

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2014] NZREADT 91

READT 019/14

IN THE MATTER OF

an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN

**M D COTTLE FAMILY TRUST
and McBRIDE STREET CARS
LTD**

Appellants

AND

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

First respondent

AND

TIMOTHY BARNETT of Dunedin,
Real Estate Agent

Second respondent

READT 020/14

IN THE MATTER OF

an appeal under s.111 of the Real Estate Agents Act 2008

BETWEEN

TIMOTHY BARNETT of Dunedin,
Real Estate Agent

Appellants

AND

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

First respondent

AND

**M D COTTLE FAMILY TRUST
and McBRIDE STREET CARS
LTD**

Second respondent

MEMBERS OF TRIBUNAL

Judge P F Barber - Chairperson
Mr G Denley - Member
Ms C Sandelin - Member

BY CONSENT HEARD ON THE PAPERS

DATE OF THIS DECISION ON JURISDICTION

18 November 2014

APPEARANCES

The appellants in 019/14 (and second respondents in 020/14), on their own behalf
Mr C S Withnall QC, counsel for second respondent licensee in 019/14 (and
appellant in 020/14)
Ms N Copeland, counsel for the Authority

**DECISION OF THE TRIBUNAL REGARDING ITS JURISDICTION
ON THIS APPEAL*****Introduction***

[1] A 2 September 2013 decision of Complaints Assessment Committee 20002 found Mr Tim Barnett (“the licensee”) guilty of unsatisfactory conduct under the Real Estate Agents Act 2008 (“the Act”) and the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 (“the Rules”). M D Cottle Family Trust and McBride Street Cars Ltd (“the complainants”) appeal against that decision and the penalty orders (imposed in a later decision of the Committee as referred to below) and seek a finding of misconduct. The licensee has cross-appealed seeking dismissal of the complaints

[2] There is a dispute between the parties as to the scope of the appeal and cross-appeal. Submissions on that issue have been filed and we are asked to rule accordingly ‘on the papers’.

The CAC Decisions Being Appealed to Us***The CAC’s Substantive Decision***

[3] In its substantive decision of 2 September 2013, the Committee found that the licensee had engaged in unsatisfactory conduct against the complainants and that the licensee holds a licence as an agent and is employed by his real estate agency Timothy Barnett Ltd.

[4] In mid-2006 the complainants retained the licensee to sell their commercial property at 57 to 63 King Edward Street, Dunedin, and that property was listed with that agency. The complaint is about the conduct of the licensee during that sale process and, in particular, that he:

- [a] deducted (from the deposit paid) more money for commission than agreed to;
- [b] did not supply an agency agreement nor offer one;
- [c] did not supply an appraisal and pricing; and
- [d] did not make the vendors aware of the licensee’s obligations and does not supply such rules on his website.

[5] In the usual way in terms of the Act, the Committee conducted its hearing on the papers. In its said decision it set out the material facts as follows:

“Material Facts

- 2.1 *The licensee received a call in mid 2006 from the complainant [Mr Cottle] seeking his assistance to sell his commercial property at 57-63 King Edward Street, Dunedin for \$1 million plus GST. No agency agreement was completed nor was a comparative market analysis completed.*
- 2.2 *On 9 June 2007 the licensee presented an offer to the complaint for \$800,000 plus GST. There was a verbal agreement reached between the two for commission of \$10,000 plus GST payable on sale of the property. The sale did not eventuate as the complainant declined the offer.*
- 2.3 *On 10 January 2011 the licensee presented an offer for \$711,000 plus GST. There was apparently no formal discussion on commission. The sale did not eventuate as the complainant declined the offer.*
- 2.4 *On 31 August 2011 the licensee presented an offer for \$712,000 plus GST. There was no formal discussion on commission. A sale was concluded and a deposit paid on 13 October 2011 and commission of \$11,000 plus GST was deducted on 28 October 2011.*
- 2.5 *The complainant disputed the amount of commission and applied to the Disputes Tribunal with a claim for a refund of \$1,000 plus GST on the basis that the agreed commission was actually \$10,000 plus GST. The Tribunal ruled in favour of the complainant and ordered the licensee to refund \$1,000 plus GST. In their decision the Tribunal noted that whilst there was no listing agreement in place, the complainant Mr Cottle had accepted in his evidence that the licensee Mr Barnett should be paid a commission of \$10,000 plus GST. However, in his complaint to the Authority Mr Cottle is now seeking a full refund of the commission.”*

[6] As well as referring to the definition of “unsatisfactory conduct” in s.72 of the Real Estate Agents Act 2008 and to s.73 of that Act which defines “misconduct”, the Committee referred to Rules 8.1, 9.5 and 9.15 of the said Rules (which applied at material times) and which respectively read:

“8.1 An agent who is operating as a business must display these rules prominently in the public area of each office or branch, and provide access to it on every website maintained by the agent for the purposes of the business.

...

9.5 An appraisal of land or a business must be provided in writing to a client by a licensee; must realistically reflect current market conditions; and must be supported by comparable information on sales of similar land in similar locations or businesses.

...

- 9.15 *Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.”*

The Complaints Assessment Committee’s Penalty Decision

[7] In its decision of 15 January 2014 dealing with penalty, the Committee outlined the background and dealt with appropriate principles about the imposition of penalty in professional disciplinary proceedings. It fined the licensee \$2,000, ordered that he undertake a relevant educational unit (standard 4674), and censured him. In that penalty decision the segment of it headed “*Discussion*” reads as follows:

“3. Discussion

- 3.1 *The Committee in its determination of 2 September 2013 concluded that Mr Barnett engaged in unsatisfactory conduct in relation to a number of breaches of the Rules and Regulations as prescribed by the Real Estate Agents Act 2008; specifically: no agency agreement was completed, no appraisal of the complainants’ property was completed and no Real Estate Agents Authority Rules were listed on the licensee’s website.*
- 3.2 *The Committee carefully considered the complainants’ and licensee’s submissions and its response to each of these is addressed as follows:*
- 3.3 *Issue 1: Whilst the complainants allege that the Committee does not have jurisdiction to correct names, Section 84(3) of the Act does in fact provide the Authority with the ability to amend names of parties. Other than correcting the name of the complainants the Committee’s findings did not change and accordingly the Committee does not accept the complainants’ submission that the complaint should be reheard in the manner they describe.*
- 3.4 *Issue 2: Whilst the complainants seek a refund of the commission paid to the licensee, this matter has already been ruled on and settled by the Disputes Tribunal. The Authority noted in their determination that both the licensee and the complainants were in agreement that a commission of \$10,000 plus GST was agreed on, at least verbally, when the 2007 offer was presented.*
- 3.5 *Issue 3: Whilst the complainants seek reimbursement of the difference between the highest offer that the licensee is alleged to have kept from the complainants and the actual amount received from the sale, the Act does not provide the Committee with the ability to order such reimbursement. (Quin v CAC & Barras (2012) NZHC 3557).*
- 3.6 *Issue 4: Reimbursement of costs incurred by the complainants. The Committee did not see sufficient justification for such reimbursement in the complainant’s submission.*
- 3.7 *Issue 5: Whilst the complainants submit that a ‘public interest’ investigation be undertaken of the licensee’s business affairs it is the Committee’s view that they failed to provide any evidence other than the complaint upon which the Committee’s determination of unsatisfactory*

conduct was based, to support his aspect of the their submission. The Committee noted that the Authority had not identified any previous complaints made against the licensee. Accordingly in the absence of any evidence on which to base such an order the complainants' submission in this regard is declined.

- 3.8 *Issue 6: Whilst the licensee's solicitor in his submission has challenged the Committee's finding that the licensee did not provide an appraisal or an agency agreement, the Committee makes its determination based on information provided by the complainants and the licensee. In this case the licensee has already admitted that he completed neither an appraisal nor an agency agreement."*

The Scope of a Complaint

[8] Under s.11 of the Act, a person affected by a determination of a Committee may appeal to us against it by a written notice setting out the information which the appellant wishes us to consider. We must deal with the appeal by way of rehearing.

[9] In dealing with a substantive appeal, we should confine our findings to such matters as can fairly be said to be within the scope of the original complaint to the Authority; but that should be considered in light of the consumer protection purpose of the Act and take into account that most complainants are lay consumers.

[10] We addressed this issue in *Graves v REAA (CAC 20003) & Langdon [2012] NZREADT 66*, in which we confirmed that a complaint form should not be construed too narrowly nor viewed as if a formal pleading in civil proceedings. It is not necessary for complainants to particularise complaints so as to point to specific provisions of the Act and/or Rules allegedly breached.

[11] In *Wyatt v REAA and Barfoot & Thompson Ltd*, [2012] NZHC 2550, the High Court held (per Woodhouse J):

"[50] In my judgment the Tribunal was correct when it observed, in effect, that the enquiry on a complaint is not limited to individual paragraphs in s 72. In this case the enquiry can include the question raised by paragraph (a) as to whether the work in this case fell short of the standard that a reasonable member of the public is entitled to expect. Negligent work will be different from what is defined in paragraph (a) and negligent work will be different from incompetent work, being the other category of unsatisfactory conduct stated in paragraph (c).

[51] The underpinning for an assessment as to whether the work in question is unsatisfactory, in one or more of the ways defined in s 72, is s 3(1) which defines the purpose of the Act as follows:

The purpose of this Act is to promote and protect the interests of consumers in respect of transactions that relate to real estate and to promote public confidence in the performance of real estate agency work."

[12] What is necessary, when considering the scope of a complaint and what conduct may lead to disciplinary findings, is that a licensee is given proper notice as to what conduct is under review and an opportunity to be heard in response. The key issue is fairness.

[13] In *CAC v R* (CA 282/01, 20 June 2002), the Court of Appeal noted that the Medical Practitioners Act contained a number of indications that the original complaint should be broadly interpreted, in line with the overriding statutory purpose of protecting the health and safety of members of the public. The Court noted:

“We think that in cases like the present one the balance between those competing considerations [protection of the public and the practitioner’s right to know the allegations he or she faces] is to be found by asking what the reasonable reader or listener would understand to be the subject-matter of the complaint when considered as a whole and in the light of its lay authorship. We agree with Durie J that the complaint is not to be interpreted in any literal or legalistic way. It is the substance that matters. Reasonable inferences are not to be frustrated by limitations in expression. The document is to be read as a whole without preoccupation with particular words.”

[14] In *K v Real Estate Agents Authority* [2013] NZREADT 111 we considered that we were bound by the dicta in *CAC v R* and put it:

“[28] Having considered the careful submissions of counsel we consider that we are bound by the dicta in the decision of the Court of Appeal in CAC v R. The decision in Wyatt v REAA and Barfoot & Thompson Ltd provides that the Tribunal can consider the overall “question of Mr Ks obligations to disclose” in a wider context than just s 136. We have adopted this dicta in our finding under Rule 9.20. However we do not read Wyatt as enabling the Tribunal to consider a completely new breach of the Rules. In his complaint Mr N identified conflict of interest, nothing else. Therefore we make no finding on any other potential breaches of the Code of Conduct (Professional Client Care Rules).”

The Submissions for the Licensee about our Jurisdiction

[15] Mr Withnall’s overall point is that certain of the grounds of appeal raised by the complainant vendors are non-justiciable before us. He particularly referred to the Committee having (in its substantive decision of 2 September 2013) made a determination in respect of five issues as follows:

4.2 Issue 1: Dispute over commission charged by the Licensee.

This has already been ruled on and settled by the Disputes Tribunal. The Authority noted in their determination that both the licensee and the complainant were in agreement that a commission of \$10,000 plus GST was agreed on, at least verbally, when the 2007 offer was presented. The dispute had arisen following the sale of the property in August 2011. The licensee believed that he had proposed the additional \$1,000 plus GST to apply to any sale which may occur following a second offer being received. He does not say, however, that this was agreed to by the complainant and admits that this additional commission was never put in writing.

4.3 Issue 2: No agency agreement was completed

The licensee admits that neither an appraisal nor an agency agreement was completed by him. In his response both to the Authority and to the Disputes Tribunal he refers to relying on an agency agreement included in Clause 12 of the sale and purchase agreement. However, section 126 of the Real Estate Agents Act 2008, which specifies the payment of

commission, amongst other requirements, and Rule 9.8 of the Real Estate Agents (Professional Conduct and Client Care) Rules 2009, which prescribes what is to be included in an agency agreement, is much more than an acknowledgement in a sale and purchase agreement that an agent had effected the sale and was entitled to be paid for this. As a result of no agency agreement being completed there was no written agreement on the amount of commission payable which is a requirement under Rule 9.8(a).

4.4 Issue 3: No appraisal was completed.

Rule 9.5 requires an appraisal of land or a business to be provided in writing which must realistically reflect current market conditions; and must be supported by comparable information on sales of similar land in similar locations or businesses. The licensee admits he did not complete this as he was of the mistaken belief that commercial transactions did not require the same degree of compliance (as residential transactions).

4.5 Issue 4: No REAA Rules on the Licensee's website

Rule 8.1 requires an agent who is operating as a business to display the rules prominently in the public area of each office or branch and also provide access to it on every website maintained by the agent for business. The Authority viewed the licensee's website and noted that there is no reference to any REAA Rules or Code of Conduct and no mention of the licensee being licensed under the 2008 Act. In addition, the flyer the licensee provided for the property does not have any reference to being licensed under the Act as required by section 121 of the Act.

4.6 Issue 5: Non disclosure of the identity of a potential purchaser.

Although not included in the original complaint the complainant has added another complaint. This relates to an alleged non-disclosure of the identity of a potential purchaser (Calder Stewart) and an allegation of a conflict of interest by the licensee. The complainant has said that he specifically asked the licensees if a potential purchaser was Calder Stewart and states that the licensee said "no". The licensee disputes this and has stated in his response in May 2013 "at no time during the sale and purchase agreement negotiations did Mr Cottle ask if the purchaser was Calder Stewart. He had mentioned during a meeting in 2007-2008 that he had spoken to Calder Stewart. I advised him that I had been actively working with them too". He added "if there had been a request for further information about a purchaser or the identity of the purchaser during negotiations, I would have provided the information. I was consented to provide and sought leave to obtain agreement to provide any further information. There was no inquiry made by Mr Cottle as to who the purchaser may be."

[16] Mr Withnall then noted that the Committee found that issue 1, about quantum of commission charged by the licensee, had been determined by a Disputes Tribunal and therefore found against the complainants.

[17] Mr Withnall noted that on issues 2, 3 and 4 it found against the licensee but, on issue 5 it found against the complainants and, on that basis, determined that the licensee was guilty of unsatisfactory conduct.

[18] Mr Withnall submits that it is unclear what determination or determinations of the Committee the appellant complainants now seek to reverse or modify, “*or whether the appeal is not against the determination under s 89(2)(b) but against the orders which the Committee either made or refused to make*”. Mr Withnall submits that “*on its face, the appeal seeks to go outside the issues which were properly before and were determined by the Committee*”. He puts it that if we treat each of the five issues as a separate complaint then, on issues 2, 3 and 4, there can be no appeal because the complainants succeeded on those issues. We agree that the complainants cannot appeal those issues 2, 3 and 4.

[19] Mr Withnall also puts it that the decisions on issues 1 and 5 could be treated as determinations under s.89(2)(c) of the Act that no further action be taken. That is a logical conclusion.

[20] Accordingly, Mr Withnall submits that on such a basis the only appeal which could lie is an appeal against the “*determination*” on those two issues (i.e. 1 and 5) and that all other matters raised do not come within the scope of an appeal.

[21] Mr Withnall also puts it that in the complainants’ notice of appeal, which is amplified by a memorandum for them filed by a Mr R McDougall as a trustee of the M.D. Cottle Family Trust, the complainants seek a general enquiry into the licensee’s conduct of his business and an audit of his business. Mr Withnall submits that those aspects are clearly outside the scope of the Committee’s decision and, accordingly, outside the scope of the appeal to us. We agree.

[22] Mr Withnall then referred to various claims put to us in written submissions for the complainants, namely, that the Committee process was vitiated by clerical error in the original Committee decision which wrongly recorded the name of the complainants; that the Authority has breached various duties to prosecute; that there are various claims from the complainants of unlicensed trading by the licensee and, as Mr Withnall puts it, “*including attempting to make an issue of the grant of a license to Tim Barnett Realty Ltd in 2014 – after the date of the events to which the complaints relate and after the date of the Committee’s decision. Much of this is because of a failure to understand the concept of a licensed agent – the licensee – carrying on business through a company or under a trading name*”. These various claims seem to us to lack merit and, in any case, have insufficient nexus to the justiciable issues we outline below.

[23] Mr Withnall then notes that the complainants assert that the licensee has channelled commissions to his company; and complain that the hearing before the Committee was conducted on the papers. Mr Withnall submits that none of those complaints form part of the Committee’s determinations against which the complainants are entitled to appeal. We agree. He also submits that we should rule that the appeal before us must be limited to an appeal against the Committee’s decisions on issues 1 and 5 referred to above, including any matter which directly relates to either of those issues. Our views are not so restricted, as we explain below.

The Submissions for the Complainants

[24] It is submitted for the complainants that the Committee made only one specific determination, namely, that of unsatisfactory conduct pursuant to s.89(2)(b) of the Act; that the complainants made several complaints, as referred to above, but the Committee treated them as contributing issues towards its single determination rather than treat them as separate complaints and issue a determination for each one; and that the Committee, therefore, erred in not making a formal determination for each complaint, although it can be inferred these became separate determinations to take no further action on each complaint.

[25] The complainants put it that, if each of their complaints is treated as a separate determination, that would simplify the appeal process *“as there appears to be not too much disagreement on some complaint matters”*. They now argue that there is a pattern of offences which, in total, amount to misconduct and it would simplify *“that process”* if each complaint is treated as a separate determination and is important that we rule on each one.

[26] The complainants seek clarification as to whether there has been a single determination or whether each complaint can be treated as a separate determination. They put it that if we confirm there should be separate determinations for each complaint, and that there have been by the Committee, they wish to now focus submissions complaint by complaint because they feel that would more clearly define the scope of the appeal. We deal with that approach below.

[27] The complainants submit that their appeal to us relates to all determinations issued by the Committee. They argue that Mr Withnall has not clarified which determinations the licensee is appealing against and, accordingly, they apply to have the licensee’s cross-appeal struck out on the basis that he does not appear to be appealing any determinations of the Committee.

[28] The complainants then seem to claim some type of procedural bias as being unfair to them, apparently, relating to timetabling. We find no merit in that. In any case, any hearing before us is a rehearing de novo, which will overcome any so-called procedural unfairness at Committee level.

[29] The complainants maintain that this matter has become a legal mess *“as regards the status of the parties”* which they seem to think may limit our jurisdiction. It is then put for them:

“20. We have arrived at this point of complexity because the REAA did not correctly identify the existence of the agency company and alert us to amend our complaint neither did it alert us that the agency was unlicensed for the entire period since the commencement of the Act to after the Committee decision.”

[30] The complainants’ submission seems to be that the Committee had no jurisdiction over an unlicensed agency and should have referred the issue *“for a full investigation to the Disciplinary Tribunal”*. The complainants then continue:

“24. To demonstrate our point we discuss the complaint that Mr Barnett did not have an agency agreement and thus has no entitlement to commission. Because we had never been given an agency agreement or the in-house

complaint procedure we had no idea of the existence of the company or that it was unlicensed.

25. *Had the agency company been licensed then this complaint should have been separated into the responsibility of the agent to execute an agency agreement on behalf of the agency company which Mr Barnett failed to do and secondly the company taking a commission when there is no agency agreement.*
26. *The agency company was unlicensed therefore those matters evaporate and instead appear to be replaced by:*
 - *The agent appearing to knowingly represent an unlicensed agency.*
 - *The agent not explaining to clients who the agency was that to take the commission.*
 - *The trust account holding the deposit not being disclosed.*
 - *The taking of commission by the unlicensed agency without authority.*
 - *The unlicensed agency has no requirement for an agency agreement because the Act only applied that requirement for a licensed agency.*
 - *The offence of trading while unlicensed.*
 - *The matter of the licensed agent facilitating the unlicensed company accepting a commission whilst leading the client to believe they were dealing with a licensed individual.*
 - *The REAA ignoring these matters.*
 - *The Committee deciding matters they may have no jurisdiction in.*
 - *There may be others.”*

[31] There are further careful submissions for the complainants which are generally rather puzzling and, likely, fanciful. They submit that there are grounds to investigate the Authority to establish if it knowingly suppressed the unlicensed status from them and the Committee. A belief is expressed for the complainants that there are grounds to investigate whether the Authority has attempted to pervert the course of justice by changing the licence status of a party during a Court process “*to amend its own systemic failure*”. The complainants seem to seriously believe that the Committee process is null and void due to improper processes being followed. Very much related to all that seems to be that the Committee issued its decision originally in the name of Mr M Cottle, rather than in the name of the current complainants, and the complainants are concerned that the name of the licensee’s company was shown as Timothy Barnett Ltd rather than Tim Barnett Realty Ltd. There could be nothing improper about those sensible corrective aspects.

Discussion

[32] We feel that many of the submissions for the complainants are rather beside the point, but we must now clarify our jurisdiction in terms of the two appeals before us, in effect, by the complainants and, separately, by the licensee.

[33] Ms Copeland puts it that, based on the original complaint, the Committee's decision, the complainants' notice of appeal, a memorandum of issues, and five pages of material recently filed by the complainants, the primary issues arising out of the Committee's decision appear to be whether the complainants are entitled to a refund of the commission paid; and whether the Committee erred in accepting that the licensees did not have a conflict of interest, or potential conflict of interest, in respect of a potential purchaser.

[34] Ms Copeland helpfully observed that the complainants also appear to raise the following alleged issues (some of which do not arise directly out of the Committee's decision):

Substantive

- [a] Unlicensed trading;
- [b] Trust account practices;
- [c] The licensee's misleading response to the complaint;
- [d] The licensee's complaints notification procedure;
- [e] That the licensee released private information; and
- [f] That the decision was based on incorrect facts and assumptions.

Procedural

- [g] Incorrect parties were named in the Committee's decision;
- [h] Failure to consider additional concerns (added by way of letter after the original complaint was filed); and
- [i] Breaches of natural justice (procedural error, apparent bias and Committee's decision to conduct a hearing on the papers).

[35] As counsel for the Authority, Ms Copeland has also identified the following alleged issues as being raised in the complainants' material, namely:

- [a] The Authority's failure to investigate the licensee for failing to complete another commercial agency sale without an agency agreement;
- [b] The Committee's failure to make a formal determination on each complaint;
- [c] Mistakes in the Committee's decision giving rise to a systematic [maybe, "systemic"] failure; and

[d] The Authority's handling of allegations.

[36] Issues [a] and [c] of those further alleged issues are puzzling.

[37] Ms Copeland puts it that the licensee's appeal appears to be restricted to the issue of whether he is guilty of unsatisfactory conduct in the following respect. Did the Committee err in finding that there no agency agreement nor appraisal were completed?

Discussion

[38] It seems to us that, as illustrated from our summary of the stance of each party above, this matter has become needlessly confused in terms of our jurisdiction on the substantive issues of this appeal.

[39] Ms Copeland puts it that the licensee's appeal must be restricted to the issue of whether he has been guilty of unsatisfactory conduct due to not having an agency or listing agreement completed nor providing an appraisal; and that he has admitted to these so there seem to be no grounds for dealing with them again on appeal to us. However the licensee is entitled to argue that those failures do not amount to unsatisfactory conduct in all the circumstances and/or that the penalties should be reviewed by us. If any Rule has been breached, s.72(b) must apply. However, in his notice of cross-appeal the licensee pleads that the Committee was erroneous in finding no agency agreement and no appraisal.

[40] The Committee has issued a single determination of unsatisfactory conduct as authorised under s.89(2)(b) of the Act. As required by law, the Committee has given detailed reasons for that determination which are related to the complaints made to the Authority. Of course, that reasoning may be analysed before us on appeal as to the correctness of the determination. In terms of the complaints as referred to in paragraph 4 above, the commission issue remains live; but the other four complaints have been ruled on by the Committee in favour of the complainants and accepted by the licensee; so those issues are no longer justiciable on the initiative of the complainants.

[41] In terms of the five issues dealt with by the Committee in its substantive decision of 2 September 2013, it seems to us that the complainants are entitled to put to us that the licensee was not entitled to charge commission. The decision of the Disputes Tribunal did not seem to deal with liability for commission under the Real Estate Agents Act 2008. An adverse finding on that point could, theoretically, raise the concept of "*misconduct*"; although we would not likely perceive that.

[42] We have already dealt with issues 2 and 3 that no agency agreement nor appraisal was completed.

[43] Issue 4 concerns the licensee's failure to appropriately display the Rules. That does not now seem to be disputed by the licensee and would have been taken into account by the Committee in its penalty decision of 15 January 2014.

[44] The remaining issue is whether the licensee failed to disclose the identity of a potential purchaser to the complainants. In that respect, the Committee found in favour of the licensee so that it is a justiciable issue for the appellants to raise before us on appeal.

[45] Some further matters in terms of jurisdiction arise from considering the penalty decision of the Committee where the Committee isolated six issues.

[46] We have dealt with the issue of correction of names.

[47] We have dealt with the issue of the complainant seeking a refund of commission.

[48] The Committee found that the law does not provide it with the ability to order reimbursement in so far as the complainants seek reimbursement of the difference between the highest offer, which the licensee is alleged to have kept from them, and the actual amount received from the sale. The Committee seems to us to be correct in noting that due to *Quin v CAC and Barras* [2012] NZHC 3557, such reimbursement cannot be ordered on the basis of unsatisfactory conduct. However, it is an issue which the appellant complainants are entitled to argue before us.

[49] We have already dealt above with non-provision of a listing agreement or an appraisal. The issue of costs needs to await the outcome of the substantive issues.

[50] With regard to the complainants' submission to the Committee that an investigation be undertaken of the licensee's business affairs as part of a penalty package, and the Committee found no evidence to warrant that, it is an issue which is justiciable before us on appeal. However, prima facie, the reasoning of the Committee seems sound in terms of the current state of the evidence.

[51] The licensee is, of course, entitled to appeal penalty.

[52] It does not seem to matter much to us whether the appeal before us proceeds on the general basis of whether the Committee's finding of unsatisfactory conduct was correct or whether we analyse each issue which remain justiciable as we have referred to them above.

[53] Accordingly, we find that we have jurisdiction on the following issues:

- [a] Whether the licensee has been guilty of unsatisfactory conduct;
- [b] If so (or if misconduct is found), whether the penalty orders against the licensees are appropriate i.e. fair and just;
- [c] The liability of the complainants under the Act to pay the licensee commission;
- [d] Whether the licensee failed to disclose to the complainants the identity of a potential purchaser.
- [e] Whether the *Quin* case can be applied in favour of the complainants.

[54] Assuming the issues, which we have identified as being justiciable on appeal to us, still need to be pursued by the particular party, we shall direct the Registrar to arrange a telephone conference between the parties and our Chairperson to timetable this matter to a substantive hearing before us

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

Judge P F Barber
Chairperson

Mr G Denley
Member

Ms C Sandelin
Member