BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 64

READT 001/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**BEVAN GOODE**
	Appellant
AND	**THE REAL ESTATE AGENTS AUTHORITY (per CAC 20002)**
	First respondent
AND	**JULIA ASHMORE-SMITH**
	Second respondent
AND	**JOHN McFADDEN (GOLD REAL ESTATE GROUP LTD)**
	Third respondent
AND	**JO CLIFFORD (HARCOURTS GROUP LTD)**
	Fourth respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr J Gaukrodger - Member
Mr G Denley - Member

HEARD at CHRISTCHUCH on 4, 5, 24 and 25 March 2014 (with subsequent series of written submissions)

DATE OF THIS DECISION 13 August 2014

REPRESENTATION

The appellant on his own behalf
Mr R M A McCoubrey, counsel for the Authority
Mr O Paulsen, counsel for second respondent licensee
Mr J E Bayley, counsel for third respondent
Mr P McDonald, counsel for fourth respondent

DECISION OF THE TRIBUNAL

Introduction

[1] Bevan Goode ("the complainant") appeals against the 3 December 2012 decision of Complaints Assessment Committee 20002 to take no further action in respect of his complaint against Julia Ashmore-Smith ("the licensee"), John McFadden (of Gold Real Estate Group Ltd (GRE), and Ms Jo Clifford (of Harcourts Group Ltd (HGL).

Factual Background

22 Bretts Road, Christchurch

[2] The licensee was the listing agent for a property at 22 Bretts Road, Christchurch (Bretts Road). The vendor was a company called Plane and Pearl Ltd, of which Margaret Collier is the sole director and shareholder. On 26 July 2011 Ms Collier signed with GRE a first sole agency agreement which expired on 26 October 2011. On 27 November 2011, she signed a second sole agency agreement which expired on 27 December 2011.

[3] An auction took place on 8 September 2011 but the property was passed in. On 9 September 2011 the vendor and *"Kirsty-lee Bracegirdle and/or nominee"* (the complainant's partner) signed a sale and purchase agreement for that property at $415,000 which was subsequently cancelled by Ms Collier's solicitor after the complainant and his partner requested an extension of time to settle. However, the complainant and his partner eventually purchased the property on 28 November 2011 for $425,000.

[4] A summary of the complaint against the licensee in respect of this transaction is as follows:

[a] The complainant alleges that the licensee provided false information about an EQC assessment of the property by saying that the EQC had not assessed the property when, in fact, an assessment had taken place on 20 October 2011. The complainant is of the view that the licensee, GLE, and Ms Collier joined forces to *"rip him off"* as he put it.

He alleges that the licensee waited for the contract for the sale of his property to be signed before sending him the EQC assessment.

The licensee's position before the Committee was that she discovered the "*scope of works"* document for Bretts Road on 5 December 2011 among other paperwork that Ms Collier had delivered to her that day in respect of a separate matter. She telephoned Ms Collier to ask when the inspection had taken place but Ms Collier was unsure of that date and said she was not present when the assessment occurred. The licensee stated that she posted a copy of the report to the complainant on the same day that she received it (i.e. on 5 December 2011).

[b] The complainant also alleges that the licensee continued to market Bretts Road while there was no agency agreement in place because the vendor (Ms Collier) had cancelled the agency agreement after the

unsuccessful auction. The licensee has stated that, while she was in any event entitled to rely on the prior listing agreement because she had introduced the complainant to the property during that agency, she completed a further listing agreement on 27 November 2011 (one day prior to the sale) by Ms Collier's company to the complainant and his partner referred to above.

16 Allard Street, Christchurch

[5] Mr Goode listed his own property at 16 Allard Street, Christchurch (Allard Street) for sale with GRE on 11 September 2011. The listing agreement began on 12 September 2011 and expired on 12 December 2011.

[6] A multi-offer situation arose whereby the licensee had a potential buyer (a Ms Phillips) as did her colleague Mr Ransfield (a Ms Hinkley). The licensee's buyer made a lower offer than Mr Ransfield's prospective buyer but her offer was unconditional, whereas the higher offer was subject to various conditions.

[7] The complainant states that the multi-offer situation was *"mishandled"*. He says that he wanted to talk to one purchaser to try to remove some of the conditions and also try to raise the offer price offered by the other purchaser i.e. to play one off against the other. He alleges that the licensee told him that the higher offer had been withdrawn, when in fact she (the licensee) had cancelled it. He also says that the licensee should not have been present at the meeting to present the offers to the agency (GRE).

[8] The licensee's position is that Ms Ashcroft, the licensee's manager, was the person who presented the offers to GRE as agent for the complainant as a vendor of Allard Street. Ms Ashcroft advised the Committee that she explained the Harcourts' procedure regarding multi-offers to the complainant as that the complainant and his partner could reject both offers, accept one, or negotiate with one of the prospective purchasers only. The licensee's position was that the complainant and his partner chose to work with Ms Phillips' unconditional offer to see if it could be increased and that, during that time, Ms Hinkley purchased another property and withdrew her offer. Ms Phillips eventually purchased Allard Street for $162,000.

The Complaints Process Regarding GRE and HGL

[9] The third aspect of the complaint related to GRE's and HGL's complaints process. The complainant submitted that the processes are flawed and given *"lip service"*. The complainant alleged that Mr McFadden of GRE and Ms Clifford of HGL are *"accomplices to the fraud"* committed by the licensee. He alleged that HGL did not acknowledge receipt of his complaint, nor review it or respond to it, and that Ms Clifford did not follow proper procedure.

[10] The complainant believes that GRE and HGL have admitted their guilt through an offer made, via Ms Collier's solicitor, that HGL was prepared to contribute to a settlement on the basis that the complainant and his partner pay $415,000 for the property (GRE agreeing to forgo $10,000 in commission), and agree not to bring any civil claim in relation to the Bretts Road agreement, or in respect of any alleged misrepresentation against Ms Collier, HGL, or Julia Ashmore-Smith. The complainant refused that offer.

[11] GRE denies that this was an admission of guilt and advised the Authority that it made an offer as it did not want Ms Collier to be out of pocket from legal expenses incurred as a result of the complainant not settling his first attempt to purchase Bretts Road and to allow the complainant to *"move on"*. Mr McFadden of GRE advised that he repeatedly offered to meet with the complainant but got no response. Ms Clifford of HGL stated that the complainant's first approach to them on 22 December 2011 did not constitute a complaint within that procedure, and that she did not understand the complainant's further email of 20 January 2012 to be a complaint within that system. She responded briefly encouraging the complainant to seek advice.

[12] The detail of the evidence from the various witnesses confirmed and expanded on what we have set out above with various important conflicts in evidence, but these aspects are covered by us below as we summarise the stance of each party.

The Committee's Decision of 3 December 2012

[13] In relation to the complaint about the EQC assessment, the Committee found there was nothing to support the allegation that the licensee knew about the final EQC assessment before the time she forwarded it to the complainant. The Committee found that the licensee's recollection of events could be relied upon and that she was more likely than not to have checked with the vendor as to whether there had been changes which she should be aware of in respect of any assessment. By comparison, the Committee found Ms Collier hazy in her recollection of events, such as whether she was present or not during the EQC inspection. In addition, the Committee noted that the complainant and his partner were advised by the vendor's solicitor that they could be released from the agreement once they discovered the existence of the assessment, but chose to continue the transaction.

[14] The Committee was satisfied with the licensee's explanation that the listing agreement of 27 November 2011 was signed prior to completion of the sale and purchase agreement for Bretts Road.

[15] In relation to the allegation that the Allard Street multi-offer situation was mishandled, the Committee could not discover any reason for not believing the licensee who had stated that it would seem unlikely that GRE would have gone against their stated policy relating to multi-offer situations, which the complainant would have been told about and seen on the multi-offer form. The Committee could find no evidence to substantiate the allegation that the licensee had lied by saying the other offer was withdrawn when in fact she had cancelled it.

[16] In relation to the handling of the complaint by GRE, the Committee noted that Mr McFadden had stated that he repeated his offer to meet with the complainant both before and after HGL became involved. The complainant was of a view that telephone calls and emails were sufficient, and that there was no value in meeting Mr McFadden due to the souring of their relationship.

[17] In terms of HGL's handling of the complaint, the Committee noted that reliance was placed by HGL on the complainant not completing the appropriate form to enable the matter to be progressed. The Committee noted that the use of the complaint form was not mandatory and was surprised that the complainant's emails could not have counted as a written complaint. However, it noted that while both GRE and HGL may not have dealt with the complaint as well as they could have, the

complainant appeared to have had an unrealistic expectation about what could be done and how quickly.

[18] Accordingly, the Committee determined, pursuant to s.89(2)(c) of the Real Estate Agents Act 2008, to take no further action with regard to the three complaints or any issue involved in them.

Issues Now Raised by the Appellant

[19] The issues in this appeal are largely factual and can be summarised as follows:

[a] The complainant disputes the Committee's finding that the licensee was not aware of the EQC assessment of 20 October 2011 until 5 December 2011. He states that the vendor was aware of the assessment because she had telephoned EQC on 25 November 2011. The complainant alleges that the licensee and the vendor (Ms Collier through her company) hid the report from him. He refers to the fact that the licensee met with him several times on 5 December 2011 but did not mention the existence of the report. He further alleges that the licensee has apologised to Ms Collier saying it was all her (the licensee's) fault;

[b] In respect of the proposed resolution of the above issue, which involved the third respondent offering to forego its commission, the appellant submits that this amounts to an admission of guilt on the part of GRE;

[c] In respect of the sale of Allard Street, the complainant maintains that the licensee was present at the meeting when the offers were presented (which she admits). He says that the licensee contacted Mr Ransfield to say that the complainant and his partner had decided to work with the lower offer when, in fact, they were undecided. He alleges that the licensee telephoned his partner to say the higher offer had been withdrawn before it had in fact been withdrawn, which (he alleges) occurred a week later;

[d] The complainant refers to a list of 150 properties marketed by Harcourts, which he says are not located in the suburbs in which they are advertised as being.

[20] The original complaints relating to the listing agreement for Bretts Road, and the complaints process of the third and fourth respondents, did not appear to form part of the appeal before us.

Statutory Context

[21] The concepts of unsatisfactory conduct and misconduct are defined in ss.72 and 73 of the Real Estate Agents Act 2008 (Act) as follows:

> *"**72 Unsatisfactory conduct***
> *For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—*
> *(a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*

(b) contravenes a provision of this Act or of any regulations or rules made under this Act; or
(c) is incompetent or negligent; or
(d) would reasonably be regarded by agents of good standing as being unacceptable."

[22] Section 73 provides:

*"**73 Misconduct***
For the purposes of this Act, a licensee is guilty of misconduct if the licensee's conduct—
(a) would reasonably be regarded by agents of good standing, or reasonable members of the public, as disgraceful; or
(b) constitutes seriously incompetent or seriously negligent real estate agency work; or
(c) consists of a wilful or reckless contravention of—
(i) this Act; or
(ii) other Acts that apply to the conduct of licensees; or
(iii) regulations or rules made under this Act; or
(d) constitutes an offence for which the licensee has been convicted, being an offence that reflects adversely on the licensee's fitness to be a licensee."

Stance of the Authority

[23] The essential issue for our determination is whether the Committee was correct to take no further action on the complaint. There has been a full re-hearing before us of all issues.

The EQC Assessment

[24] Rules 6.2 and 6.4 require licensees to deal fairly and in good faith with customers, and not to mislead them either by omission or positive statement. A wilful or reckless breach of these rules (including intentional misrepresentations) may amount to misconduct under s.73(c)(iii) of the Act. A breach of these rules that is not committed wilfully or recklessly, including unintentional misrepresentations, may amount to unsatisfactory conduct under s.72(b) of the Act, subject to the licensee demonstrating that he or she took all reasonable steps in the circumstances to avoid the misrepresentation.

[25] Whether the licensee knew of the EQC assessment and lied about this to the complainant and, further, deliberately withheld the report from the complainant, are matters of fact for us. In the Authority's submission, the Committee closely considered the evidence on this topic and gave reasons for preferring the evidence of the licensee.

[26] The obligations of a licensee when passing on information from a vendor were the subject of comment by us in *Donkin v REAA and Morton-Jones* [2012] NZREADT 44. Generally speaking, a licensee will be required to have good grounds for making a representation about property being marketed for sale. Where a licensee makes a representation as a *"mere conduit"* of information from the vendor to the purchaser, the licensee must make clear to the purchaser that the information is provided on that basis and has not been verified.

[27] It is for us to ascertain what enquiries the licensee made of the vendor (Ms Collier), what information was given to the complainant about the EQC assessment, and what verification is possible.

The offer by GRE to settle (i.e. for the complainant to have his purchase price reduced by $10,000

[28] The appeal as it relates to the third respondent is not particularised beyond the allegation that GRE was complicit in the fraud allegedly committed by the licensee. There is no convincing evidence to suggest that Mr McFadden or GRE had any relevant knowledge of the EQC assessment. The Authority submits that agreements to waive commission fees are not uncommon in order to achieve settlement of a dispute and that, on its own, this aspect is unlikely to establish liability on the part of the third respondent. We agree.

The Multi-offer Situation Regarding Allard Street

[29] Again, this is a matter of fact for us. The Authority notes that the Committee found no evidence to substantiate the allegation that the licensee *"cancelled"* the higher (but conditional) offer made on Allard Street. The agency's standard procedure is that the vendor would choose to work with one party in a multi-offer situation, which appears to be what occurred in this case. While that was happening, the other potential buyer found an alternative property.

Advertising of Properties and References to their Suburbs

[30] While this issue does not appear as a specific complaint on either complaint form lodged by the complainant, it is mentioned in an appendix to the complaint laid against HGL. The complainant developed this issue in the course of the appeal hearing before us and has now provided a list of 150 alleged misrepresentations by Harcourts' franchisees as to suburbs in which advertised properties were sited.

[31] This aspect of the complaint was not considered by the Committee, presumably, because the complaint was focussed on two particular sale and purchase of property transactions involving the complainant and this issue did not form any meaningful part of the complaint. As to our jurisdiction to consider this aspect of the appeal, the Authority submits that this case is different to that of *Wyatt v REAA and Barfoot & Thompson* [2012] NZHC 2550 where the issue raised on appeal was entirely new and formed no part of the original complaint. In any case, as we cover below, the issue is not relevant to the appeal put to us by the appellant and seems rather vague and of little merit.

[32] The Authority submits that, as a general principle, licensees must not misrepresent the location of a property in advertising, in line with the standards of professional conduct referred to above. That must be so. However, the burden of proof lies with the complainant (in this case, the appellant). It is for us to determine whether the complainant has established to the requisite standard (the balance of probabilities) that there have been misrepresentations which support a finding of unsatisfactory conduct or misconduct.

The Stance of the Appellant

[33] The appellant is now a tool and dye maker. Throughout his evidence he has asserted that the licensee is a liar and a fraudster. Inter alia, he maintains that she told him before he entered into the contract to purchase Bretts Road that all damage which he had noted at Bretts Road was covered by EQC. He also asserts that she fraudulently had an offer cancelled for his Allard Street property as described herein. He also accuses the licensee of a number of fairly minor so called deficiencies, such as that after showing people through Allard Street she left the garage door open, that she allegedly sent a contract to the wrong lawyer at one stage and that, in terms of efficiency, she was *"all over the place"*; but the licensee had sensible explanations regarding those accusation which seem to us to be unfounded.

[34] A prime assertion of the appellant is that, as he initially viewed damage to Bretts Road well before his purchase of it, the licensee was following him around and advising him that all that damage would be repaired by EQC and he relied on that in eventually proceeding to purchase the property with his partner. The licensee denies giving such advice.

[35] Another theme from the appellant is that throughout all negotiations over the purchase of Bretts Road, he and his partner kept asking the licensee if the property had been assessed by EQC and were told that had yet to happen. It seems odd to us that such an intelligent and experienced person in commerce as the appellant could think that all the damage he saw at the property would be EQC covered if the property had not been inspected and assessed by EQC.

[36] The appellant asserts that the licensee was negligent in not checking with EQC as to whether it had actually assessed the property by the date the appellant and his partner entered into the purchase contract for the property, namely, on 28 November 2011. He notes that the licensee simply blames the vendor for having been vague and not advising the licensee that the property had been assessed at an inspection from officers of EQC on about 20 October 2011. The appellant also seems to believe that the reason why Ms Collier eventually decided to sell Bretts Road to him and his partner was because she knew EQC would not repair that Bretts Road property. The appellant feels that he and his partner were set up and cheated by a combination of the licensee and Ms Collier who both deny such accusations and have convincingly explained that the accusations are unfounded.

[37] The appellant was unable to explain why he had simply not had a condition added into his purchase contract making the purchase subject to a satisfactory EQC report from his point of view. In fact, when he raised his allegations, Ms Collier offered to release him from the purchase but he declined to do that. It also covered in this decision he was offered a $10,000 reduction in purchase price, but he still preferred to proceed with the purchase contract.

[38] Also in the course of being cross-examined the appellant seemed to be saying that the existence of an EQC assessment was not of concern to him until after he had entered into the second purchase contract for Bretts Road; although he does seem to have asked about the existence of such an assessment quite often prior to purchasing the property on 28 November 2011. He said that he knew that all EQC assessments were due to be completed by 30 September 2011 so he expected there would be an EQC report about Bretts Road. The appellant seems convinced that

Ms Collier had found out from EQC by telephone on 25 October 2011 that the damaged foundations at Bretts Road would not be covered by EQC and therefore decided to sell. She stated that she needed to sell in order to comply with her banker's requirements.

[39] The appellant finds it very sinister that despite all his requests about whether EQC had inspected the property, and/or issued their report about its state, and whether it would be covered by EQC, once he and his partner signed a purchase contract the report suddenly materialised and showed that the foundations at Bretts Road would not be covered by EQC. However, the sequence of events seem to have been coincidental. We understand that the appellant is still in dispute with EQC over that issue and, at material times, he was advised by or on behalf of the licensee that he was entitled to apply for reassessment from EQC.

[40] The appellant emphasises that during the time he spent with Ms Ashmore-Smith, the licensee, when considering whether or not he would make an offer to buy 22 Bretts Road, asked her on many occasions whether that property had been assessed by EQC and on each occasion she replied *"no"*. He puts it that was the first and most important question he and his partner had asked when Ms Ashmore-Smith put it to them that they sign two contracts i.e. one for the purchase of that property and the other for the sale of their then home at 16 Allard Street, Christchurch. The appellant emphasises that he and his partner agreed to sign the purchase contract for Bretts Road *"based on the representation the agent had made"*, namely, that the property had not been inspected by EQC. The appellant emphasises that, unbeknown to them, the property had been assessed by EQC back on 20 October 2011.

[41] The appellant noted that the effective vendor of Bretts Road, Ms Collier, (who gave evidence before us) had telephoned the EQC before the contract for sale and purchase of Bretts Road was prepared. She enquired of EQC about some earthquake repairs needing to be effected and had been told that none of the damage to the foundations of the property was included in the scope of those repairs and that the repairs were not going to be paid for by EQC. The appellant noted that the EQC posted its assessment to the vendor on that day of the telephone call, which must have been about 28 November 2011, and, in the course of that telephone call with the vendor, told her they were about to post it that day. In any case, the evidence is that Ms Ashmore-Smith received that assessment from Ms Collier (with other unrelated papers) on Monday 5 December 2011, and immediately copied it and posted a copy to the appellant and his wife at their address at 16 Allard Street, Christchurch. This was because she believed that they had not yet vacated that address which they had not, although they had almost completed packing to leave it.

[42] It happens that at 5.45 pm that day they met with Ms Ashmore-Smith at Bretts Road for a prepurchase inspection; but the licensee did not mention that the property had by then been inspected by EQC and she had received the assessment only a few hours earlier. The licensee says that the assessment did not then seem to be an important issue and the parties were in a hurry at that pre-inspection meeting.

[43] Inter alia, the appellant queries why the licensee simply did not email the assessment to him as she had with other documents. He takes a sinister implication from her not having done that, namely, that the licensee was hiding the assessment and had deliberately posted it to an address from which she thought they had shifted

out. As it happens they had moved out of Allard Street, and were due to settle the purchase on Bretts Road two days from 5 December 2011, but had come back to Allard Street apparently for final packing and for a prepurchase inspection by the purchaser from them.

[44] The appellant asserts that the licensee was setting up him and his partner and that she (the licensee) deliberately waited for the Allard Street sale contract to be signed by them before she forwarded them the EQC assessment *"because it would have killed both deals"* he put it.

[45] In terms of the point of time when the appellant signed the offer to purchase Bretts Road, he now puts it that the licensee should have then made a telephone call to the EQC to check whether that property had been inspected by EQC. He said that he infers that, on the evening of 28 November 2011, the licensee expected to have signed by the complainant and his partner both the purchase contract for Bretts Road and the sale contract for Allard Street. He also infers that the agent *"tried to cover herself by posting it to us, to an address where we wouldn't get it immediately. Then she could blame the post."* He said that it was very difficult to find out constructive information about a property from EQC so that the appellant's lawyer could not protect them from *"this kind of fraud"* as he put it. He added that real estate agents in Christchurch were desperate for sales at that time and knew that he was then desperate for good housing for his family.

[46] The appellant referred to the vendor's offer to allow the appellant to cancel the purchase contract for Bretts Road but only if the purchasers agreed to take no civil action against the vendor and the licensee in terms of that transaction. The appellant sees that as sinister. The vendor's lawyer had organised that the price be reduced by $10,000 if the appellant and his wife proceeded with the purchase on the basis of waiving any civil claim against the vendor, the licensee, and HGL. It seems that $10,000 would have come about by Harcourts waiving much of their sale commission. The appellant interprets that offer as *"a complete admission of guilt"* by the licensee and the agencies, and adds that the offer was quickly retracted once Harcourts found out that the Real Estate Agents Authority had been notified by the appellant of his concerns. He emphasises that, because he was desperate to properly house his family at material times, he had no choice but to settle the purchase of Bretts Road on Friday 16 December 2011 for the full price plus, as he put it, *"daily penalties caused by the dispute"*.

[47] The appellant emphasises that Ms Ashmore-Smith kept telling him that the property had not been assessed by EQC but she had not asked that question of the vendor (Ms Collier). He submits that is negligence on the part of that licensee both by giving him what he regards as untrue information and, in any case, failing to check with EQC about the status of damage at Bretts Road. He asserts *"Ms Ashmore-Smith should have made the phone call to check, it is that simple. The facts are Ms Ashmore-Smith gave an answer that was untrue"*.

[48] On Tuesday 6 December 2011, there was a further meeting by the appellant and his partner with the licensee at another prepurchase inspection. The appellant says that he and his partner had received the assessment in the post that day but the licensee did not mention it. He asserts that conflicted with her previous statements that the property had not been assessed by EQC. The appellant says he gave the licensee the chance to raise that the EQC assessment was to hand but she did not.

He infers that was because she did not expect him to have then received it by post and she was well aware that the new owners of Allard Street were to move in the next day, 7 December 2011. He insists that the licensee did not want the appellant and his partner to receive the assessment until after they had vacated Allard Street and that she deliberately hid it from them for two additional days after she claims to have received it (i.e. from 5 December 2011). In fact, they seem to have received it on 6 December 2011.

[49] As covered above, another concern for the appellant is that when a multi-offer situation developed over the sale of Allard Street (by the appellant and his partner), a meeting took place at Harcourts on 20 October 2011 between the licensee and her business partner and superior, Ms Ashcroft of Harcourts, and the appellant and his partner. The licensee presented an offer from a client of hers, which offer the appellant had already rejected and then Ms Ashcroft presented an offer from a Mr Ransfield. No decision on negotiation with one of the offerers was made because, the appellant alleges, the licensee would not accept that the appellant and his partner were not interested in selling to her client. However, on the following morning, Saturday 21 October 2011 the licensee, according to the appellant, telephoned Mr Ransfield and advised him his contract was unsuccessful but without the appellant's authorisation to do that and (the appellant alleges) later told the appellant and his partner that Mr Ransfield had withdrawn his offer. The appellant puts it (in effect, surmises) that the licensee presented the offer from her own client at the multi-offer meeting and then later *"killed the other offer without our permission, leaving only her offer in play. Ensuring that she receives both the listing and sales portion of the commission"*.

[50] At the hearing before us the appellant also spent some time focusing on a complaint against Harcourts that, on many occasions in Christchurch at material times, it had misrepresented the proper suburban location of properties it was advertising for sale. In effect, the appellant puts it that when a property was sited in a less desirable suburb, Harcourts' franchisees would advertise it as being in a desirable nearby suburb.

[51] The appellant also covered his submission that Harcourts Group Ltd failed to properly deal with his complaints relating to the above transactions.

[52] As indicated above the appellant presented his case to us in great detail. We consider that much of it was surmise and conjecture. We do not consider it necessary to expand on the detail we have covered herein.

The Stance of the Licensee Ms Ashmore-Smith

[53] The licensee asserts that until 5 December 2011 she was unaware that there was an EQC assessment on the Bretts Road property. She said that assessment was delivered to her office on that day by Ms Collier, the vendor of Bretts Road, along with other documents relating to another property. She states that she immediately posted that assessment to the appellant and his partner and she understands they received it the next day. As it happens, Ms Collier did not recall any discussion with the licensee about the EQC inspection until about 5 December 2011 which was well after the appellant and his wife had signed the Bretts Road contract on 28 November 2011.

[54] There seems no dispute that the EQC inspection of Bretts Road took place on 20 October 2011 and there is uncertainty as to whether Ms Collier was present when that took place. The appellant puts it that it is also unclear whether the licensee was present at that EQC inspection and/or knew of it. Ms Collier says that, at the time she signed the sale contract to the appellant and his wife regarding Bretts Road i.e. on 28 November 2011, it never occurred to her that EQC had assessed the property. However, the appellant says that Ms Collier had telephoned EQC on 25 November 2011 about getting some repairs undertaken and was told that the foundations to the property were not covered and that conversation caused EQC to post out the assessment to her. The appellant calculates she must have received that by mail on about 27 November 2011.

[55] Both the evidence-in-chief and the cross-examination of the licensee was extensive. She was thoroughly pressed in cross-examination on all key aspects of the appellant's claims. However, the content of her evidence has been covered in this decision.

[56] She emphasised that, from the outset, the appellant and his partner, as were other prospective purchasers, were told by her that claims had been lodged with EQC, that the chimney had come down and new heating had been installed, that a claim for the driveway had been lodged with the private insurer and that the rest of the house was awaiting assessment by the EQC. She asserts that she never made any comment to the appellant or his partner as to whether any specific damage would be covered by the EQC.

[57] In the course of her extensive evidence, the licensee stated how she had presented forms of contract for both Bretts Road and Allard Street to the appellant and his partner at approximately 8.00 pm on 28 November 2011. She told them that the Bretts Road offer was on a *"take it or leave it"* basis, and that Ms Collier was not negotiable on any aspect of the contract. She adds that she was careful to explain that this would be an unconditional contract which meant that the appellant and his partner were committed to the purchase from the time the contract was signed, and that the 10% deposit would be payable immediately, and that 45 days notice needed to be given to the tenants at Bretts Road before the appellant and his partner could move into it.

[58] Later in her evidence-in-chief she noted, inter alia, that as a result of the appellant's refusal to settle the purchase of Bretts Road on the contracted settlement date of 8 December 2011, Ms Collier offered to allow the purchasers to withdraw from the contract but they confirmed that they wished to proceed and did about a week later.

[59] In additional evidence-in-chief before us the licensee emphasised that, at her meeting with the appellant and his partner on 5 December 2011, which seemed to be a presettlement inspection at Bretts Road, it never occurred to her to mention that she had that day posted the EQC report to them. She said that, at that stage, obtaining a report from EQC was simply part of a claim process and she was conscious that 24 hours earlier the vendor had declared to her that there had been no change in the condition of the property. The licensee accepts that she did not specifically ask Ms Collier whether the property had been assessed by EQC so that she, the licensee, did not know that until 5 December 2011.

[60] She mentioned that, at that time, it was well known that EQC did not readily provide information or documentation about progress of claims and people in Christchurch were only then starting to *"get a grip on EQC scope of work assessments"*. The licensee remarked that EQC procedures have evolved since 2011 and she was conscious at all material times that the parties had lawyers representing them in the usual way. The licensee knew that Ms Collier had made an insurance claim and an EQC claim and she believes that she (the licensee) had done what she should have done as licensee at all times in this situation.

[61] It also seems to us that neither Ms Collier nor the licensee appreciated that the content of the EQC assessment might be of great significance to the appellant in deciding whether or not to purchase the property. He did not seem to make that clear to them. In any case, when the report was to hand he elected to proceed with the purchase of Bretts Road even though Ms Collier was happy to release him and his partner from that commitment. Indeed, the licensee put it that knowing that the appellant and his partner had signed an unconditional contract she felt that they could not regard an EQC assessment as critical to their decision. She also made it clear that having efficiently, so she thought, posted a copy of the report to the appellant on 5 December 2011 as soon as she received it *"it never entered my head that I should not post the report to him nor that I should withhold its existence from him".* Apparently at that point in time such EQC assessments were *"all very new"* to the real estate industry.

[62] Counsel for the licensee (Mr Paulsen) notes, inter alia, that given the content of a structural engineer's report which Ms Collier had obtained and which recorded that there had been no structural damage to the property by earthquake, there could have been nothing unexpected about EQC stating to Ms Collier that the foundations of Bretts Road were not covered by EQC.

[63] Counsel for the licensee also notes that 27 November 2011 was a Sunday so that it is unlikely Ms Collier had received the EQC assessment by then if it was posted on 25 November 2011. He puts it that it is very likely that Ms Collier did not receive the EQC assessment until after the contract with the appellant and his partner had been signed.

[64] As Mr Paulsen also puts it, if Ms Collier had not received the EQC assessment report by 28 November 2011, the licensee could not possibly then have had it. He also referred to the appellant's insinuation that there is some sort of *"relationship"* between Ms Collier and the licensee which might have involved them discussing the EQC assessment. He firmly submits that the only relationship between them was the professional one of real estate agent and vendor. His point seems to be that they are not conspiring against the appellant because of a friendship.

[65] Mr Paulsen also makes the point that, if the licensee was hiding the report from the appellant, there was no reason for her to send it to him by post or at all. He puts it that there is nothing peculiar in the fact that the licensee posted the report to the appellant, rather than emailing it, because it was not thought to be a significant matter at that time and there was no need for it to be instantaneously sent by email to the appellant.

[66] Also in terms of the licensee's evidence to the contrary, Mr Paulsen refers to the licensee's evidence that the appellant had not been regularly asking her if Bretts Road had been assessed by EQC.

[67] The appellant's first contract to purchase Bretts Road was cancelled on 23 September 2011 and, from then until 28 November 2011, the appellant and his partner had ongoing contact with the licensee as they looked at other properties and continued to have the licensee market their property at Allard Street. Over that time they did not expect to be able to acquire Bretts Road because it had been tenanted.

[68] The licensee acknowledges that on 28 November 2011, at the meeting when the second contract was signed by the appellant and his partner, they asked her if Bretts Road had been assessed by EQC; but she did not regard that matter as of sufficient importance to mention it in her transaction report which she completed the next day. That transaction report records what the licensee regarded as the important matters discussed with the appellant and his partner on 28 November 2011. These were that the contract was unconditional, that the deposit would need to be paid immediately, and that notice needed to be given to the tenants.

[69] Mr Paulsen also submits that if the EQC assessment was so important, Ms Brace-Girdle would not have signed an unconditional contract to buy Bretts Road without it; especially given that the appellant said in evidence that he was aware of structural damage to the foundations, piles, and porch of Bretts Road.

[70] In terms of the suggestion from the appellant that the licensee posted him the EQC report at Allard Street knowing they would have vacated Allard Street, Mr Paulsen points out that they did not vacate Allard Street on 5 December 2011, its settlement was not due until 7 December 2011, and the licensee believed they would receive the report comfortably by post before vacating, which they did.

[71] As Mr Paulsen also says, the offer from Harcourts to reduce the price by $10,000 in return for waiving of civil litigation rights by the appellant and his partner simply shows the length that a professional firm will go to in order to maintain good client relationships and protect its reputation. He emphasised that the licensee herself opposed that offer to reduce Harcourts' commission on the basis that she asserts that she had not failed the appellant in any way.

[72] An issue raised before the Committee was that, at material times, there was no listing agreement existing for the sale of Bretts Road. That issue seems to have been dropped by the appellant in the course of the hearing before us.

[73] Mr Paulsen also dealt with the allegation that the licensee cancelled Ms Hinkley's offer to purchase Allard Street without the authority of the appellant. Mr Paulsen notes that the licensee had no power to do that and only Ms Hinkley could. He then put it:

> *"47. The sequence of events was that when Mr Goode and Ms Brace-Girdle decided to negotiate with Wendy Phillips, Ms Ashcroft informed Ms Hinkley's agent, Mr Ransfield. Ms Hinkley was initially prepared to leave her offer on the table but withdrew it when she found another property at Petrie Street. Mr Ransfield advised Ms Ashcroft that Ms Hinkley's offer was withdrawn.*
>
> *48. Ms Ashmore-Smith had no reason to cancel the offer (even if she had such power). Ms Ashmore-Smith would benefit from a sale to Ms Hinkley should the sale to Ms Phillips not proceed. It therefore suited Ms Ashmore-Smith to have Ms Hinkley's offer on the table as a back-up".*

[74] The point is that there is no convincing evidence that the licensee cancelled that offer.

[75] Inter alia, Mr Paulsen submitted that the appellant has suffered no loss from the matters covered above. He notes that the appellant and his partner vacated Allard Street before settlement of its sale knowing they could not move into Bretts Road because they had first to give notice to its tenants to vacate. Settlement of Bretts Road was scheduled for 8 December 2011 and, in fact, occurred on 16 December 2011 well before the appellant and his partner were ever going to be in a position to move into it. Accordingly, accommodation costs for the appellant's family were always going to be incurred because, whether or not they settled the purchase of Bretts Road on 8 December 2011, they could not occupy it while tenants were there.

[76] Mr Paulsen also puts it that insofar as the EQC assessment did not record any actual damage to Bretts Road, the appellant was entitled to, and did, request a reassessment from EQC; and, if there was earthquake damage, it would be covered by EQC; and both the licensee and Mr McFadden (of GRE) confirmed this and had explained it to the appellant at material times.

[77] Mr Paulsen noted that the appellant's incurring of penalty interest and additional legal costs on the purchase of Bretts Road was the result of the appellant's unlawful refusal to settle the purchase of Bretts Road (on 8 December 2011), rather than from the actions of the licensee or of any of the respondents.

[78] Finally, Mr Paulsen observed that the pragmatic offer from Harcourts to reduce commission, so as to reduce the price to the appellant and his wife by $10,000, was unnecessary but pragmatic and generous and would have provided *"a large windfall"* for the appellant had he accepted it.

The Stance of the Third Respondent (Mr J McFadden of Gold Real Estate Group Ltd)

[79] The appellant's allegation against the third respondent seems to be that he somehow conspired with the licensee with regard to the appellant's above allegations against her.

[80] Mr McFadden seems to have come into the above situation on Tuesday 13 December 2011 when he was advised of the appellant's allegations and that settlement of the sale of Bretts Road had not occurred as planned. He then telephoned the vendor's solicitor to ascertain the position about the settlement not having taken place. He then informed the appellant, by email that day of 13 December 2011, that the vendor was prepared to release the appellant from the purchase on the terms mentioned above. Mr McFadden had also previously telephoned EQC and explained to the appellant that a reassessment of the scope of works could be undertaken once the appellant became a registered proprietor of Bretts Road. Mr McFadden advised the appellant that he was happy to meet with the appellant to consider any proposals or suggestions.

[81] The next day (14 December 2011) the appellant emailed Mr McFadden suggesting that the price for Bretts Road be reduced to $400,000 (from $425,000) and that the shortfall to the vendor be offset by Harcourts waiving all commission. Also that day, Mr McFadden emailed the appellant to advise that Harcourts had been

in touch with EQC with regard to the appellant appealing EQC's assessment and that Harcourts was willing to assist the appellant do that if necessary.

[82] The appellant responded to Mr McFadden that the vendor was being obstructive. In turn, just after 3.00 pm that day, Mr McFadden responded to the appellant that Harcourts was willing to meet with the appellant to discuss any issue he had with Harcourts; and that his ongoing refusal to settle the purchase of Bretts Road needed to be addressed between the appellant's and vendor's respective solicitors; and that the appellant might like to refrain from being rude and aggressive to receptionists at Harcourts and GRE.

[83] Just before 4.00 pm that day the appellant emailed Mr McFadden to the effect that there was no need for further communication between them. This meant that Mr McFadden did not directly deal with the appellant again. However, Mr McFadden did speak to the appellant's lawyer and offered for his company (GRE) to reduce the commission by $10,000 as covered above and that offer seems to have been formally put by the vendor's solicitor to the appellant's solicitor on 14 December 2011, but was rejected.

[84] It was also put for Mr McFadden (by Mr Bayley) that he does not recall receiving any complaint about the licensee's handling of the Allard Street listing for the appellant and his partner. Nor does he recall there being any complaint from the appellant to Harcourts about various listings by Harcourts being (as he put it) *"not in the area advertised, usually listed as in a more expensive neighbouring suburb"*. However, these are issues which were not put before the Committee of the Authority, nor were they in the appellant's original complaint; so that we do not have jurisdiction to deal with them and, in any case, there seems nothing of merit in them.

The Stance of Ms J Clifford of Harcourts Group Ltd

[85] Ms Clifford is the Chief Operations Officer for Harcourts Group Ltd. In the course of his complaint to the Authority the appellant raised allegations of various failings with the Harcourts complaints system, about a suggested involvement of Harcourts in the concession (by reduction of commission) offer made by Ms Collier's solicitors to the solicitors for the appellant and his partner; and about the advertising of properties in the Christchurch area where, according to the appellant, the property is misrepresented as being in one suburb when it is in fact in a neighbouring suburb of lesser esteem.

[86] However, the Harcourts complaints system was not dealt with in either the appellant's evidence or his submissions. Ms Clifford was not involved in the appellant's said concerns until 23 December 2011. The purchase of Bretts Road was settled on 16 December 2011 so that Ms Clifford could not have been involved in real estate agency work. HGL has not undertaken any real estate agency work in respect of that transaction because it is merely the franchisor of GRE. Harcourts is not required to have a complaints system as a franchisor and does not undertake real estate agency work although, it is put by Mr McDonald (counsel for Harcourts) in this exceptional case it has intervened to quite some extent.

[87] It is also put that the appellant did not give either Mr Duncan or Ms Clifford (both of HGL), or the Harcourts' complaint system a proper opportunity to assist him but quickly bypassed them to address the board of HGL which is not part of the Harcourts complaints system. In any case it is put that the appellant did not clearly

articulate his concerns at that point. Mr McDonald explained that the Harcourts complaints system is set up to deal with complaints about the conduct of franchisees who are the persons and organisations which conduct the real estate agency work within the wider Harcourts Group; and that system was not established to deal with complaints about the conduct of the franchisor of its officers or staff.

[88] The appellant seemed to be contending that Harcourts Group Ltd was, somehow, involved in the offer made by the solicitor for the vendor to have the purchase of Bretts Road settled at a reduced price on the basis of the purchasers (the appellant and his partner) waiving any civil remedies they might have at civil law. There seems to be a suggestion that, thereby, HGL is complicit in some type of fraud. As it happens, the company which would have reduced commission was not HGL but one of its franchisees, namely, Gold Real Estate Group Ltd. In any case, the offer to reduce commission was made before anyone at Harcourts Group Ltd became involved in the issue.

[89] We agree that a bona fide offer by a real estate agency to make a concession on commission, in order to resolve a difficulty of the kind encountered in this case, is a proper professional approach to take and not unusual. We agree with Mr McDonald, counsel for Ms Clifford, that such a concession is not in any way an admission of liability and much less an admission of or connivance in fraud.

[90] The stance of the Harcourts group and of Ms Clifford, its Chief Operations Officer, is that it does not undertake real estate agency work, is only involved in real estate as a franchisor, and has not been involved in the real estate transactions referred to by the appellant. It has a complaints system to deal with complaints made to it about the activities of its franchisees and their salespersons and staff, but HGL does not itself deal with the public or with buyers or sellers of properties and therefore has no need for a complaints system about its own activities. It provides systems and training to enable its franchisees to conduct their real estate agency business. Any complaints are usually dealt with by Ms Clifford or by the company's Chief Executive Officer Mr H Duncan.

[91] Ms Clifford has never met or spoken to the appellant but became involved in an exchange of emails with him in December 2011. As at 22 December 2011 she appreciated that the appellant was insisting on addressing the board of HGL to complain about Mr Duncan. She felt that the appellant was, effectively, demanding money from the that company, namely, the sum of $8,622.80 which must have been for advertising expenses the appellant had incurred. Ms Clifford understood that the appellant had solicitors acting for him. She felt that the appellant had not provided any detail for his allegations against Mr Duncan and she regarded his assertion that HGL was, somehow, an accomplice to some type of fraud as something which could not be taken seriously.

[92] Mr H S Duncan gave evidence before us as the CEO of HGL. Simply put, he had concluded that Mr McFadden and his staff were dealing with the issues raised by the appellant in a professional and proper fashion and endeavouring to achieve a satisfactory resolution and with both parties having legal advice. Accordingly, Mr Duncan could not see that HGL could make any useful contribution to the concerns which the appellant raised in December 2011. On 16 December 2011 he advised the appellant of his views and notes that the appellant was not happy about that and *"became combative and abusive"*.

[93] Mr Duncan also addressed the issue raised by the appellant that 150 properties had been advertised by franchisees of HGL in a manner which misrepresented the suburb where the respective properties were sited. Mr Duncan stated that there is room for differences as to whether a property lies within one suburb or another, and that whether the property is advertised as being in one suburb rather than another is an issue which is largely vendor driven. However, agents rely extensively on maps, including Google Maps. He had considered all the properties referred to by the appellant and felt that they were generally as close to one suburb as they were to another and he could not see how a salesperson could refuse to accept a vendor's instructions about which suburb was to be used in advertising.

Evidence from and Stance of Ms Collier

[94] Ms Collier gave evidence under subpoena from us. We assessed her as an honest witness. Her evidence is quite detailed and we need not cover it fully. For various reasons, she was a reluctant vendor of the Bretts Road property. At the time of the two main Christchurch earthquakes in September 2010 and February 2011 she owned three houses one of which was Bretts Road. During August 2011, she arranged for an engineer from W2 Design to inspect Bretts Road so that she could be sure that property was safe for tenants but she later made that property available to the licensee when she decided to market it.

[95] One of her reasons for selling the property to the appellant and his partner was that they insisted that they loved the property. They first entered into a purchase contract for Bretts Road on 9 September 2011 but did not confirm various conditions. Accordingly, that contract was cancelled and the property was let to tenants. However, the licensee seems to have from time to time raised with Ms Collier whether she might sell the property to the appellant and his partner and, eventually, she did by contract of 28 November 2011.

[96] Ms Collier understood that EQC conducted an inspection of Bretts Road during October 2011 and it is thought that happened on 20 October 2011. However, she cannot recall that inspection or whether she was present during it because at that time she had a number of meetings, including with EQC, over her three properties and feels that because Bretts Road was tenanted in October she may not have been present at any EQC inspection; although the tenants seemed to take occupation on 21 October 2011. She had telephoned EQC on 25 November 2011 about some emergency repairs needed to Bretts Road and ascertained that EQC would not effect those repairs. She does not recall being unhappy about that decision and simply regarded it as a stage in the process of settling her claim for earthquake damage. A key reason for her deciding in November 2011 to sell Bretts Road is that she had not been able to sell one of her other properties as her banker felt she needed to.

[97] Ms Collier is adamant that at no stage did she withhold any information from anyone. She was asked by the licensee on 27 November 2011 whether anything had changed in relation to the property as she signed a new listing agreement; and she replied there had been no change. She asserted that had she by then received the EQC assessment or any other information about the property, she would have given it to the licensee whom she deeply trusts. She added that she understands the EQC assessment was posted to her, on 25 November 2011 but was sent to one of her other properties where she was not residing and went infrequently to collect mail. It was only on 28 November 2011, after seeing her bank manager, that she firmly

decided to sell Bretts Road. That led to the licensee bringing an unconditional offer from the appellant and his partner to purchase it at $425,000. She recalled getting the EQC assessment in the mail at some stage and feels that was probably on 5 December 2011 when she took it to the licensee whom she was going to visit that day with other papers.

[98] In her evidence-in-chief Ms Collier also made it clear that, to the best of her knowledge, she did not have the EQC assessment *"until around 5 December 2011"* and she asserts that *"I never hid anything about the property from Mr Goode"*. She adds that when the appellant and his partner refused to settle the purchase of Bretts Road on 8 December 2011 she was happy to let them out of the contract but they did not want that, although Mr Goode wanted a reduced price. In that respect Ms Collier stated: *"I had done nothing wrong and was not prepared to reduce the sale price"*.

[99] Ms Collier also referred to the GRE offering to reduce its commission so that Ms Collier (through her company) could reduce the price to the appellant and his partner but be no worse off herself. She noted that the offer put to them included a clause that they not bring any civil claims against her or the agency or the licensee. In that respect she stated *"I would have instructed my solicitor to include that clause because Mr Goode was a difficult person and I thought he might accept a reduced price and then also bring a claim for more money. I wanted an end of the matter for everyone involved. When Mr Goode rejected that offer I insisted on full payment and settlement occurred on that basis"*.

[100] Despite intense cross-examination, Ms Collier did not deviate from the above evidence-in-chief. However, inter alia, she did say that she did not discuss the state of the foundation damage at Bretts Road with the licensee. She added that the tenants moved into the property on 21 October 2011 which would have been the day after the EQC assessment, but she simply still cannot remember whether she was present at that assessment. She said that the matter of an EQC assessment was not particularly important to her then because she had decided not to sell the property and to tenant it. She concluded her evidence-in-chief by asserting again *"I swear I didn't withhold information intentionally from anyone"*.

Discussion

[101] The EQC assessment was sent to Ms Collier at a former address of hers with an undated covering letter. The assessment seems to be referring also to claims made back in about September 2010 but, for present purposes, states damage as at about October 2011 as cosmetic except for some cracking to wall cladding. However, it refers to structural damage to the roof covering of the main dwelling, and to a collapsed chimney.

[102] We can understand how the appellant became very suspicious that there might have been some type of conspiracy against him regarding the state of damage of the property he was purchasing at 22 Bretts Road, Christchurch in the context of there being possible cover with the EQC. This was in the context of him being desperate to provide accommodation to his family at relevant times. However, the onus is on him to prove that there have been some type of failure in conduct by real estate agents connected with that purchase transaction for him and his partner. The standard of proof is the balance of probabilities.

[103] In final submissions, Mr Paulsen (counsel for the licensee Mrs Ashmore-Smith), noted that the appellant's case at the hearing before us had become quite different from that upon which he had based his appeal. He originally alleged a fraudulent conspiracy between Mrs Ashmore-Smith (the licensee agent) and Ms Collier (the proprietor of the vendor company of Brett Road), but seems to have abandoned that in the course of the hearing. Also, he seems to now accept that Mrs Ashmore-Smith did not know of the EQC assessment until 5 December 2011 but he now argues that she should have checked the EQC status of the Bretts Road property at the time the contract document was presented to Ms Brace-Girdle (the appellant's partner) on 28 November 2011 and that it was only later that Mrs Ashmore-Smith tried to hide the EQC assessment from him.

[104] Mr Paulsen noted that although the appellant originally alleged that the licensee marketed the Bretts Road property without an agency agreement, he abandoned that argument during the hearing before us as well as some other complaints related to the standard of service she provided.

[105] However as Mr Paulsen noted, the one aspect of the appellant's original case which remains is the allegation that Mrs Ashmore-Smith cancelled Ms Hinkley's offer on the Allard Street property and lied to him that it had been withdrawn by Ms Hinkley.

[106] With regard to the EQC status of Bretts Road, Mr Paulsen submits that the appellant's case is based on the false premise that when asked by Ms Brace-Girdle (the appellant's partner) if Bretts Road had been assessed by EQC, Ms Ashmore-Smith replied *"No".* Mr Paulsen submits that is not what occurred. He then put it:

> *"7. The matter is dealt with at paragraph 136 of Mrs Ashmore-Smith's evidence. She accepts that she was asked if the property had been assessed by EQC but says that her response was:*
>
> > *"… that Ms Collier had told me that there had been no changes in relation to the property, other than that it was now tenanted. I also said that the contract provided for the EQC claims to be transferred to them so that once they were the new owners they could manage the claims and the repairs."*
>
> *8. Mrs Ashmore-Smith's evidence as to what she was told by Miss Collier is supported by Miss Collier. At paragraph 16 of her evidence Miss Collier said:*
>
> > *"Julia was always very thorough when she was explaining anything to me or having me sign documents. She would have gone through the listing agreement with me. I understand that Julia says that she asked me whether anything had changed in relation to the property and I replied that there was not. I cannot recall if Julia asked me that question but if she says that she did then I believe her.""*
>
> *9. Mr Goode has presented nothing to contradict Mrs Ashmore-Smith's evidence as to what she told Mrs Brace-Girdle. The only people present when the contract on Bretts Road was signed on 28 November 2011 were Mrs Ashmore-Smith and Mrs Brace-Girdle. Mrs Brace-Girdle has not*

given a statement or any evidence to the Complaints Assessment Committee or the Tribunal.

10. *It is submitted that Mrs Ashmore-Smith cannot be criticised for not asking Miss Collier directly if Bretts Road had been assessed by EQC. She thoroughly went through the listing agreement and the vendor warranties with Miss Collier. She asked if there had been any changes in relation to the property and was told there were not. One would expect that Miss Collier would have told her that the property had been assessed by EQC had she known that had occurred.*

11. *Furthermore had Mrs Ashmore-Smith asked specifically whether Bretts Road had been assessed by EQC it is likely that Miss Collier would have told her it had not. It was never established that Mrs Collier was present or event knew of the EQC inspection. Miss Collier said in her evidence at paragraph 25:*

    > *"As I said to Ms Hope had I been specifically asked if an EQC assessment had been undertaken I may have recalled that but I can't say positively that I would have. I cannot actually recall for certain being present during the inspection, though as I have stated I imagine I would have been."*

12. *Mr Goode alleges that Mrs Ashmore-Smith should have made a phone call to EQC to determine if Bretts Road was assessed. This is contrary to his case that EQC would not disclose such information. He said in his brief of evidence at paragraph 12 on page 3:*

    > *"There is no way to check whether a property has been assessed by EQC because of the privacy act [sic], it is essential that there is honesty from the vendor and her agent, who acts for her."*

13. *In those circumstances all Mrs Ashmore-Smith could do was rely on the advice of Miss Collier.*

14. *Mrs Ashmore-Smith truthfully related the information provided to her by Ms Collier to Mrs Brace-Girdle. She did not say that Bretts Road had not been assessed by EQC. She did not take it upon herself to make any representations as to the EQC status of Bretts Road."*

[107] With regard to the allegation by the appellant that the licensee hid the EQC report from him after she received it on 5 December 2011, Mr Paulsen puts it that she had no reason whatsoever to do that; and, in fact, due to her actions the appellant received the report on 6 December 2011 one day after the licensee had received it herself. We find nothing in the evidence to sensibly support that allegation of the appellant. We accept that, at that particular time, the licensee did not consider the EQC assessment to be a matter of significant importance. In the course of the evidence it became clear that, at that time, EQC assessments were not generally regarded as of major significance; although we can accept that report was of major interest to the appellant. In the course of her evidence the licensee acknowledged that such reports were information to which a purchaser was entitled and could expect to receive and that is why she promptly forwarded it to the appellant when she received it.

[108] It seems to us that if the licensee had been attempting to hide the EQC assessment from the appellant, she would have simply retained it for a few days until settlement was to have taken place, or indefinitely; but she did not do that and posted it to the appellant and his partner the very day she received it from Ms Collier. The addressees received it the next day as one would expect.

[109] We accept the licensee's evidence that she posted the EQC assessment on 5 December 2011, rather than emailing it, because she felt it was not of great significance at that point but she considered that the appellant and his wife would expect to acquire the original document and the licensee had previously posted other documents to them. There was nothing to be gained by the licensee hiding the EQC assessment because the sales of both Bretts Road and Allard Street had been entered into and were confirmed and binding contracts.

[110] With regard to the multi-offer situation, Mr Paulsen emphasises that Mrs Ashmore-Smith did not present the Hinkley offer on Allard Street but it was presented to the agency by Ms Sara Ashcroft who was the licensee's manager. Despite the appellant's view to the contrary, we accept that there is no reason why the licensee should not have been present when the offers for Allard Street were presented at the agency. The agency's multi-offer procedure (created by Harcourts) does not prohibit attendance by the salesperson. Mr McFadden stated that the offers were presented to the appellant and his partner in accordance with the Harcourts' procedures and there has been no evidence to contradict that. There is no convincing evidence before us to show that Mrs Ashmore-Smith withdrew or cancelled Ms Hinkley's offer. The evidence is that Ms Hinkley withdrew her offer.

[111] Mr Bayley emphasises that GRE and Mr McFadden endeavoured to address the complaints made by the appellant in respect of Bretts Road, but that after only two days the appellant bypassed them. During that time, nine emails passed between the appellant and Mr McFadden and the latter offered on three occasions to meet with the appellant. Also, Mr McFadden personally contacted EQC to ascertain information for the benefit of the appellant. As well, he contacted the vendor's solicitor for updates with regard to settlement and organised a generous reduction in price to enable settlement to proceed. The evidence of Mr McFadden is that the appellant's attitude was threatening and aggressive with allegations of collusion and dishonesty and yet Mr McFadden and GRE were treating the appellant's complaints as serious and were endeavouring to quickly address them.

[112] Mr Bayley also points out that the complaint about listings of property, which allegedly mislead as to the suburb in which the property is sited, relates to the listings of licensed salespersons who are not involved in these proceedings; and that there are many factors to be considered in deciding whether a property falls within a particular suburb; and the views of the vendor need to be respected so long as the point is not reached where a property cannot sensibly be said to fall within a particular suburb.

[113] When we stand back and absorb the concerns of the appellant overall, and we have endeavoured to cover them above in some detail, we find that none of his allegations have been proved on the balance of probabilities. We allowed extensive hearing time, and post hearing submission time, to assist the appellant who is clearly very distressed about his experiences covered above.

[114] Perhaps, with hindsight, upon her receiving the EQC report, it would have been better if on 5 December 2011 Mrs Ashmore-Smith, as the licensee, had couriered the hard copy of that report forthwith to the appellant rather than posting it as she did. Alternatively, she could have scanned it and emailed it to him. However, we accept that she thought she was being efficient, and she was being efficient, in posting it that day. Indeed, it was received by the appellant and his partner the next day.

[115] It would have been helpful to the appellant if the licensee had kept in contact with EQC about its assessment of the property, but there seem to have been privacy issues over that. In any case, the appellant may have been able to make such contact himself.

[116] Perhaps also with hindsight, the licensee should have pressed Ms Collier more about the EQC situation but, just prior to the sale to the appellant and his partner, the licensee carefully went through a new listing agreement and its warranties and was assured by Ms Collier that there had been no material change to the situation.

[117] Also with hindsight, it would have been better if Mrs Ashmore-Smith had realised throughout the negotiations between her, Ms Collier, and the appellant over 22 Bretts Road, Christchurch that, if possible, the appellant felt it would be very helpful for his strategy to have the EQC report before he committed himself to the purchase. On the other hand, at that time such EQC reports were not thought to be particularly important and useful and, even in this case, it is not at all clear whether the appellant would have obviously needed to change his strategies had he received the report on 5 December 2011 rather than the next day.

[118] With regard to other rather peripheral matters raised, such as whether franchisees of Harcourts were precise enough about the siting of properties in the correct suburbs for advertising purposes, that seems to be a vendor or prospective purchaser issue relating to other cases. Most people would expect some type of puffery in real estate advertising but, of course, not to the extent of a misrepresentation. Generally, a prospective purchaser of real estate would be expected to see through any such puffery and would merely need to raise such a question (as to the appropriate suburb) with his or her lawyer.

[119] Despite the extent of the hearing in this case and the extent of submissions, we do not find misconduct of any type nor, in the context we have covered above, do we find even unsatisfactory conduct on the part of any licensee for reasons which we have covered above.

[120] Although it is not part of our reasoning, it seems very doubtful to us that obtaining the EQC report earlier than he did would have deterred the appellant from purchasing Bretts Road or affected the price available and, at that time, such reports did not seem to be regarded as particularly important to prospective purchasers. Such reports might be quite helpful to a prospective purchaser although, in this case, the report gave an assessment of earthquake damage but no indication of what the owner could expect to be covered by the EQC nor an indication of repair costs. As we understood the evidence in this case, the appellant is quite knowledgeable about such matters and had taken them into account from the outset in his offer price. Also, the appellant was given every chance to withdraw from the purchase. He was even offered a $10,000 reduction in price with the understandable commercial tag that, because it flowed from a reduction in commission, he would take no action in the civil courts with regard to the complaints he had then formulated against

licensees. It is troubling that the appellant has become so stressed over the matters we have covered above and put so much time and effort into pursuing issues which have not been proved, and probably cannot be, and do not seem to be of much merit in any case.

[121] For the above reasons, this appeal is dismissed.

Name Suppression?

[122] On 17 June 2014 the appellant applied to us under s.108(c) of the Act seeking full name suppression for himself and for Ms Kirsty-lee Brace-Girdle on the grounds of being entitled to personal privacy for themselves and their children. The appellant describes Ms Brace-Girdle and himself as victims and *"unwilling participants throughout this whole ordeal"*. He adds: *"the publication of our names in relation to this fraud could affect us in the present, and also in the future. As well as having a detrimental effect on our business and careers further down the track, especially given the way society has evolved and anything published on the internet is there forever, and would show up in searches such as Google, Yahoo etc. This is why we request permanent name suppression."*

[123] In response from the Authority, Mr McCoubrey states that the Authority is content to leave the matter of name suppression to us but draws to our attention our statement in *Darling v REAA & Penrose* [2014] NZREADT 46:

> *"[68] There is a public interest in openness in judicial proceedings, whatever the facts of the particular case, and that interest is not outweighed by any agreement between the parties as to restricting publication. Where parties bring disputes before Complaints Assessment Committees and/or us, that must be on the basis that they are engaging in a public and open process and their names may be reported subject to good reasons for an order restricting that."*

[124] Mr Paulsen for records the licensee's opposition to the appellant's application for suppression under s.108 of the Act and also refers to the *Darling* case in putting it as follows:

> *"2. The principles to be considered on such applications are discussed in the decision referred to by counsel for the Authority, Darling v REAA & Penrose [2014] NZREADT 46 and also in An Agent v Complaints Assessment Committee [2011] NZREADT 02. Relevantly for present purposes these are:*
>
> *2.1. There is a presumption in favour of openness of judicial proceedings and against suppression of details of proceedings.*
>
> *2.2. The Tribunal has an unfettered discretion to make suppression orders where it is 'proper to do so'.*
>
> *2.3. Before it is proper to make such orders there must exist good supporting factors relevant to the application/other persons or the public interest justifying suppression.*
>
> *2.4. An order will not be made when that would undermine the consumer protection purposes in the Act.*

2.5. Applications that make vague references to prejudice or are unsupported by evidence will not be granted.

2.6. The Tribunal will not make orders based on concerns about how proceedings might be reported in the media or understood by impressionistic readers. Concerns about unfair or unbalanced reporting is to be dealt with by the regulatory authorities which govern the media.

2.7. Parties bringing disputes before the Tribunal must do so on the basis that they are engaging in an open process and that their names will be reported."

[125] Mr Paulsen also notes that the appellant has given no particulars of alleged detrimental effects publication may have on him and his family. He also submits that there are compelling reasons for publication in the present case and that is the starting point at law. He notes that the appellant has chosen to make very serious allegations of fraud and dishonesty against the licensee and other parties and even against other persons who are not parties. Mr Paulsen puts it that should we find these allegations unfounded then the licensee and the other parties and persons have a real interest in publication to effectively clear their names and maintain their reputations.

[126] Mr Paulsen also disputes that the appellant is an unwilling party to these proceedings and puts it he is not a *"victim"* (as the appellant has put it), but has willingly and purposively pursued these proceedings seeking a material advantage and he must accept the consequences of that if he fails.

[127] For the fourth defendant (Harcourts), Mr McDonald put forward no strong view about publication or otherwise of the name of the appellant's partner but felt that whether the appellant's name be published or not should depend in significant measure upon our findings. Mr McDonald put it that if we were to find that the appellant had been the victim of fraud, there may be a case for his name not to be published but, otherwise, if he has made unreasonable or untenable allegations against various people it is only right that his name be published. He also does not accept that the appellant has been an unwilling participant but puts it that the appellant is a person who has complained, appealed, and been anything but unwilling.

[128] Over the past year or so we have issued many decisions on the issue of name suppression, but we agree with the principles covered above under this head.

[129] Proceedings before us are generally open to the public and may be reported on. Under s.108 of the Act we may, however, make orders restricting publication of, among other things, the names of persons involved in proceedings.

[130] We considered the principles relevant to applications under s.108 in *An Agent v Complaints Assessment Committee (CAC 10028)* [2011] NZREADT 02. There we held that we had the power to make non-publication orders on appeals from decisions of Complaints Assessment Committees and we set out the principles to consider when determining whether to make such orders. Relevantly, we relied on *Lewis v Wilson & Horton Ltd* where Her Honour Elias CJ said at paragraph [41]:

> *"In R v Liddell … the Court of Appeal declined to lay down any code to govern the exercise of a discretion conferred by Parliament in terms which are unfettered by legislative prescription. But it recognised that the starting point must always be the importance of freedom of speech recognised by s.14 of the New Zealand Bill of Rights Act 1990, the importance of open judicial proceedings, and the right of the media to report Court proceedings: What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness."*
>
> [citations omitted]

[131] We went on to consider whether those principles were applicable to disciplinary proceedings. In doing so, we referred to the purposes of the Act, which focus on consumer protection, as well as other decisions referring to principles applicable to disciplinary tribunals and non-publication orders *Director of Proceedings v I* [2004] NZAR 635 (HC); *F v Medical Practitioner's Disciplinary Tribunal* HC Auckland AP 21-SW01, 5 December 2001; and *S v Wellington District Law Society* [2001] NZAR 465 (HC). In those decisions, the courts accepted that the principles referred to in *Lewis* were applicable to disciplinary tribunals.

[132] More recently, in *W v The Real Estate Agents Authority* (CAC 20004) [2014] NZREADT 9 at [17] we accepted that the starting point must always be publication because this reflects Parliament's intention in passing the Act.

[133] As regards the nature of any potential media reporting of proceedings, in *Ryan v REAA and Skinner* [2013] NZREADT 51, we confirmed that at paragraph [10]:

> *"… we are not in a position to make non-publication orders based on concerns about how matters "might" be reported in the media, or understood by "impressionistic" readers. Any concerns about unfair or unbalanced reporting must be dealt with by the regulatory authorities which govern the media."*

[134] There is a public interest in openness in judicial proceedings, whatever the facts of the particular case, and that interest is not outweighed by any agreement between the parties as to restricting publication. Where parties bring disputes before Complaints Assessment Committees and/or us, that must be on the basis that they are engaging in a public and open process and their names may be reported subject to good reasons for an order restricting that.

[135] It cannot be that a mere fear that publication might impact a licensee's business is enough to rebut the presumption in favour of openness. If that was the case, virtually all licensees appearing before us would be granted an order prohibiting publication of their name.

[136] There are no sufficient grounds in this case for abrogating from the principle of open justice. The appellant's application for name suppression is dismissed.

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

_____
Judge P F Barber
Chairperson

_____
Mr J Gaukrodger
Member

_____
Mr G Denley
Member