm that at 7.00 pm on 7 August 2011 he had come to the home of the vendors and shown them the written offer for Ms Mao and he said he brought it and put it on the table and discussed it with the vendors. Mr Henaghan was pressed that they there and then wished to sign and accept that offer, but Mr Henaghan said that was not so because no deposit was attached and Mr McDonald wished to sleep on the matter and they discussed all options in terms of sensible negotiations.

[31] It was also put firmly to Mr Henaghan that he had not told the McDonalds' to take legal advice. He responded "*I don't know. My Manager did. There were so many conversations it is difficult to know who said what to whom and what I actually said. The main question was whether Ms Mao was able to pay a deposit. Mr McDonald never asked to accept the contract and never asked to actually sign it.*" There was also coverage that Ms Mao needed to either sell properties to fund the purchase of the vendors' property or obtain funds from her parents in China; so that she preferred not to attend the auction where she would be required to sign a cash contract.

The Evidence of Mr Henderson

[32] Mr Henderson gave evidence as a respondent licensee and as Mr Henaghan's manager. He generally confirmed the factual events covered above.

[33] He covered that, on about 2 August 2011, he was told by Mr Henaghan that an offer had come to hand from Ms Mao's accountant at \$2.25 million and it was also his concern that a deposit cheque was needed. He said that he and Mr Henaghan felt that the vendors were very exposed without a deposit and he was conscious that Ms Mao needed authority and funding to purchase from her father in China. He had phoned Mr McDonald on 2 August 2011 to ensure that the vendors understood their options which he covered with them and he urged them to require a deposit and to take legal advice. He noted that Mr McDonald accepted Mr Henderson's views and wanted to invite offers from other interested parties, but declined to take legal advice. He said that Mr McDonald wanted any other offers, in particular from Ms Wu, to be received by 6.00 pm that day, 2 August 2011, so that the vendors could decide by 7.00 pm whether or not to accept Ms Mao's offer which expired at midnight that day.

[34] Inter alia, Mr Henderson advised Ms Ma that Harcourts would be calling off the auction and inviting tenders by 6.00 pm that day of 2 August 2011, and that led Ms Ma to advise that her client, Ms Wu, was not interested in making a pre-auction offer.

[35] Mr Henderson said that, as it happened, not long after Harcourts sought a bank deposit cheque from Ms Mao's accountant, the latter withdrew his clients offer "*because she had heard that the auction had been brought forward*" when, in fact, it had not. Against that background the auction proceeded as intended on 7 August 2011. Mr Henderson was involved in post-auction negotiations between the vendors and Ms Wu and Ms Ma and, eventually, the vendors accepted Ms Wu's offer of \$2.2 million, but Mr Henderson felt they were not happy and unsuccessfully sought that Ms Wu increase her price to \$2.3 million.

[36] Of course Mr Henderson was carefully cross-examined.

The Evidence of Mr A L North

[37] Mr North is, inter alia, the Manager and National Auctions Manager for the Harcourts Group. He covered his involvement in the above transaction and noted that it had certain unusual aspects which he put as follows:

"3. The pre-auction offer as described to me was unusual in many respects:

- (1) It had come from Ms Mao's accountant, rather than through the agent;*
- (2) It was on the standard sale and purchase agreement, rather than the pre-approved auction contract from the agent or the vendors' solicitor;*
- (3) No cheque for the deposit was attached:*
- (4) The offer was open until midnight on 2 August 2011;*
- (5) The offer was conditional on the auction set down for Sunday, 7 August 2011 not being brought forward; and*

- (6) *Communication with Ms Mao had largely been verbal or through her accountant.”*

[38] Mr North covered the delicate aspects of this situation and the concerns of Harcourts to act in the best interests of the vendors and the type of strategies applied by Harcourts in such a situation. He emphasised that Harcourts realised it had to be fair and just to all parties.

[39] Mr North was of the view that Mr and Mrs McDonald could have accepted the offer from Ms Mao at any time and that they understood that and it was made clear they were under no obligation to let others have the opportunity to bid or offer. He emphasised that, at all times, the objective of Harcourts was that the vendors explore strategies to obtain a higher price but understand that such strategies and negotiations involved the risk of losing an existing offer as happened in this case. However, Mr North felt that the strategies applied by the vendors, with the advice of Harcourts, were a risk worth taking in order to ascertain the best market price for the property.

The Evidence of the Vendor, Mr B A McDonald

[40] Generally speaking, Mr McDonald covered the above narrative. He focussed on Monday 1 August 2011 when Mr Henaghan rang him to advise that he had received a signed \$2.1 million offer from Ms Mao for the property. He said that Mr Henaghan visited the vendors to discuss that about 1.00 pm that day but did not present that offer in writing as Mr McDonald was dismissive of that amount. Mr Henaghan said the buyer (Ms Mao) had indicated she could go to \$2.25 million and Mr McDonald said he would accept that, as did Mrs McDonald reluctantly a little later in that conversation.

[41] Mr McDonald told us that Mr Henaghan left with the vendors' instructions to obtain a written offer of \$2.25 million from Ms Mao and confirmation of her ability to pay. Mr Henaghan rang Mr McDonald about 3.00pm that day to say that Ms Mao had agreed to offer \$2.25 million and her accountant said she had the ability to pay that, but the offer would only be open until midnight the following day Tuesday 2 August 2011 and she was not interested in attending any auction.

[42] Mr McDonald said that Mr Henaghan also advised that there was some other interest through a fellow agent, Ms Ma, who had a buyer, Ms Wu. The latter had visited the property and, from talking with her, Mr McDonald knew that she had two other properties to sell so could not make a pre-auction offer. Apparently Ms Ma and Ms Wu were friends. Mr Henaghan also told Mr McDonald he needed to consult Harcourts management about the proper procedures in this situation.

[43] Mr McDonald said that Mr Henaghan attended the vendors at their home at 7.00 pm that day without bringing the offer. Mr McDonald is adamant that Mr Henaghan did not have the \$2.25 million offer from Ms Mao with him. Mr McDonald said that Mr Henaghan then advised Mr McDonald that he could not allow the vendors to sign the written offer from Ms Mao as that would be unfair to Ms Ma's potential buyer, Ms Wu, who would not make an offer before auction so that Harcourts wanted to set up a multi-party offer with a deadline of 6.00pm the next day, Tuesday 2 August 2011, to allow offers from both parties to be considered by the vendors. The latter say they were not happy with that proposal and there was a general discussion about the situation and appropriate strategies.

[44] Mr McDonald said he was very surprised by the turn of events as there was a written offer available that he wished to accept, but Mr Henaghan would not allow that. He said he agreed to the multi-offer proposal because he did not think he had any other choice but was angry and confused at the time.

[45] Because there would be only three working days between the end of the multi-offer process and the auction date, Mr Henaghan advised the vendors that any successful bidder from the multi-offer process must pay a 10% deposit within 24 hours by bank cheque or electronic transfer, and the vendors agreed to that. Mr McDonald is adamant that at no stage did Messrs Henaghan or Henderson, or any other Harcourts agent, advise him to seek legal advice on the best course of action. Later that day, Tuesday 2 August 2011, Harcourts advised Mr McDonald that Ms Mao had withdrawn her offer.

[46] In the course of cross-examination it emerged that, although experienced in real estate, Mr McDonald seems to have managed an electroplating company for the past 12 years. At the outset of his listing he had expected to obtain over \$2.5 million for the property. He seemed to have conversed with the prospective purchasers as they visited his property and he obtained relevant background information about their intentions and means.

[47] Mr McDonald is adamant that if Mr Henaghan had produced Ms Mao's offer of \$2.1 million to him, he would have counter-offered at \$2.25 million and signed it, and that he was content at all relevant times with a price of \$2.25 million, as was Mrs McDonald. They did not seem concerned about the absence of a deposit cheque.

[48] Later in his cross-examination, Mr McDonald seemed to be saying that Mr Henaghan came to the vendors home at 7.00 pm on 2 August 2011 with an offer of \$2.25 million from Ms Mao, but no deposit cheque, and would not let the vendors sign it and, as explained above, insisted that there needed to be a multi-offer process put in train. Mr McDonald emphasised that he wanted to sign the contract at 7.00 pm that evening, but Mr Henaghan would not let him.

The Evidence of Mrs McDonald

[49] Generally speaking, Mrs McDonald corroborated the evidence of Mr McDonald and she was adamant that at the 7.00 pm meeting of 2 November 2011 she wanted to accept the offer of \$2.25 million from Ms Mao as "*A bird in the hand*". At that point, she understood that Ms Wu would not make a pre-auction offer and she at least infers that the vendors feel that Harcourts were protecting their leading agent, Ms Ma. She said that, at material times, she felt there was a big risk of losing Ms Mao's offer.

[50] Mrs McDonald emphasised that the vendors did not wish to enter into the multi-offer process and wanted to accept Ms Mao's offer at \$2.25 million, but that Mr Henaghan said they could not do that.

DISCUSSION

[51] The broad issue is whether the licensees failed in their duties to the complainants in the way that they dealt with Ms Mao's offer.

[52] In dispute is whether the licensees presented a variety of options on how to proceed once the offer from Ms Mao was received. The licensees have stated that they indicated that the offer could in fact be accepted, or a condition inserted that the offer required a 10% deposit cheque, or that the vendors could proceed to auction, or the vendors could invite offers from other parties.

[53] The vendors allege unsatisfactory conduct by the licensees within the meaning of s.72 of the Act in the following respects, namely:

- [a] That the licensees did not physically place a written offer before the vendors;
- [b] That the licensees would not allow the vendors to sign Ms Mao's pre-auction offer at \$2.25 million which they wished to accept;
- [c] That the appellants mishandled the multi-offer process contrary to the vendors' interests so that Ms Mao's offer was withdrawn; and
- [d] The licensees did not advise the vendors to obtain independent legal advice when that advice should have been given by the licensees to the vendors.

[54] Broadly, these are all issues of fact.

[55] Mr Mulgan (counsel for the complainants) particularly referred to rules 6.1, 6.2 and 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which respectively read:

"6.1 An agent must comply with the fiduciary obligations to his or her client arising as an agent.

6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

...

9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law."

[56] There was also reference to the Real Estate Institute of New Zealand's code of practice for the conduct of auctions which states at para 2.7: *"Members must make reasonable endeavours to inform all interested parties if a property is to be withdrawn from auction or is to be sold prior to auction"*. As Mr Mulgan said, that advice does not have the force of law. In any event, making other parties aware that the property is not proceeding to auction, or is being sold prior, is different from preventing a vendor client from accepting an offer on the basis that other parties must be given an opportunity to make an offer.

[57] All counsel referred to some semi-relevant case law.

[58] The complainants have stated that they were informed that the only option available to them was to enter into a *"multi-offer"* situation and that they were told they could not accept Ms Mao's offer as all parties had to be advised that the offer

had been received. They have therefore stated that the only option presented to them was the last one of inviting offers from other parties.

[59] If we find that the licensees presented options to the complainants and clearly explained the benefits and risk involved in each possible course before taking instructions, then the licensees have complied with their obligations.

[60] It was an available option for the vendors to seek other offers from other interested parties, but there was no requirement to do this. The property was marketed as "*auction (unless sold prior)*". This would have put other parties on notice that there was a risk that the property would not proceed to auction. Nevertheless, we can understand the concern of the licensees to inform interested parties that the auction might not proceed due to a pre-auction offer having been made.

[61] If the complainants had wished to sign the agreement as it stood on 1 August 2011, they were entitled to do so.

[62] As noted by counsel for the complainants, the licensees have stated that they presented all available options to the complainants and received instructions to seek other offers. It is also put that, at the same time, they indicated that had they not invited offers from other interested parties, they understood that they would have been in breach of their obligations under the Act. It is put by counsel for the Authority that this may suggest that, in fact, the licensees only presented one "*feasible*" option to the complainants, namely, that of a "*multi-offer*" situation.

[63] The Committee found that the licensees did not advise the vendors of their need to seek legal advice. Mr Henderson has stated in his brief of evidence that he fully advised the complainants of their ability to seek legal advice compliant with his obligation under rule 9.9 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009. He confirmed that before us and Mr Henaghan understood that to have been done by Mr Henderson.

[64] The licensees have argued that even if this advice was not provided, it was clear that the complainant, Mr McDonald, with his real estate background, knew he was entitled to get legal advice. It is submitted for the Authority that is insufficient to comply with rule 9.9 and that the onus falls on licensees to ensure that vendor clients are aware of this entitlement whatever the experience of a vendor might be. We agree, but find that advice to have been given to the vendor complainants.

[65] Mr Henaghan has stated that he did physically present the offer to the complainants. Mr McDonald denies that. Rule 9.13 requires that a licensee must submit to the client all offers concerning the sale and purchase, or other disposal of any land or business, provided that such offers are in writing.

[66] The licensees had received a written offer from Ms Mao. Until that offer was signed by the complainants there was a real risk that it could be withdrawn, as occurred in this case. Making the complainants aware of the terms would be insufficient; the licensee needed to present the offer to the complainants for the fulfilment of this rule 9.13 to be effective. We have no particular reason to disbelieve the licensees and, at this stage, there seems to us to be confusion between the parties as to who said what to whom at material times.

[67] It is submitted for the Authority that the issue on the complainants' appeal about penalty is whether the Committee wrongly exercised its discretion as to what orders should be made in declining to make a monetary award in favour of the complainants in respect of the commission paid on the sale of the property; and legal costs incurred on the complaint.

[68] The Committee found that the breach warranted censure of the licensees.

[69] It appears that the licensees felt bound to invite offers from other interested parties; but the complainants were entitled to accept the offer from Ms Mao on 1 August 2011 when it was received. Any acceptance would require physical presentation of the document to them. It is submitted for the Authority that the Committee's decision was correct and that, in broad terms, the licensees did not adequately address the available options to the complainants. We cannot be sure about that on the full evidence adduced to us; and the CAC did not have that benefit.

[70] We are appreciative of detailed submissions from Mr Mulgan on behalf of the vendors. He submitted that all three witnesses for the licensees were uncertain in their evidence and were not credible. He put it that the vendors made it clear to the licensees that they wished to accept Ms Mao's offer of \$2.25 million but were told they could not when, of course, they could. We find the evidence for the licensees to be credible.

[71] Mr Mulgan also put it that Harcourts had mishandled the multi-offer process which was not appropriate or required in the situation, so that Ms Mao's offer was lost. He also made submissions on the financial loss which the vendors feel they incurred due to alleged failures by the licensees in the handling of the said transaction. In particular, the vendors feel they lost a further \$50,000 as part of the price available from Ms Mao and that they should receive a refund of commission and a contribution to very substantial legal fees which they had incurred for representation before the Committee and before us.

[72] There is some merit in Mr Mulgan's argument that there was no basis for a multi-offer process to be declared as only one offer had been received, the prospect of receiving a second offer was speculative, and there was a real risk of Ms Mao's offer being withdrawn if a multi-offer process was declared. Mr Mulgan referred to the evidence from Mr McDonald that the vendors were not advised by the licensees to obtain legal advice and to rule 9.9 which requires that to be done by a licensee when inviting the signature of an agency agreement or a sale and purchase agreement or other contractual document. Mr Mulgan submits that commitment to a multi-offer situation could be considered a form of contractual document. We have already recorded that we accept that the vendors were advised to seek legal advice. However we agree that this was not a case of there being multi-offers.

[73] Mr Mulgan submits that the vendors have suffered loss as a direct result of mishandling by the licensees. He accepts that this forum is not a substitute for civil courts, but refers to our powers under s.93(1)(e) of the Act to "*order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint*". He notes that the vendors paid commission to Harcourts of \$65,000 and that they regard themselves as having lost the \$50,000 difference between the offer from Ms Mao which they wished to accept for the property at \$2.25 million, and the one they accepted from Ms Wu post-auction, after considerable negotiation, at \$2.2 million. It is put that they also lost \$18,646 on bridging finance incurred to purchase

another home over the period when there would have been an early settlement on a sale to Ms Mao as distinct from the eventual later settlement date to Ms Wu.

[74] The vendors also seek costs under s.93(1)(i) of the Act from the licensee at \$6,830.25 for legal fees incurred in their dealing with the Committee and further fees for representation before us.

[75] Of course, Ms Harrison, as counsel for the licensees, also dealt thoroughly with the issues. As she put it in her final oral submissions, the licensees did explain appropriate options and rules to the vendors at all material times to enable the vendors to make an informed decision and their advice was sound and based on their perception of the best interests of the vendors. She referred, as covered above, to their concern about there being a lack of any deposit from Ms Mao and the ramifications of that, and submits that the predicament for the vendors flowed from the actions of Ms Mao. In any case, Ms Harrison submits that our forum should not be regarded as a civil court for damages, and that commission is paid to the Harcourts' agency and not to the licensees. She put it that any loss of interest for the vendors over bridging finance was due to the way they had structured their affairs but that, in any case, any perceived loss to them was not caused by the licensees who had been dedicated to their obtaining the highest possible sale price.

[76] Generally speaking, Ms Harrison submitted that the vendors were fully advised of the situation at all material times, made a fully informed decision, and well understood their options including what was meant by the multi or competing offer process and what that was aimed at. She also submitted that the licensees clearly recommended to the vendors that they take legal advice but that Mr McDonald declined to do that.

[77] Ms Harrison also made quite detailed submissions on the aspect of penalty and submitted that whether or not Mr McDonald saw Ms Mao's offer, he knew of its material terms and did not wish to sign it; that the 2009 Client Care Rules did not require a licensee to advise vendors to seek general legal advice; and that the licensees were obliged to give Ms Wu the opportunity to present an offer in terms of the Rules requiring licensees to deal fairly with all parties to the transaction. It is correct that rule 9.9 requires the informing of the client of the right to legal advice on the signing of various documents rather than in general.

[78] As Ms MacGibbon put it, there was only one offer on the table at material times so it is confusing that any consideration was given to creating a multi-offer situation. The strategies of the vendors and the licensees seemed designed to put pressure on both Ms Mao and Ms Wu, and particularly on the latter, but there was the acknowledged risk of losing Ms Mao's offer.

Our Views

[79] Having observed the witnesses, in all the circumstances of this case we do not find it credible that the vendors failed to fully understand the picture i.e. their rights and options at all material times.

[80] There is a firm conflict of evidence, inter alia, over whether or not Mr Henaghan presented or even opposed the vendors accepting Ms Mao's offer at \$2.25 million. Almost the short point of this saga is that Mr McDonald says that Mr Henaghan

prevented him from accepting Ms Mao's offer and so caused him to lose a sale at that price to Ms Mao, i.e. to lose a price increase of \$50,000.

[81] We do not find it credible that Mr and Mrs McDonald would not have signed Ms Mao's offer if they had wished to do that. It was only necessary to say "*Give me that offer and I will sign it and stop talking to me about a multi-offer procedure*". Why would they have not signed that offer from Ms Mao? We infer because they wished to create pressure on Ms Wu and seek a higher price either from her or, perhaps, from a counter-offer against her from Ms Mao. The only sensible inference is that, between the vendors and the licensees, the multi-offer process was commenced to try and achieve a higher price for the vendors.

[82] In the circumstances we have explained, we could not conclude, on the balance of probabilities, that the licensees have failed in any way in their duties to the vendors. Perhaps they over-strategised; but the complainants were a well-informed part of that approach. Also in terms of credibility, all witnesses seemed sensible and honest to us so that we are unable to particularly prefer one witness's evidence against another, yet there are some real conflicts in evidence as we have covered and quite some confusion over recollections of relevant discussions.

[83] It follows that we revoke the Committee's finding of unsatisfactory conduct against both Messrs Henaghan and Henderson, so that there can be no penalties to be considered, and the censure must also be revoked. We find that there is to be no further action taken against the licensees in this case.

[84] 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