

**IN THE REAL ESTATE  
AGENTS DISCIPLINARY TRIBUNAL**

**[2014] NZREADT 6  
READT 85/12**

**In the matter** of an appeal under s 111 of the  
Real Estate Agents Act 2008

**BETWEEN** DOUGLAS ALLINGTON of Christchurch,  
complainant  
Appellant

**AND** THE REAL ESTATE AGENTS  
AUTHORITY  
First Respondent

**AND** MEGAN DIDHAM of Christchurch,  
Real Estate Agent  
Second Respondent

**Members of the Tribunal:** Judge P F Barber – Chairperson  
Mr G Denley – Member  
Ms C Sandelin – Member

Heard at: Christchurch on 7 November 2013

Appearances: The Appellant on his own behalf  
Ms J MacGibbon, counsel for First Respondent  
Mr J Waymouth, counsel for Second Respondent

Date of this Judgment: 29 January 2014

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**DECISION OF THE TRIBUNAL**

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## **Introduction**

[1] Douglas Allington (“the appellant”) appeals against the determination of Complaints Assessment Committee 20005 to take no further action on his complaint against Megan Didham (“the licensee”).

[2] Ms Didham is licensed as a salesperson and works for Grenadier Real Estate Ltd, trading in Christchurch as Harcourts.

[3] The Committee was not satisfied, as a matter of fact, that the licensee misled the appellant regarding the price expected by the vendor in the manner alleged by the appellant and covered below. It was on the basis that the factual allegation was not established on the balance of probabilities, that the Committee decided to take no further action against the licensee. The Authority submits that decision was open to the Committee on the evidence.

## **Factual background**

[4] The appellant was interested in purchasing the property (at 9 Beachville Road, Redcliffs, Christchurch) which was for sale by auction. Joy Butel was the listing agent for the property. The price range indicated on the listing agreement was \$650,000 - \$800,000.

[5] On 14 March 2012, having disclosed an interest in purchasing the property herself, the licensee obtained the consent of the vendors to continue to market their property. A pre-auction offer of \$710,000 was then submitted to them by the licensee. On the same day, a brief valuation was provided at \$720,000. However, a full valuation was not available until a later date.

[6] The auction was held on 15 March 2012. After the auction, the appellant was advised that the licensee was the successful purchaser of the property because her pre-auction offer had not been beaten at the auction.

[7] The appellant states that the licensee had advised him that no pre-auction offer less than \$850,000 would be sufficient to stop the auction. The appellant also states that, although he did not make the licensee aware of his interest, he was prepared to make a pre-auction offer of \$750,000. However, the appellant was not in a position to make an unconditional offer.

[8] The licensee disputes that she made the alleged statement to the complainant/appellant about pre-auction offers less than \$850,000 being inadequate. She states that she merely told those who enquired of her that the price would be higher than \$650,000 and that the rateable value of the property was \$701,000.

[9] The vendors of the property have stated that the price they received for the property was within their expectations. Further, they state that, at the auction, there was a correct and proper

presentation of the pre- auction offer and they ensured that the licensee was not in the room when the offer was discussed and reserve set by the vendors.

[10] A full valuation of the property dated 11 May 2012 was, about then, provided by the licensee to the vendors. In the first line of the valuation, the valuer states that the report is in accordance with his inspection of the property on 13 March 2012.

### **Committee decision**

[11] The Committee carefully considered all the evidence and argument put to it for a hearing on the papers. Simply put, it determined that it could not be satisfied, on the evidence, that the licensee had indicated an inflated likely sale price to potential purchasers as alleged. As a result, the Committee decided to take no further action on the complaint. As we explain below, having heard full evidence, we respectfully agree with the Committee and we record some of its views as follows:

- 4.6 On examination of the evidence available to us it does not appear to the Committee that there is evidence that the licensee deliberately emphasised a higher sale price to potential purchasers than the price the property ultimately sold for.
- 4.7 The second part of the complaint deals with whether the licensee allowed a “level playing field” to other potential purchasers.
- 4.8 On examination of the available evidence the Committee finds no evidence to support this part of the complaint.
- 4.8 On examination of the available evidence the Committee finds no evidence to support this part of the complaint.
- 4.9 The third part of the complaint is that the licensee by her conduct did not work in the best interest of the vendors and prevented the vendors from achieving the best outcome available.
- 4.10 The second and third complaints are linked. What is clearly very frustrating to the complainant is that they were interested in the property and would have under the right circumstances been prepared to bid \$750,000 for the property. In fact they may have purchased it for a price less than this but in either case they may well have been the eventual purchasers of the property at the auction had the circumstances been different. No doubt the vendors would have been happy if this was the case.
- 4.11 The complainant needed the agreement of their insurance company to be able to make an unconditional bid. The complainant believes that he did not put himself in to a position to make such a bid because of the actions of the licensee. We have found no evidence to support that allegation. Whatever the reason if the complainant had his finance and insurers organised he may well have been the buyer of the property on the day, but unfortunately that was not the case. While the vendors no doubt would have been happier with a higher price, they have provided evidence to Committee showing that they were very happy with the price achieved and with the conduct of the licensee throughout the

transaction. They go on to say they have no issues with the conduct of the licensee's manager Cedric King or Harcourts.

### **A Summary of Salient Evidence for Appellant Complainant**

#### *The evidence of Mrs A Allington*

[12] Mrs Allington described how, at material times, she and the appellant were virtually cash buyers seeking a property in Christchurch. They held a payout offer from their earthquake insurer with the condition only that the insurer would need to view and approve any sale and purchase agreement Mrs Allington might enter into. Accordingly, they were looking at properties in early 2012 and soon met the licensee whose manner they found friendly and professional. After a while, they noticed that 9 Beachville Rd was for auction in March 2012 and Ms Butel was marketing it.

[13] The appellant and Mrs Allington visited that property on Friday 24 February 2012 and, inter alia, asked Ms Butel for a guide price. Ms Butel responded it was \$650,000 to \$850,000 and Mrs Allington said, they were told to ignore those figures because the licensee had told Ms Butel that any pre-auction offer would need to be at least \$850,000 to stop the auction. After considering the property, Mr and Mrs Allington decided they would not pay more than \$750,000 for it "*based upon that clear directive from Megan Didham*". They concluded the only way they could purchase the property was if it was passed in at auction.

[14] Accordingly, they attended the last open home for the property prior to the auction and felt there was not much other interest. Ms Butel asked them whether they would enter a possible side agreement for the auction but, with the advice that the offer would need to be over \$850,000 already given them by the licensee, they saw no point in that and were only willing to offer \$750,000 maximum. Also a side agreement would have needed to be conditional upon their insurer approving it, and the licensee would not take such a conditional offer to the vendors.

[15] At the auction, Mrs Allington waited in the foyer and the appellant went into the auction room. Mrs Allington says that the appellant later told her that immediately something did not look right to him and he had noticed the licensee standing by herself to the side near the back of the room, as if to avoid people. The auctioneer commenced by stating there was a tabled bid and the appellant was surprised (his wife says) that the bidding opened at just over \$700,000. The appellant came back into the foyer and told Mrs Allington and Ms Butel that the property had sold for just over \$700,000. They were all upset and stunned because, if Mr and Mrs Allington had known that the vendors would sell the property for \$710,000, they would have put in a pre-auction offer; and they felt that the licensee had held Ms Butel at arm's length over that property. They were stunned even further when Ms Butel phoned them a few days later to advise that the purchaser of the property was the licensee. The witness asserts that she and the appellant "*would have gone up to \$750,000 in any negotiations*". She feels that the market should have been properly informed of the correct expectations of the vendors.

[16] In cross-examination, Mrs Allington said she regarded Ms Butel as a buyers' agent for her and the appellant (her husband) and they did not deal directly with the licensee except at the last open day when the licensee did not spell out the price sought by the vendors but just pressed the appellant and the witness as to whether they were likely to bid.

[17] The witness' distress is that she feels that she and her husband were strongly advised that they would need to offer \$850,000 to have a prospect of purchase when that was not so.

[18] The witness seemed to acknowledge that Ms Butel had suggested a week or so before the auction that they could offer \$650,000 but this was just mentioned in passing. They knew that the Government valuation of the property was \$701,000. They feel that the licensee misrepresented to them the views of the vendor; ascertained their auction strategy; put it to them via Ms Butel that they could not succeed in purchasing the property and that the licensee achieved an advantage over them with that knowledge. They feel that they were totally duped so as to be out manoeuvred by the licensee who obtained knowledge of their approach but knew the intention of the vendors.

### **The evidence of the appellant**

[19] The appellant gave evidence along the lines of and consistent with that of his wife, Mrs Allington, and he was carefully cross-examined by counsel.

### **The evidence of Ms J Butel**

[20] In a pre-hearing memorandum, Ms Butel stated that on 24 February 2012 the licensee had told her that a pre-auction of \$850,000 would be required to stop the bidding. She said that the licensee also advised her to look at what the property had for some time previously been on the market at, namely, \$879,000, and that proved to be so. Accordingly, Ms Butel had told the appellant that the property had been on the market previously for \$879,000, but that in the Harcourt system the quote price ranged from \$650,000 - \$850,000. She had suggested to Mr and Mrs Allington and to the licensee that a side agreement should be entered into before the auction by Mr and Mrs Allington to give them additional time to inform their insurance company and she had not told the licensee that the Allingtons could not proceed with the purchase.

[21] Ms Butel gave quite detailed oral evidence to us which was consistent with the narrative set out above. Inter alia, she stated that she felt that the licensee had a conflict which affected the outcome of the auction. Ms Butel has had extensive experience in commerce and seemed to be supporting the appellant as a witness before us because of her concern at a breach of ethics by the licensee. At the auction even Ms Butel was not aware that the purchaser of the property had been the licensee at a price of \$710,000. She confirmed that on 24 February 2012 the licensee made it clear to her that the vendors would require \$850,000 as their sale price.

### **The evidence of the licensee / second respondent**

[22] The licensee provided a formal type-written brief and gave extensive oral evidence and was, of course, thoroughly cross-examined by the appellant and Ms MacGibbon.

[23] The licensee was the listing agent for the property and knew the vendors, one of whom is a real estate agent. The vendors knew that the licensee must comply with the Act and its Regulations (the Real Estate Agents (Professional Conduct and Client Care Rules (2009)) and said that her priority from the outset was to be transparent and comply with the law. The licensee knew that the vendors had the property valued when one of the vendors herself marketed the property in early 2011; and that the valuation had diminished in the meantime due to the earthquake of 22 February 2011.

[24] With regard to the allegation that the licensee quoted \$850,000 as the price sought by the vendors, the licensee stressed that she never spoke directly to Mr or Mrs Allington about the property but she added:

14. But as to valuation possibly Mr Allington heard me at open homes (as he seemed to be constantly “floating around listening”), indicating to other viewers that we expected to sell it for “in excess of \$650,000 as we did as feedback from viewers at open homes or from other prospective buyers had indeed been late \$600,000s into the very early \$700,000s”.

[25] She was aware that Ms Butel had told Mr and Mrs Allington that the property was worth \$850,000 “*as that is what it was on the market for previously*”. The licensee says that she then told Ms Butel firmly that the feedback on the property value was nowhere near that level and she puts it that if anyone misinformed Mr and Mrs Allington as to value “*then it was possibly Joy Butel but certainly not myself.*” She said that she repeatedly asked Ms Butel if Mr and Mrs Allington were interested in arranging an aside auction agreement but understood they were not. She emphasises that Mr and Mrs Allington did not bid at the auction but were given every opportunity to do so. She asserts “*and they were absolutely never informed by me that \$850,000 would stop the auction or buy the property*”. She asserts that she told Ms Butel that “*none of the feedback is at that level on the property*”.

[26] The licensee emphasises that she was “*incredibly aware*” of her obligations to be transparent in that sale process. She took pains to comply with the requirements of s 134 of the Act. She said that she obtained advice from a registered valuer that the property should fetch \$700,000 to \$720,000 so (together with her partner) she offered \$710,000.

[27] The licensee was a very assured and confident witness but rather tense over this situation, if not uncomfortable, under cross-examination by Ms MacGibbon, However, she was very assertive under cross-examination by the appellant.

[28] By consent, an affidavit was filed by one of the vendors fully supportive of the process and conduct of the licensee. The vendors are close friends of the licensee. That line of evidence was repeated by the other vendor.

### **The stance of the appellant**

[29] The appellant feels that the licensee had a clear conflict of interest and achieved an unfair advantage over him (and his wife) and also misled Ms Butel over the price expectations of the vendors. His approach is that of an experienced and wise person. Understandably, he is distressed that he and his wife feel out-manoeuvred by the licensee as they could have purchased the property.

### **The Stance of the Licensee**

[30] On behalf of the licensee, Mr Waymouth provided us with very helpful and extensive typed and oral submissions with a view to refuting allegations against the licensee that she and her partner purchased the property at a lower price than she had been promoting to the general public; did not allow a level playing field to Mr and Mrs Allington; and was not working in the best interests of the vendors and prevented them from achieving the best possible result.

[31] With regard to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009, Mr Waymouth submitted, with quite some reasoning, that the licensee had not breached any of them. In particular, he referred to Rules 5.1, 5.2, 6.1, 6.2, 6.3, 6.4, and 9.7 (set out below). He also very helpfully covered relevant case law. He also explained that he did not differ with the submissions of Ms MacGibbon for the Authority.

[32] Essentially, his stance is that the allegations of the appellant have not been proved on the balance of probabilities; and that the position is simply that, with hindsight, Mr and Mrs Allington were not proactive enough in endeavouring to purchase the property and simply did not bid at the auction when they could have. He particularly asserts that the licensee totally rejects ever telling anybody that \$850,000 would be needed by the vendors to stop the auction.

### **Discussion**

#### *Conflict of interest*

[33] The appellant has appealed against the Committee finding and states that there was a conflict of interest. Until the hearing had progressed before us the appellant also maintained that the licensee did not comply with her obligations under s 134 of the Real Estate Agents Act 2008 which reads:

### **134 Contracts for acquisition by licensee or related person may be cancelled**

- (1) No licensee may, without the consent of the client for whom he or she carries out real estate agency work in respect of a transaction, directly or indirectly, whether by himself or herself or through any partner, sub-agent, or nominee, acquire the land or business to which the transaction relates or any legal or beneficial interest in that land or business.
- (2) No licensee may, without the consent of the client, carry out or continue to carry out any agency work in respect of a transaction if the licensee knows or should know that the transaction will, or is likely to, result in a person related to the licensee acquiring the land or business to which the transaction relates or any legal or beneficial interest in that land or business.
- (3) The client's consent is effective only if –
  - (a) given in the prescribed form; and
  - (b) the client is provided with a valuation in accordance with section 135.
- (4) The client may cancel any contract –
  - (a) made in contravention of subsection (1); or
  - (b) brought about by agency work carried out in contravention of subsection (2).
- (5) No commission is payable in respect of any contract of the kind described in subsection (4), regardless of whether the client cancels the contract.
- (6) The client may recover any commission paid in respect of any contract of the kind described in subsection (4) as a debt.
- (7) For the purposes of this section, a person who is the client of an agent in respect of a transaction is also the client of any branch manager or salesperson whose work enables the agent to carry out real estate agency work for that client.
- (8) This section and section 135 have effect despite any provision to the contrary in any agreement.

[34] We also set out the following Rules which were referred to by the parties:

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

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

...

6.1 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.

6.3 A licensee must not engage in any conduct likely to bring the industry into disrepute.

6.4 A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or fairness be provided to a customer or client.

...

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

[35] The alleged conflict of interest relates to the licensee's dual role as both agent for the vendor (and, therefore, having the appellant as a customer) and prospective purchaser of the property.

[36] The Act allows for licensees to bid for and buy properties listed by them (or their employers) as long as the statutory provisions set out at ss 132 -137 of the Act are complied with. However, there will often be an inherent tension in such circumstances between the licensee's own interests, his or her duties to the vendor client, and his or her duties to a prospective purchaser.

[37] Where a licensee continues to act for a vendor once he or she has become interested in the transaction as a potential purchaser, there is a real risk of a perception of unfairness as far as other, competing, purchasers are concerned. Licensees must be mindful of the potential for customers to conclude that the licensee is at an unfair advantage given their "inside" role as regards the vendor and the marketing of the property.

[38] We agree with Ms MacGibbon (counsel for the Authority) that, when this situation arises, a careful agency should ensure that steps are taken to ensure fair dealing between all the parties.

[39] In the present case, counsel for the Authority accepts that, were it established as a matter of fact that the licensee intentionally misled potential purchasers as to the vendor's price expectations, that would be a very serious matter given her interest as a potential purchaser herself.

[40] Of course, the case must turn on its facts. As Ms MacGibbon points out, the Committee gave detailed reasons for concluding that, on the evidence, it was not satisfied that the licensee misrepresented the vendor's price expectations as alleged. That question is now for us having heard all the evidence.

[41] Counsel for the Authority notes, in particular, that Joy Butel (a licensee from another branch of Grenadier who was assisting the appellant) stated to the investigator that, on the morning of auction, she was informed by the licensee that someone could buy the property for \$701,000. While this was, on its face, at odds with the licensee's pre-auction offer of \$710,000, it is also inconsistent with the appellant's claim that the licensee told interested purchasers that any offer would have to be over \$850,000. Further, Ms Butel states that, in previous discussions with the licensee, she had been informed that there was low interest in the property.

[42] While Ms Butel does state that when she asked the licensee about price range, the latter indicated that Ms Butel should refer to previous marketing prices on Property Guru which had indicated \$879,000, \$870,000 and \$950,000. It is also clear from the information provided at open homes that the rateable value of \$701,000 was disclosed to those who attended.

### *Breach of s 134*

[43] The complainant had also alleged a technical breach of s 134 of the Act because the full valuation report was supplied to the vendor more than 14 days after consent was given. However, it appears that a short version of the valuation, which appears to comply with the requirements of the Act, was available at the time of the offer and that the valuer gave an oral report. This is further detailed in a file note of a conversation between the Authority's investigator and the valuer. Accordingly, the appellant withdrew this issue from the appeal to us after hearing all relevant evidence.

### **Unsatisfactory conduct**

[44] The Authority submits that the Committee's decision to take no further action was appropriate given the view it took as to the facts; but that if we take a different view of the facts and find a breach of the Rules in this case, then a finding of unsatisfactory conduct should follow.

[45] Ms MacGibbon referred to *Ryan v Real Estate Agents Authority* [2013] NZREADT 45 where we held:

[48] Any breach of any of these rules, would prima facie, result in a finding of unsatisfactory conduct under s 72(b) of the Act. Of course, it is a matter of judgment whether any of the rules have been breached...

[46] We went on to state:

[51] We have previously held that not every departure from best practice will amount to unsatisfactory conduct requiring a disciplinary response (*Wetzell v CAC & MacVicar* [2011] NZREADT 8 at [37]); but care must be taken when applying this dicta. Any suggestion that licensee conduct must be at the more serious end of the disciplinary spectrum before a disciplinary response is warranted would be contrary to the statutory scheme of the Real Estate

Agents Act 2008. The Act creates a two tier disciplinary scheme, where more serious conduct amounts to misconduct and less serious conduct to unsatisfactory conduct.

[47] Therefore, Ms MacGibbon submitted that any breach of the Rule in this instance should result in a finding of unsatisfactory conduct. It is, however, a matter for judgment whether the licensee's conduct amounts to a breach of the Rules. Ms MacGibbon disagreed with counsel for the licensee that *CAC v Downtown Apartments Limited* [2010] NZREADT 06 is authority for the proposition that s 72 of the Act requires a *deliberate* departure from acceptable standards. *Downtown Apartments* states: [50] At a high level of generality, therefore, it may be said that s 72 requires proof of a departure from acceptable standards and s 73 requires something more a marked or serious departure from acceptable standards. As such, for the purposes of unsatisfactory conduct, all that is required is proof of departure, rather than deliberate departure.

[48] In *Pollett v Real Estate Agents Authority* [2013] NZREADT 4, we held:

[32] Committees of the Authority have a wide discretion whether to inquire into, or inquire further into, a complaint or allegation under the Act. If, having held a hearing on the papers under s 90, a Committee is satisfied on the balance of probabilities that an agent has breached the Rules, then a finding of unsatisfactory conduct must follow pursuant to s 72(b). A defence of total absence of fault may be available to an agent. Additionally, a breach of the Rules involving a low level of culpability will generally be reflected in a low level penalty.

[49] Any "low level" breach of the Rules will be reflected in the penalty imposed.

[50] Ms MacGibbon also referred to the High Court decision of *S v New Zealand Law Society* HC Auckland, CIV-2011-404-3044, 1 June 2012, where Winkelmann J dealt with the application of the two-stage test from medical disciplinary proceedings. The appellant had sought the imposition of the same two stage test which requires the Tribunal to first ask whether there had been any misconduct, and secondly to ask whether it warranted any disciplinary sanction. Her Honour stated at paragraph [27]:

The provisions upon which the medical disciplinary proceedings, and their two stage test are based, are very different from s 7 of the Act with which I am concerned. Most obviously, s 7 is concerned solely with a determination of the nature of the relevant conduct whereas the equivalent medical disciplinary provisions are additionally concerned with the circumstances in which sanctions may be imposed. Adopting the proposed test in this case would require the addition of a gloss to the words of the statutory provisions and one that has no justification as a matter of statutory interpretation. I decline to adopt that analysis.

[51] Accordingly, Ms MacGibbon submitted that should we find a breach of the licensee's obligations, then an unsatisfactory conduct finding should follow, subject to the licensee making some absence of fault argument.

[52] As Ms MacGibbon put it, it was open to the Committee to conclude that there should be no further action taken as the essence of this matter is credibility of evidence. However, she also

put it, if we find different facts from the findings of the Committee, we may come to findings of guilt. Ms MacGibbon also recorded that, commendably, in the course of the hearing the appellant accepted that s 134 of the Act had been complied with so that the vendors had been supplied with proper valuation information, and had been given an informed consent to the licensee becoming a prospective purchaser.

[53] Ms MacGibbon addressed the conflict of interest position arising in this case acknowledging that there are real risks when licensees become interested in purchasing a property which they are marketing and that ss 134 – 137 of the Act must be complied with. We agree with her that licensees must be very mindful of there being a perception of an unfair advantage arising when they participate in the purchase process against, in effect, clients of their agency. In the present case, there is also an evidential conflict as to whether Mr and Mrs Allington or Ms Butel were told by the licensee that \$850,000 was the price needed. On the one hand, Mr and Mrs Allington and Ms Butel seem very truthful people to us. On the other hand, there is a strong denial from the licensee and doubt as to what was said about price at various times and in what context.

[54] Once the licensee decided that she and her partner were interested in buying the property, they disclosed that position to the manager of the agency and to the vendors. The licensee then followed agency policy for such a situation. However, it would have been better if the licensee had stood aside from the marketing process of the property by her agency completely, and had simply attended the auction as a member of the public to bid for herself and compete with any other bidders. In these conflict of interest situations arising from a licensee, in effect, bidding against a client of her employer agency, it is important that there be clear compliance with ss 134-137 of the Act and that that licensee be completely removed from the sales process. That needs to be assigned to the control of the office manager or another salesperson, and the licensee's name and contact details need to be immediately removed from all marketing material.

[55] We feel uncomfortable about the involvement of the licensee in this case in terms of the concerns expressed by the appellant and his wife. Nevertheless, the licensee appears to have followed an adequate procedure in all the circumstances. Also, with hindsight, the appellant was a little passive in his endeavours to be able to bid for the property. We cannot be satisfied, on the balance of probabilities, that the appellant was misled by the licensee or anyone on behalf of the licensee. It is always concerning when, in the course of a sales process, a licensee perceives a good buy and gazumps a prospective customer client of the agency. It does not seem to be an uncommon situation.

[56] While we have quite some sympathy for the position which resulted for Mr and Mrs Allington, for the reasons we have set out above, we dismiss this appeal.

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

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Judge P F Barber – Chairperson

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Mr G Denley – Member

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Ms C Sandelin – Member