BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 75

READT 074/13

IN THE MATTER OF	an appeal under s.111 of the Real Estate Agents Act 2008
BETWEEN	**GARY AND VICKI WALLACE**
	Appellants
AND	**THE REAL ESTATE AGENTS AUTHORITY (per CAC 20006)**
	First respondent
AND	**MICHAEL AND SUSAN BAKER**
	Second respondents

MEMBERS OF TRIBUNAL

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

HEARD at AUCKLAND on 23 June 2014

DATE OF THIS DECISION 24 September 2014

COUNSEL

R Latton and A Hellaby for appellants/licensees
R M A McCoubrey for the Authority
B P Molloy and B P Kirwen-Jones for second respondent complainants

DECISION OF THE TRIBUNAL

Introduction

[1] Vicki and Gary Wallace ("the licensees") appeal against the 24 April 2013 decision of Complaints Assessment Committee 20006 finding them guilty of unsatisfactory conduct and that Committee's 8 November 2013 decision making penalty orders as detailed below.

Factual Background

[2] Michael and Sue Baker ("the complainants") retained the licensees to sell their property at 8 Ventnor Road, Remuera, Auckland.

[3] The parties initially met on 3 April 2012 when the complainants showed the licensees around the property and signed a listing agreement with the licensees. During this first meeting, the complainants provided the licensees with a copy of a list of *"specification details"* for the property which they wanted included in the marketing material for the property. The licensees soon produced a Comprehensive Property Report which included the specification details so provided by the complainants.

[4] Prior to various open homes for the property, the complainants say that there were communications between them and the licensees in relation to the wardrobes; but the licensees deny that.

[5] Following a series of open homes, a conditional sale and purchase agreement was entered into on 2 June 2012 by the complainants as vendors and certain purchasers.

[6] On the day of settlement, 27 July 2012, the licensees discovered that the wardrobes had been removed from the property, despite them and the purchasers believing that they were to form part of the sale. The purchasers therefore refused to settle the purchase.

[7] The complainants' maintained that the wardrobes did not form part of the sale. Ultimately, the complainants returned the wardrobes and settlement was completed.

[8] However, the complainants subsequently filed a complaint to the Real Estate Agents Authority alleging the following:

[a] First, that the licensees had failed to disclose to the purchasers of the property that three free-standing BoConcept wardrobes in the house were not included in the sale;

[b] Second, that the specification details, which the complainants had prepared to assist the licensees with marketing the property, were included without their consent in a report the licensees prepared and gave to the purchasers.

[c] Third, that a pre-settlement inspection by the purchasers took place without their prior notification, and the licensees contacted the purchasers' solicitor about the wardrobes without first speaking to the complainants.

The Committee's Decisions

[9] In its decision of 24 April 2013 the Committee found:

[a] Regarding the wardrobes, that the licensees should have taken more care and confirmed the exclusion or otherwise of the wardrobes, particularly, given they had been put on notice about the uncertain status of the wardrobes at an early stage. The licensees had not attached enough importance to the wardrobes, and did not clarify whether the wardrobes were fixtures or chattels. They breached their obligations to the complainants by not acting according to instructions;

[b] With regard to the licensees contacting the complainants' solicitor directly and a pre-settlement inspection taking place without the complainants

knowing, the Committee found that the licensees did not breach their duties and their actions were prudent and reasonable in the circumstances.

[10] The Committee did not seem concerned that specification details were provided to the purchasers, nor are we.

[11] Overall, the Committee found that the licensees engaged in unsatisfactory conduct.

[12] In its decision of 8 November 2013 dealing with penalty, the Committee ordered the licensees to supply to the complainants, at the licensees expense, the equivalent BoConcept wardrobes (estimated total value of $42,336 GST inclusive) and to pay the cost of transport and assembly of the wardrobes. Further, the licensees were ordered to pay a $500 fine.

This Appeal

[13] The licensees have appealed the finding of unsatisfactory conduct and the corresponding penalty in relation to the wardrobes. In particular, they claim that there was insufficient evidence before the Committee for it to determine that they should have been put on notice that the wardrobes did not form part of the sale.

Statutory Context

[14] Section 72 of the Act provides:

> *"**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."*

[15] Rule 9.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (the Rules) states:

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

Relevant Evidence for the Appellant Licensees

Evidence from Licensee Mr G D Wallace

[16] The appellants are husband and wife and work together as a real estate salesperson team selling high-end residential properties in Auckland's Eastern suburbs as employees of Bayleys Real Estate Ltd. They are award-winning salespersons.

[17] They first met with the complainant vendors on 3 April 2012. From then onwards, marketing proceeded in the usual way which included a thorough tour of the property at the initial meeting there as there were many features to consider. Mr Wallace does not recall any discussion regarding the wardrobes in the bedrooms during that tour, but many other matters were discussed by the licensees with the complainant vendors.

[18] It was clear to Mr Wallace that Mr and Mrs Baker had already given much consideration as to how they would like the property to be marketed and Mr Baker had prepared his specification for that. The property was described to the licensees as very technical with a lot of unusual features and high end materials. At the end of that tour, the parties discussed putting that specification into a Comprehensive Property Report for the property, because it was the licensee's standard practice to produce such a report when listing a property.

[19] The complainant vendors wished to sign a listing agreement that very evening at the end of that discussion and tour, and that was done. Inter alia, Mr Wallace stated that, after a listing agreement is signed, it is standard practice for Bayleys to draft a sale and purchase agreement from that and any chattels which have been specifically excluded from the sale by the vendor are then listed on the draft agreement as excluded.

[20] Mr Wallace also states that, ordinarily, wardrobes (unless they are tallboys or something similar) are classed as fixtures, not chattels, and unless agents are advised otherwise, wardrobes will form part of a sale. He said that there was nothing which indicated to him that the BoConcept wardrobes, in the bedrooms in this particular property, were any different from usual, and they appeared to him to be fixtures so that they were not listed as chattels or excluded from the sale. He said that, if the licensees had been advised that the vendors wished to retain the wardrobes, they would have been listed on the agency/listing agreement as excluded from the sale. He also said that, in the present case, he felt there was no need to check whether the wardrobes were fixtures or chattels; because of the specification provided to the appellants by Mr Baker which was designed to let prospective purchasers know what they were purchasing. In that specification, under the heading, *"Internal Specification & Structure"*, there was reference to wardrobes as *"Master dressing room with built-in cherrywood wardrobe and drawers by Laustsen Cabinetmakers. Bedrooms – BoConcept wardrobe systems"*.

[21] Mr Wallace also stated that he thought it to be very clear that the wardrobes were to form part of the property being sold. He also states that he is sure the complainants did not say to him and/or Mrs Wallace, that the wardrobes might not form part of the sale. He added that, if they had said anything like that, he would have made a written note of it.

[22] In a detailed coverage of communications between the complainant vendors and the licensees, Mr Wallace also stated that at further meetings there was no discussion about the wardrobes or any other fixtures or chattels and that Mr Baker had been meticulous in checking the marketing arrangements and the advertising organised by the licensees.

[23] Late in the settlement day of 27 July 2012, Mr Wallace ascertained from Mrs Wallace that the vendors had removed the BoConcept wardrobes from the property but the purchasers believed that the wardrobes were to form part of the sale. Mr Wallace explained to her his understanding that the wardrobes were to be included in the sale *"as they were included in the specification document provided by Mr Baker"*. He said this was the first time he had heard anything to the effect that the vendors did not want the wardrobes to form part of the sale. He then immediately contacted Mr Baker and explained that the wardrobes were included in the specification document which he had provided to the licensees on 3 April 2012. He then also contacted the vendors' solicitor to that effect. The purchasers also asked him to explain the situation to their solicitor and provide a copy of the specifications. Mr Wallace then suggested to the purchasers' solicitor that an option was to settle but withhold an appropriate sum from settlement proceeds until the wardrobe issue was clarified. However, eventually the vendors, through their solicitor, undertook to return the wardrobes and settlement took place on 27 July 2012 as planned. At that point Mr Wallace thought that was the end of the dispute.

[24] Mr Wallace also stated that the vendors had said to him that the wardrobes were being sold so that he did not need to decide whether or not they were chattels. Mr Wallace also added that the wardrobes were huge and very difficult to move and once installed really needed to be taken apart for any removal. It was put to him that the vendors were not to know that he thought the wardrobes were being sold and Mr Wallace emphasised that he relied on the specification provided by Mr Baker.

[25] Mr Wallace also remarked that he and his wife had achieved *"a fantastic result"* in terms of the sale price for Mr and Mrs Baker as vendors.

[26] Mr Wallace was thoroughly cross-examined by Messrs Molloy and McCoubrey.

Evidence from Mrs V M Wallace

[27] In thorough typed evidence-in-chief Mrs Wallace confirmed the above events. She added that, to her, the wardrobes looked *"fitted and kept with the design of the property"*. She also added that, at one of the open homes for the property, she had noticed that one of the wardrobes was taped shut; but she thought that to be not unusual as *"often vendors do not like the thought of prospective purchasers looking through their belongings, and take steps to keep wardrobes closed."*

[28] Mrs Baker also observed that the wardrobes appeared to be built-in, and the feet on which they stood were not apparent unless one got down on one's hands and knees. It never occurred to her that the wardrobes were not fixtures. She also remarked that they did not appear to be anywhere near as valuable as the award against the licensees by the Committee.

[29] Of course, Mrs Baker was also carefully cross-examined by Messrs Molloy and McCoubrey.

The Evidence from the Second Respondents/the Complainant Vendors

Evidence from Mr Baker

[30] Mr Baker fully covered the general thrust of the above evidence. He put it that the three BoConcept wardrobes were furniture and *"there was everything to indicate that they were not fixtures/attached to the house"*. He stated that these wardrobes looked different from the walls and were not recessed nor attached to the walls, and sat on the carpet and skirting boards. He said it was the vendors' expectation that, if they were to be included in the sale, they would be included in the *"chattels list"* part of the sale agreement but that was not so and, accordingly, he believed it clear that the vendors were keeping those BoConcept wardrobes.

[31] Mr Baker stated, inter alia, that he did not provide the specification on the basis that its content would be included in a Comprehensive Property Report to be provided to potential buyers. Also, he emphasised that he and Mrs Baker had stressed to the licensees that they wanted to sign-off on all marketing material, and that the licensees agreed to that.

[32] Mr Baker also said that, during the tour of the property given to the licensees on 3 April 2012, the vendors mentioned that their architect had had a philosophy of not wanting built-in wardrobes so that they had added the free standing BoConcept wardrobes in some of the bedrooms. He added that, for a time, the vendors had not agreed between themselves whether to keep the wardrobes as Mrs Baker wanted to keep them but Mr Baker was unsure; and they had told that to the licensees and Mr Wallace responded that view was fine as *"you can let us know your decision later"*.

[33] Inter alia, Mr Baker referred to the issue about the wardrobes which arose at settlement on 27 July 2012. He said that he and Mrs Baker had proceeded towards settlement on the basis *"of our clearly expressed intention that the wardrobes belong to us. To this end, we had our wardrobes packed-down and moved into storage"*. When Mr Baker learned late on 27 July 2012, the settlement date, that there was an issue as to who owned the wardrobes, he telephoned Mr Wallace who informed him that the wardrobes had to be returned as they were part of the sale. Mr Baker responded that they were free-standing and could not be part of the sale. He then ascertained that Mr Wallace had told the purchaser's solicitor that he, Mr Wallace, believed the wardrobes were part of the sale. Mr Baker was surprised and disappointed as he put it *"that Gary would prejudice our position in this matter. I was also extremely unhappy that Gary would contact the purchaser's solicitor without talking to me first."* He concluded his evidence as follows:

> *"6.1 We stated at multiple times during the sale process that we wished to retain the wardrobes. We also made it very clear to the Wallaces that we wished to approve all marketing material. Neither of these wishes were complied with by the Wallaces.*
>
> *6.2 We paid just under $100,000 for the assistance of the Wallaces in selling our home. We were entitled to expect greater professionalism and attention to detail than what we received*".

[34] In a later brief of evidence Mr Baker stated as follows:

> *"I, MICHAEL JAMES BAKER of Auckland, Medical Specialist and Company Director, state:*
>
> 1. *On 28 May 2012 I sent an email to Gary Wallace. In this email I thanked Gary for supplying copies of the Bayleys' Comprehensive Property Report ("BRPD") at the conclusion of the first open home evening. This was the first time I had seen these documents.*
>
> 2. *I requested two changes to be made to the specifications included in the BRPD. These related to the house floor area and the size of the Miele oven. I did not request the BoConcept Wardrobes ("the Wardrobes"), listed in the internal specifications, be removed. I did not request they be removed because firstly, we had already informed the appellants that the Wardrobes were not to be included in the sale. I believed the Wardrobes were already excluded. However I also did not request the Wardrobes be removed as they were chattels. As such, I believed that if they were to be included, they would have been included in the chattels list at the front of the PRPD. The Wardrobes were not included in this list.*
>
> 3. *The appellants charged us $100,674.25 for their services (including GST). A copy of the appellants' invoice is attached to this statement and marked 'A'.*
>
> 4. *BoConcept provided a valuation of the Wardrobes via email to Susan Baker in August 2012. BoConcept valued the Wardrobes at $42,336 (including GST). A copy of this email is attached to this statement and marked 'B'.*
>
> ***DATED** this 8th day of June 2014"*

Evidence of Mrs Baker

[35] Mrs Baker is a physiotherapist. She confirmed Mr Baker's evidence to the extent that she had knowledge of the relevant events.

[36] Mrs Baker added that, on 4 May 2012 which was a few days prior to the beginning of the open home period, she showed potential buyers through the home together with Mrs Wallace. When they were showing one buyer through one of the bedrooms, that prospective buyer opened one of the BoConcept wardrobes but then Mrs Baker says she immediately informed that prospective buyer that the wardrobes were not included in the sale. Mrs Baker asserts that Mrs Wallace was present in the room when she said that.

[37] Mrs Baker also said that she had taped closed all three BoConcept wardrobes for the open homes but not the built-in cherrywood wardrobes in the master bedroom. She said she did this to prevent people inspecting the BoConcept wardrobes and with a view to confirming that they were not to be included in the sale.

[38] Mrs Baker also gave evidence about not expecting a presettlement inspection by the purchasers. It was during that when the purchaser noted that the BoConcept wardrobes had been removed. Mrs Baker then continued:

> *"Vicki said that the purchaser will not settle without the wardrobes. I was surprised at this as Mike and I had told the Wallaces on multiple occasions that the wardrobes were not included in the sale. I told her three times that if they were to be part of the sale they needed to be listed as chattels. The last thing I said to her was that we don't agree on this and we need a legal opinion from a lawyer. I told Vicky I was not happy with her I was annoyed that Vikki prejudiced our position in front of the purchaser. I understood the agents were meant to be acting in our best interests, not the purchasers. They had told us this on multiple occasions during the marketing process."*

The Stance of the Appellants

[39] Mr Latton submits for the appellants that this appeal turns on three major disputes of fact:

[a] First, whether or not the Barkers discussed the wardrobes with the Wallaces during the initial meeting on 3 April 2012, and whether the Wallaces had thereby been put *"on notice"* that the wardrobes were not likely to be included in the sale of the property;

[b] Second, whether at a subsequent meeting at the property the Bakers told the Wallaces that they had decided to keep the wardrobes, and that they were not to be included in the sale; and

[c] Finally, whether the Bakers told the Wallaces that the list of specifications, which Mr Baker had prepared, was only for discussion purposes and for preparing the tri-fold marketing brochure, and was not to be included in its entirety with the marketing material for the property.

[40] Mr Latton also puts it that, aside from the written evidence-in-chief, there is no evidence that definitively answers any of the above three issues; and credibility needs to be determined by us with reference to all the evidence. Mr Latton noted that there have been briefs of evidence filed in this appeal by Gary and Vicki Wallace, and Michael and Susan Baker; and that the Wallaces' recollection of events is at odds with the Bakers'.

[41] Mr Latton submits that the questions for us are: did the Bakers put the Wallaces on notice at the 3 April 2012 meeting; and did they subsequently tell them that the wardrobes were not included? Mr Latton puts it that if they did either of those, then it is conceded that the appeal cannot succeed; but if they did not, then the appeal must succeed.

[42] Mr Latton points out that the Bakers gave the Wallaces a specification document in circumstances which would make any reasonable real estate agent (or, indeed, person – he puts it) think that the wardrobes were included in the sale. He submits that in the absence of a finding that the Wallaces were told that the wardrobes might not or would not be part of the sale, the appeal must succeed.

[43] Both the Wallaces and the Bakers agree that an initial meeting took place at the property on 3 April 2012. However, the Wallaces are certain that there was no discussion about the wardrobes at this meeting.

[44] The Wallaces returned to the property several times following the initial meeting. They say that at no time did any discussion regarding the status of the wardrobes take place.

[45] There is also a disagreement about the purpose of the specification list provided by Michael Baker. Both Gary and Vicki Wallace recall being told that the specification list was to be provided to prospective purchasers to help them understand what they would be getting if they purchased the property.

[46] Mr Latton submits that the Wallaces' version of events is reinforced by that specification list provided by Michael Baker. Michael Baker had prepared this list prior to the initial meeting on 3 April 2012. It is put that, if viewed in isolation, the specification list clearly includes the wardrobes in the sale. He puts it this is further supported by the Wallaces' evidence that Michael Baker explained that he had recently viewed a property that had provided a list of specifications, and thought it was a great marketing tool. It is the Wallaces' evidence that the Bakers specifically asked for the list of specifications to be included in the marketing for the sale of the property.

[47] It is undisputed that by 28 May 2012, the Bakers were aware that the specification list had been provided with the CPR for the property. After reviewing the CPR, Michael Baker advised the Wallaces that he had picked up on two minor errors which he asked Gary Wallace to remedy. Mr Latton submits that it is difficult to see why, if the Wallaces had been specifically told not to include the specifications list with the CPR, the Bakers would not have questioned its inclusion at this time.

[48] Mr Latton also submits that the evidence also shows that the Wallaces were cautious about the inclusion of items in the sale. He puts it that Vicki Wallace's evidence shows an example of how the appellants specifically asked questions about items where there was ambiguity about whether or not they were part of the sale. Vicki Wallace asked the Bakers whether an item of furniture which Vicki Wallace described as a *"free-standing unit on wheels"* was to be included in the sale. Although this unit did not look like a fixture, Vicki Wallace said that it did look as though it had been built for the property so thought it best to check with the Bakers who advised that this unit was not to be included in the sale, which was why it was not listed in Mr Baker's specifications list.

The Stance of the Second Respondents

[49] For the second respondents, Messrs Molloy and Kirwen-Jones make the following submissions about facts:

[a] The second respondents told the appellants that the wardrobes were not to be included in the sale;

[b] Alternatively, the appellants were put on notice that the wardrobes were not fixtures and should have enquired further; and

[c] In these circumstances, the appellants should have obtained an agreed inventory of chattels to be included in the sale contract but failed to do so.

[50] Mr Molloy submits that the above facts support findings of unsatisfactory conduct under s.72 of the Act in that:

[a] The appellants' failure to act on the second respondents' express request to exclude the wardrobes was incompetent conduct under s.72(c) of the Act;

[b] Alternatively, the appellants' failure to enquire further as to the wardrobes, or prepare an agreed inventory of chattels, was negligent under s.72(c) of the Act; and

[c] Given the complexity of the property and the fee paid to the appellants, the failure to exclude the wardrobes for the reasons above fell below the standard of conduct that the second respondents were entitled to expect from licensed real estate agents under s.72(a) of the Act.

[51] It is submitted for the complainants that the appellants should have taken greater care to identify which items were to be included in the sale and which were not; and that reasonably competent real estate agents would have taken greater steps than did the appellants in this case. Here, the appellants specifically asked as to the status of some items, but made assumptions in relation to others, such as the wardrobes. It is put that one way in which the appellants could have been certain as to the status of each household item would have been to obtain a comprehensive list, signed by the second respondents, setting out which items were included in the sale.

[52] It is submitted for the complainants that it is common practice for Bayleys' real estate agents to obtain such an agreed list. These standard Bayleys' documents are entituled *"Bayleys Residential Property Description"* ("BRPD") and contain a large number of 'tick boxes' which allow the property being sold to be fully defined or detailed. The furthermost right-hand column is headed *"chattels"* and contains a list of checkboxes for items such as blinds, light fittings, and security systems. It also contains a box entitled *"See notes"* which would allow items not printed on that list to be further defined in the *"notes"* section. It is submitted to be common practice for Bayleys' licensees to obtain signed completed versions of the BRPD and noted that the appellants rely on these as evidence of their attention to detail in respect of their clients' chattels. Unfortunately, the second respondents' approval and signature of the BRPD was not sought in respect of this sale, and it is asserted that it was prepared by a Bayleys employee.

[53] Mr Molloy notes that Gary Wallace stated that the wardrobes were not included in the chattels list *"because they were not chattels"*; and puts it this is a further unwarranted assumption which the appellants could have avoided making had they obtained a signed BRPD completed by the second respondents.

[54] It is submitted by Mr Molloy that a BRPD signed and sighted by the second respondents would have resolved the confusion as to the wardrobes, or at least provided a firm basis for the appellants' understanding of what was included in the sale; and, therefore, a reasonably competent real estate agent would have ensured that this document was signed by the vendor client. It is further submitted that the

failure to obtain a signed BRPD, or a similar approved inventory, represents unsatisfactory conduct by the appellants.

[55] Mr Kirwen-Jones also gave us a final oral summing-up for the complainants which related to the evidence before us.

The Case for the Authority

[56] Mr McCoubrey submits that there is one factual issue for us to determine i.e. what (if anything) the licensees were told or knew about the wardrobes. The complainants contend that they told the licensees that the free-standing *"BoConcept"* wardrobes were not to be included in the sale. The licensees deny being told this.

[57] The complainants have submitted that, on at least two occasions, they told the licensees that the wardrobes were not to be included in the sale, namely:

[a] On 3 April 2012, when the complainants first met the licensees at their property. During the tour of the property the complainants state that they told the licensees that they had yet to decide whether or not they wanted to sell the wardrobes with the property or take them with them when they moved;

[b] On 4 May 2012 during a pre-open home tour, the complainants state that a potential purchaser attempted to open one of the wardrobes and Ms Baker informed them, in the presence of the licensees, that the wardrobes were not included in the sale.

[58] Mr McCoubrey notes that the complainants argue that the wardrobes were clearly chattels and not fixtures and, therefore, if they were to be included in the sale they would have been listed in the chattel section of the sale and purchase agreement.

[59] In the alternative, the complainants argue that the licensees were, at least, put on notice that the wardrobes were potentially chattels, and not fixtures, and therefore could not be assumed to be included in the sale.

[60] The complainants also pointed to the wardrobes in question being taped shut during the open homes, compared to a wardrobe that was to be included in the sale not being taped shut.

[61] Mr McCoubrey notes that the complainants submit that a competent real estate agent would have clarified the issue of the wardrobes with the vendors; but in contrast, the licensees state that they were never told about the wardrobes not being included in the sale. They say that they are sure there was no discussion of the wardrobes during their initial tour of the property on 3 April 2012. Ms Wallace has given evidence that she was not privy to any discussion of wardrobes on 4 May 2012, when two prospective buyers were taken through the property.

[62] It is also the licensees' evidence that the wardrobes appeared to be fixtures which is why they did not list them as chattels. Mr Wallace further states that, if the complainants had told him not to include the wardrobes for sale, he would have made a specific note of this, and the fact that he did not shows that they made no such statement to him.

[63] Ms Wallace admits that she noticed that one of the wardrobes was taped shut during one of the open homes. However, she says that she did not see this as unusual because this is often done by vendors to stop prospective purchasers looking through their personal belongings.

[64] Mr McCoubrey noted that to further support the licensees' evidence, they have each referred to the specification that Mr Baker gave to them at the initial meeting and, on this specification, the BoConcept wardrobes are listed in reference to the bedrooms.

[65] Finally, Mr McCoubrey points out that the penalty orders are appealed by the licensees but if the prior finding of unsatisfactory conduct is wrong, no penalty could be ordered.

[66] The orders made by the Authority were for the licensees to:

[a] Supply, at their own expense, equivalent BoConcept wardrobes and pay the cost of transport and assembly; and

[b] Pay a fine of $500 to the Authority.

[67] It is submitted for the Authority that if the unsatisfactory conduct finding is correct, then these orders were open to the Committee pursuant to s.93(1)(f)(ii) of the Act as interpreted by *Quin v the Real Estate Agents Authority* [2012] NZHC 3557. The licensees have not challenged the penalty order itself and any effect of *Quin* was not canvassed before us; but the Committee took *Quin* into account.

DISCUSSION

[68] All the witnesses seem honest and competent people, but we do not need to decide this case in terms of credibility. Nevertheless, we found the complainants' evidence more compelling.

[69] It seems to us that this dispute arose because the licensees wrongly understood that the particular wardrobes were fixtures and passed with the property when, in fact, they are chattels and were not listed in the sale contract as being sold.

[70] The BoConcept wardrobes are not affixed to the structure of the home in any way and are freestanding. True, at first glance they may appear to be affixed to the property and fitted into its design, but that is not so on any type of sensible inspection.

[71] Also, the licensees seem to have been wrong-footed by the detailed specification provided to them by Mr Baker which, understandably, they might have thought was designed to let prospective purchasers know what they were purchasing. Even if that were so, the BoConcept wardrobes should have been listed as chattels.

[72] This seems a case of neither of a husband and wife team of highly skilled and experienced real estate agents examining the wardrobes carefully enough to realise that they were free-standing on feet.

[73] It is elementary that a real estate agent carefully ascertain what it is that he or she has been briefed by the vendor to sell.

[74] The appellants' listing form mixes up chattels and fixtures and the licensees should have carefully checked out with the vendors whether or not the BoConcept wardrobes were to be sold. It seems to us that the purchasers acquired the wardrobes when they should not have, because they were not listed as chattels passing in the sale and purchase transaction.

[75] We observe that, because of the licensees' personal confusion between the concepts of chattels and fixtures, they prejudiced their vendor clients at settlement when indicating to the solicitor for the purchaser that the wardrobes were fixtures and needed to be provided by the complainant vendors to their purchasers.

[76] In terms of the reimbursement ordered by the Authority, we accept that BoConcept wardrobes are very upmarket and expensive at retail but the wardrobes now in issue were not being purchased new at retail, but are secondhand goods. We can accept that an estimated general value as about $2,500, provided to the appellants by a well-known auctioneer for the three wardrobes, is realistic for a routine auction sale of household goods; but the wardrobes in question must be marketable at a specialised furniture auction although, of course, not as antiques. Nevertheless, it would be surprising if an auction of those three wardrobes achieved more than $10,000 in total.

[77] This is simply a case where two very experienced agents, husband and wife working as a team, overlooked clarifying whether household furniture items were to be included in the sale price of realty. It seems this came about because one may have left it to the other to clarify whether the wardrobes were fixtures or chattels and, in any case, each licensee honestly, but erroneously, thought that these wardrobes were fixtures and so passed with the structure of the house in the sale transaction.

[78] As already indicated above, these wardrobes could not be regarded as worth their apparent retail cost price (as new) of about $42,000 when being viewed as second-hand goods. However, we think it inappropriate to regard them as household goods for a standard weekly auction sale. We would expect them to have a fair and sensible market value of about $10,000 for the three wardrobe items. As there is no proper expert evidence of their value before us, we reserve leave to apply (for one month from the date of this decision) in terms of adducing such evidence if our $10,000 figure is contested.

[79] We consider that the Committee was correct to find the licensees guilty of unsatisfactory conduct but we reduce the replacement order to $10,000 subject to further evidence being adduced on market value of the wardrobes. We understand that the complainants have had their $100,000 sale commission liability reduced by $10,000. That is a commendable approach by the agency and the licensees.

[80] We repeat, for emphasis, that it is fundamental that licensees carefully establish whether or not the contents of a property are to pass with the sale and to what extent. In this case, two highly skilled licensees overlooked being careful about this requirement.

[81] We observe that there is the factor that the vendors (also very intelligent people) could have been more precise in briefing the appellants in the detail provided

and could have clearly explained to the licensees that these three BoConcept wardrobes were not to be included in the sale. We take that factor into account.

[82] One might have thought that, absent a representation to the purchasers or a compelling inference, the purchasers have acquired the wardrobes by mistake so that they might be recoverable by the complainants in civil litigation.

[83] We agree with the reasoning of the Committee. The licensees should have taken more care in ascertaining whether the wardrobes were to pass in the sale as part of the sale price. Accordingly, we confirm the Committee's finding of unsatisfactory conduct against each licensee, but we reduce the reimbursement order as set out above; also, we impose a fine of $500 against each licensee to be payable to the Registrar of the Authority at Wellington within 15 working days of this decision.

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

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Judge P F Barber
Chairperson

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Mr G Denley
Member

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Ms N Dangen
Member