

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

[2015] NZREADT 15

READT 057/14

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

**BETWEEN** **DALE MARIE O'REILLY**

Appellant

**AND** **REAL ESTATE AGENTS  
AUTHORITY (per CAC 301)**

First respondent

**AND** **ROSALIE BUCHANAN**

Second respondent

**MEMBERS OF TRIBUNAL**

Judge P F Barber - Chairperson

Mr J Gaukrodger - Member

Ms C Sandelin - Member

**HEARD** at PALMERSTON NORTH on 2 February 2015

**DATE OF THIS DECISION** 25 February 2015

**REPRESENTATION**

The appellant on her own behalf

Ms K Lawson-Bradshaw, counsel for the Authority

Ms G Wishart, counsel for the licensee

**DECISION OF THE TRIBUNAL**

***Introduction***

[1] Essentially, this case concerns whether a real estate agent proceeded with the sale of a rural club knowing (allegedly) that the vendor lacked authority to sell the property.

[2] Mrs Dale O'Reilly ("the complainant") appeals against the decision of Complaints Assessment Committee 301 to take no further action with respect to her complaint against Mrs Rosalie Buchanan ("the licensee") which we cover below.

***Factual Background***

[3] The Bunnythorpe & Districts Country Club owned a property at 2 Dutton Street, Bunnythorpe, which was sold in June 2013. The complainant, Mrs O'Reilly, was a club member between 2006 and 2010. She applied to become a club member again

in 2013, but at this stage all new membership had been closed by the club Committee and she could not become a club member.

[4] At the time of the property's sale, the licensee was the Committee treasurer, a part time administrator of the club's Governing Body, and was also a debenture holder for \$1,500 over the club's assets. She had recently become a member of the Governing Body. At the time of sale she was owed about \$3,450 gross in honoraria over about the previous year or two.

[5] According to the club's rules, the general business, management, and control of the club was to be conducted by a Committee, comprising a vice president, treasurer, secretary, and at least four Committee members.

[6] In 27 September 2012, the club changed its rules. However, due to clerical error, these were not registered with the Companies' Office until September 2013.

[7] On 12 February 2013, the Committee met to review an accountant's draft report on the club's financial position. The report detailed that the Club was in a weak financial position and, as such, the Committee unanimously agreed to sell the property owned by the club. As the decision required approval from the club's governing body, a Committee meeting was scheduled to discuss the proposed sale.

[8] On 19 March 2013, the club held a "*Committee & General Body Meeting*" to discuss the sale of the property. At the meeting the licensee was appointed as the real estate agent to market the club building and its land because of her knowledge of the property and the importance of selling it before the club became insolvent.

[9] On 20 March 2013, the licensee appraised the value of the property as between \$290,000-\$340,000. An independent valuation in March 2011 had valued the property at \$220,000. In June 2013, the government valuation was \$240,000.

[10] On 14 April 2013, a Special Meeting of the club was held and 39 members attended. It was unanimously agreed that the property be put up for sale, and that the sale process be controlled by the Committee and Governing Body.

[11] On the following day, the Committee signed a listing agreement with the licensee which included a disclosure of benefits by the licensee and a consent and acknowledgement by the Committee on behalf of the club.

[12] On 4 May 2013, the complainant complained to the club about the validity of the proposed property sale.

[13] On 22 May 2013, the Committee had a meeting at which the complainant expressed her concerns that the property sale did not have the required mandate from the members. Primarily, her concern was that the new club rules allowing the motion which appointed the licensee as sales agent had not been lodged with the Registrar of Incorporated Societies at the Companies Office and were therefore not valid. Under the previous rules, a quorum was required for a general meeting. The licensee abstained from the Committee meeting during this discussion.

[14] The property was sold on 12 June 2013 for \$260,000.

[15] There is no dispute about the basic facts.

***The Committee's Decision of 27 May 2014***

[16] Mrs O'Reilly had complained to the Real Estate Agents Authority that:

- [a] The licensee advised the Committee members to sign a sale and purchase agreement of the real property of the club knowing that they (nor the club) did not have the mandate to do so at that point.
- [b] The licensee misinformed the Committee members about the property's valuation.
- [c] The licensee used her position to convince the members to sell the property.
- [d] The licensee provided conflicting information to the members about the club's financial position in order to obtain a quick sale.

[17] The Complaints Assessment Committee considered each issue and determined as follows:

- [a] Re alteration of the rules: That it was reasonable for the licensee to rely on her understanding that the rules had been validly changed.
- [b] Revaluation: The Vice President disclosed the \$220,000 valuation to the members at the meeting, not the licensee; that the licensee's reasons for keeping her appraisal confidential were "*sound*", and that the appraisal itself was comparable.
- [c] Re use of position to convince to sell: That there was insufficient evidence to prove this allegation and that the licensee had removed herself from all discussion about the property's sale.
- [d] Re club's financial information: There was insufficient evidence to prove this allegation of providing conflicting financial information to club members.

[18] Ultimately, the Complaints Assessment Committee determined that the licensee had not breached the Real Estate Agents Act 2008 or the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 and, in fact put it that she had "*taken all steps she could take to ensure that she acted legally and in accordance with her licensee obligations under the Act*".

***Appeal Issues***

[19] There are four main issues for us to determine, namely:

- [a] whether the licensee advised the Committee members of the club to sign a sale and purchase agreement knowing that they did not have the valid mandate to do so;
- [b] whether the licensee misinformed those club Committee members about the property's valuation;

- [c] whether the licensee used her position to convince the members of the club to sell the property, which relates to whether she handled any conflict of interest situation correctly; and
- [d] whether the licensee provided conflicting information to the members about the Club's financial position in order to obtain a quick sale.

### ***Submissions on Behalf of the Authority***

#### *Misleading Conduct in Relation to the Club Rules*

[20] Mrs O'Reilly has submitted that the licensee misled the club that they had a mandate to sell the property, when she was aware that they did not.

[21] At the club's AGM on 27 September 2012, the club's rules were amended by unanimous resolution. In particular, the rule relating to quorum for passing a resolution was amended so that a quorum became "*30% of the current financial membership to a maximum of (40) members excluding proxy votes*". The licensee posted these rules for registration in May 2013 but, due to various administrative errors (on part of both the club and the Incorporated Societies Office), these were not registered until 23 September 2013.

[22] Mrs O'Reilly contends that, as alterations to the rules do not take legal effect until they are registered, the 14 April 2013 at which it was agreed to sell the property was invalid. She also submits that the licensee was aware that vote was invalid and that, therefore, the club, had no mandate to appoint her as a salesperson of the club property.

[23] Ms Lawson-Bradshaw submits for the Authority that whether or not the club had a mandate to sign the sale and purchase agreement is not determinative for the purposes of these disciplinary proceedings against the licensee. Rather, it must be shown that, in her role as salesperson, the licensee was aware that the club lacked authority to sell and continued on regardless. We agree with that submission.

[24] The licensee has given evidence that she reasonably believed the rule changes at the AGM on 27 September 2012 were effective (refer Rule 34 of those 2012 Rules); so that she believed, at all relevant times, that there was a valid mandate for the club to sell the property.

[25] It was emphasised for the licensee that the 2012 Rules recorded that the rule alterations had immediate effect. The licensee has also pointed to correspondence from the Incorporated Societies Office suggesting that the legal position on rule registration requirements was not entirely clear.

[26] We agree with Ms Lawson-Bradshaw that it is for us to determine whether or not the licensee reasonably held a belief that she had valid authority to market the property for the club as a licensed salesperson.

### *Misinformation about Property Valuation*

[27] Mrs O'Reilly alleges that the licensee misled the club about the valuation of the property. In particular, she has pointed to the licensee's written appraisal (dated 30 March 2013) not being disclosed to the general membership, and that only the Blackmore Group's May 2011 valuation was disclosed

[28] As instructed by the Committee, the licensee provided it with her said appraisal of the property. The club's Vice President chose not to disclose the licensee's appraisal, and rather to only disclose the Blackmore Group valuation. The licensee has stated that she: *"Did not forward any expected sale price to the membership or public. That allowed for the sales process to properly reflect the market value and the potential purchasers' own enquiries about value."*

[29] Ms Lawson-Bradshaw noted that counsel for the licensee has submitted that the licensee had good reasons to keep the club's appraisal information confidential during the tender process as it would have affected the sale price if a club member wanted to tender for the property. She accepts that if we determine that the licensee had sound reasons for not disclosing her appraisal to the general club membership, then the Complaints Assessment Committee's decision should stand on this point.

### *Conflicts of Interest and Use of (Licensee's) Position (at club) to Convince Members to Sell*

[30] Section 136 of the Act provides;

#### ***"136 Disclosure of other benefits that licensee stands to gain from transaction***

- (1) *A licensee who carries out real estate agency work in respect of a transaction must disclose in writing to every prospective party to the transaction whether or not the licensee, or any person related to the licensee, may benefit financially from the transaction.*
- (2) *Subsection (1) does not apply to any matter disclosed under section 128 or 134.*
- (3) *The licensee must make the disclosure required by subsection (1) before or at the time that the licensee provides the prospective party with any contractual documents that relate to the transaction.*
- (4) *For the purposes of this section, an agent does not benefit financially from a transaction merely because of any commission payable to the agent under an agency agreement in respect of the transaction.*
- (5) *A contract entered into in contravention of this section may not be cancelled merely because of that contravention."*

[31] Ms Lawson-Bradshaw comments that, pursuant to that s.136, a licensee may not carry out real estate agency work or continue to carry out real estate agency work without obtaining the client's (the vendor's) consent if the licensee knows or should know, that the transaction may result in the licensee, or a person related to the licensee, benefitting financially from the transaction. Section 136 also relates to such

disclosure “to every prospective party” but Mrs O’Reilly seems to be complaining as a former club member rather than as a prospective purchaser of the club property.

[32] Ms Lawson-Bradshaw puts it that, here, there was clearly a potential conflict of interest between the licensee’s position in the club and her position as a salesperson and the issue for us is, given this potential conflict, whether s.136 of the Act and the relevant rules were complied with. She notes that, according to the licensee, she (the licensee):

- [a] disclosed her interest in a form (set out below), in accordance with s.136 of the Act, stating that she was:

*“One of the 105 current vendors and has an interest in, by way of being a debenture holder, Committee treasurer, governing body administrator, the property at 2 Dutton Street, Bunnythorpe and may benefit financially from this transaction.”*

The form was also signed by the club and dated 15 April 2013.

- [b] had potential purchasers also sign the s.136 disclosure form;
- [c] provided her own appraisal to the Committee, referred back to an independent valuation from Blackmore Group on 30 May 2011, and obtained a further independent valuation from the Blackmore Group on 14 June 2013.

[33] Mrs O’Reilly asserts that the licensee failed to disclose that she was also a guarantor of the mortgage. However, the licensee states that the mortgage from the club to its bank did not require any guarantors and she was not in fact a guarantor, but was simply a signatory to the mortgage along with four other governing body members.

[34] Ms Lawson-Bradshaw notes that the licensee has also stated that, to avoid conflicts of interest, she:

- [a] noted on her appraisal that, as nominated salesperson, she would not be party to any final decisions relating to the sale acceptance price;
- [b] avoided social occasions at the club to prevent other members inquiring informally about the sale;
- [c] abstained from all meetings which Mrs O’Reilly had with the Committee and governing body members;
- [d] abstained from voting or having any further involvement with Mrs O’Reilly’s application for membership with the club; and
- [e] never put forward expected sales prices to membership or public.

[35] Prior to her appointment as the salesperson, the licensee had presented her financial report to the Committee and voted on selling the club property as salesperson of the club property. She states that she was unaware in advance of her appointment. There is also evidence from other Committee members that there were sound reasons for deciding to sell the property.

[36] It is submitted for the Authority that it was open to the Committee to find that there was insufficient evidence to prove this complaint that the licensee breached conflict of interest obligations.

#### *Misleading Information about Financial Position of Club*

[37] Mrs O'Reilly has alleged that the licensee provided inconsistent information regarding the financial position of the club.

[38] Witnesses Messrs Hedley, Schnell, and Ms Larking, have stated that the club was in clear financial difficulty (and had been since 2011) due to a lack of membership and large overheads that could not be paid.

[39] According to Mr Hedley, the club had external accountants and the licensee merely presented these reports to the club. The licensee has submitted that when these reports were presented, she did so as the treasurer, not as a salesperson. Also, it has been submitted for the licensee that her report presented at the 19 March 2013 meeting was presented before she was (or knew she would be) appointed as a salesperson to market the club property.

[40] It is also submitted for the Authority that it was open to the Committee to determine that there was insufficient evidence to prove this complaint of misleading the club about its financial position.

#### *The General Submission for the Authority*

[41] Ms Lawson-Bradshaw submits that the Committee's decision to take no further action was appropriate given the view it took as to the facts; but that if we take a different view of the facts, and find a breach of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 in this case, then a finding of unsatisfactory conduct should follow.

#### ***The Stance of the Appellant/Complainant***

[42] Mrs O'Reilly emphasises that the club and its land were part of the premises of the original Glaxo company, which is now a worldwide pharmaceutical Corporation but had its birth place in Bunnythorpe, so that the club had a personal significance to many people in that area.

[43] Mrs O'Reilly considers that the wider membership of the club and, indeed, the wider Bunnythorpe community were disadvantaged in terms of its sale as covered above by their believing that an Incorporated Society must abide by its registered rules especially, as Mrs O'Reilly put it, "*when making important and far reaching decisions*". She also emphasised the belief of herself, the club membership, and the Bunnythorpe community (as she put it) that club officials must and would abide by the rules of the club, particularly, when reminded of a particular rule; and would refer to the membership for a clear and binding mandate such as to sell the club building.

[44] Mrs O'Reilly submits "*that it was the licensee who undermined this by giving continual assurances to the Committee members, Governing Body Members, and General Club membership that the rules within which they had acted had been actioned by her and were binding.*"

[45] Mrs O'Reilly submits that, had the membership and community known at material times to the facts set out above that the Committee and Governing Body would not schedule a Special General Meeting "*for this purpose*", then relevant parties would not have been taken by surprise. She particularly referred to applications to become members of the club not being accepted; to her formal complaint to the Committee failing; to a complaint to the Real Estate Agents Authority not slowing "*the impetus*", as she put it; and that requests for a copy of tender documents did not seem to convey interest from any prospective tenderer as far as the Committee of the club was concerned. In fact, various meetings were held by the club as we have covered above; and there was the special general meeting of club members on 14 April 2013 which authorised a sales process.

[46] Mrs O'Reilly's concern is that the people of Bunnythorpe have been "*stymied*" of a significant community asset and she puts it that the licensee influenced the inappropriate and invalid decision-making process of the Committee and Governing Body of club.

[47] In particular, Mrs O'Reilly expressed concern that, in her view, she was led to believe that the licensee had guaranteed the mortgage over the club to its bank but is now told that the licensee was never a guarantor of that mortgage.

[48] Mrs O'Reilly is very concerned that in her view, the club did not approach the local community following its decision to simply sell the club premises. She seems to infer that, if it had, there would have been so much support for retention of the club that there would have been no need for the said sale and that the only practical barrier was the continuation of the club bar being open during community events. She puts it that could easily have been resolved in various ways.

[49] Mrs O'Reilly also made it clear that "*the harm to my credibility and reputation within the Bunnythorpe community has been significant and extremely disconcerting. I believe this is directly attributable to the actions of the licensee, both in her professional role as agent and in her positions of authority on the club Committee and on the governing body*".

[50] It seems that the remedy the complainant seeks from us is that we order that Mrs R Buchanan, the licensee, apologise publicly to her and to certain other members and "*to the wider Bunnythorpe Community*".

[51] Mrs O'Reilly was extensively cross-examined before us and, at all times was calm, coherent, and sincere.

[52] In her rather lucid oral summing up to us at the very end of the hearing, Mrs O'Reilly expressed particular concern that material rule changes, referred to above, had been made to the rules of the club in a way which not only did not comply with the law but did not even comply with the requirements of the club as set out in its own website.

[53] It also concerned her that resolutions of members at an annual general meeting of the club were ignored by the Committee and the Governing Body and she believes and alleged that was all triggered and influenced by the licensee.

[54] Overall, the complainant's concern is that the club premises were sold by the Committee and the Governing Body of the club without their obtaining a mandate



from the members and that, again, this was under the influence and triggered by the licensee for, allegedly, her own material purposes.

[55] Mrs O'Reilly is also concerned that the proper market value for the land and building of the club was not obtained and that various valuation advices were kept from members, including the appraisal given the club by the licensee. She puts it that, generally, the aspect of value was fudged, and yet (the complainant alleges) the licensee was at a meeting where, in terms of discussions of value and the financial position of the club being allegedly dire, the licensee's advice was taken and her appraisal was set up on a blackboard.

[56] The complainant takes the view that the licensee was appointed to market the property as a real estate agent on 19 March 2013 and organised that, on 14 April 2013, an annual general meeting of the members of the club mandated that the sale take place because members agreed with the licensee's analysis of the situation and best needs of the club. However, it is put for the complainant that the advice from the licensee was influenced by her (and her husband) being a debenture holder of the club and desiring repayment of that loan together with interest, and also her seeking outstanding honoraria and substantial commission as a real estate agent together. Apparently the club could not afford to pay her the honoraria (for being treasurer and doing other work on behalf of the club) because it was not in a financial position to do so unless it sold the property.

[57] In particular, Mrs O'Reilly alleges that the licensee did not advise the governing body and Committee of the club honestly and, especially, because she knew that the rules of the club necessary to give jurisdiction for the sale had not been registered and were ineffective at material times.

### ***The Stance and Submissions for the Licensee (Mrs R Buchanan)***

[58] Counsel for the licensee (Ms Wishart) notes that Mrs O'Reilly has appealed against the Complaints Assessment Committee's decision on the basis that the licensee has breached ss.72 and 73 of the Act and Rules 6.2, 6.3 and 6.4 (set out above).

[59] As Ms Wishart puts it, Mrs O'Reilly has raised on appeal that Mrs Buchanan has allegedly breached her duties as a licensed real estate salesperson by:

- [a] relying on changes to the Bunnythorpe & District Country Club' rules that were not registered in the Incorporated Societies Office, invalid and did not grant a mandate for sale of the Club's property;
- [b] misinforming Club members about the value of the property and equity in the Club to justify the need to sell; and
- [c] misusing her positions in the Club's administration to vote on the property sale and convince members to sell.

[60] Ms Wishart emphasises that, accordingly, Mrs O'Reilly has raised the following points on appeal (all of which are disputed by Mrs Buchanan):

- [a] Mrs O'Reilly made Mrs Buchanan aware that alterations to the Club's rules in 2012 were not properly registered and were invalid. Mrs Buchanan then failed to check they applied and actively convinced others that they did

apply, amounting to misrepresentation and breach of her duties of office holder of the Club and as sales agent. Mrs Buchanan advised the committee to enter into the agreement for sale and purchase for the property when she was aware they did not have the mandate to do so under the Club's rules;

- [b] Mrs Buchanan misinformed members about the value of the property and under-represented the Club's equity to Club members to justify the need to sell. Her statement that the Club needed \$200,000 to pay all debts was incorrect as there was over \$100,000 in equity left after sale of the property and other Club assets.
- [c] Mrs Buchanan misused her position to convince members to sell and should not have voted on the sale at two Club meetings on 12 February 2013 and on 19 March 2013.

[61] It is submitted for Mrs Buchanan that she has fully complied with her professional obligations as licensed salesperson under ss.72 and 73 of the Act and under Rules 6.2 to 6.4 of the Rules and that we should therefore confirm the Complaints Assessment Committee's decision under s.111(4) of the Act.

[62] In response to the specific issues raised by Mrs O'Reilly, Mrs Buchanan has said:

- [a] she reasonably believed that the rule changes, which had been passed unanimously at the Club's September 2012 AGM, were in place and granted a valid mandate for sale of the Club's property; and her attempts to register the rule changes were delayed by technical issues and factors outside her control, including administrative problems by the Incorporated Societies Office, for which it subsequently apologised;
- [b] she acted properly in respect of all valuation and financial information that she dealt with and ensured she provided accurate information in that respect to the Club's administration and membership; and
- [c] she voted appropriately on the property sale before she was appointed as salesperson. Once appointed, she acted as licensed salesperson with full disclosure of her other interests in the Club to avoid any conflict and carried out the sales process in keeping with her professional duties.

#### *The Definition of Real Estate Agency Work*

[63] As Ms Wishart put it, a licensee can only be guilty of unsatisfactory conduct or of misconduct under s.73(b)-(d) in relation to "*real estate agency work*" as defined in s.4 of the Act, principally: "... *any work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction.*"

[64] The definition of "*transaction*" under s.4 of the Act requires: "*The sale, purchaser, or other disposal or acquisition of a freehold estate or interest in land [or other defined interest, licence or right in land or business].*"

[65] Ms Wishart submits that, if the activity complained about is not real estate agency work, then it cannot, by definition, be unsatisfactory conduct under the Act; and non-real estate agency work could only be misconduct for disgraceful conduct

under s.73(a) of the Act. Ms Wishart puts it that sanction for non-real estate agency work under s.73(a) requires:

- [a] a sufficient nexus with the fitness of the licensee to conduct real estate agency work; and
- [b] a marked or serious departure from the standards of an agent of good standing or of a reasonable member of the public *Complaints Assessment Committee v Robert Subritzky* [2012] NZREADT 20, para [28].

[66] We agree that if the non-real estate agency work activity does not meet the threshold for misconduct under s.73(a), then there is effectively no sanction for that activity under the Act.

[67] Mrs Buchanan's position is that none of the activities (both real estate agency work and non-real estate agency work), which are the subject of Mrs O'Reilly's complaint and appeal, meet the criteria for breaches of s.72 of the Rules 6.2 to 6.4 and fall far short of the level of conduct (i.e. misconduct) required for breach of s.73; and there is there no basis for sanction under the Act and the Complaints Assessment Committee's decision should be upheld.

[68] Ms Wishart submits that a significant proportion of Mrs O'Reilly's allegations on appeal do not relate to real estate agency work and cannot constitute unsatisfactory conduct under s.72 or misconduct under s.73(b)-(d); and have no element of the requirements for a finding of disgraceful conduct under s.73(a).

[69] It is emphasised that the Club appointed Mrs Buchanan as sales agent on 19 March 2013 and the sale settled on 19 July 2013 so that any allegations of unsatisfactory conduct, or misconduct, outside that time period are of very limited relevance and/or of peripheral background relevance only, as they do not relate to real estate agency work.

[70] We agree with Ms Wishart that the allegations that do not relate to real estate agency work include, but are not limited to:

- [a] the historical use of the property;
- [b] the alternative uses to which the property may have been put;
- [c] Mrs O'Reilly's, and other individuals', applications for Club membership;
- [d] Mrs O'Reilly's communications with parties other than Mrs Buchanan and the Club about the sale;
- [e] the Club's consultation with members about the sale;
- [f] the Club's decision to sell and its reasons for doing so (as distinct from Mrs Buchanan's work as sales agent to effect the sale);
- [g] communications between Mrs O'Reilly and the Club that do not directly relate to sale of the property;
- [h] the sale of the remaining Club assets after sale of the property; and

- [i] The process for distribution of the remaining equity in the Club to charitable organisations after the sale.

[71] Ms Wishart submits that, in any event, the Club's decision to sell the property was based on sound commercial reasons that sale of the property was the only viable option, made after the Club's genuine attempts between mid 2011 and early 2013 to turn the Club around financially; was not Mrs Buchanan's individual decision, but rather was the Club's Governing Body's and Committee's decision, with the supporting votes of the membership.

### **Discussion**

[72] If we find any breach of the licensee's obligations, then an unsatisfactory conduct finding should follow, subject to the licensee making some absence of fault argument.

[73] It is settled law that committees of the Authority (and we on appeal) have a broad discretion to take no further action.

### *Definition of Real Estate Agency Work*

[74] It is contended for the licensee that no conduct by her outside of the time period 19 March 2013 (her appointment as salesperson) to 19 July 2013 (when the sale settled) is relevant for the purposes of an unsatisfactory conduct finding as it falls outside the definition of "*real estate agency work*".

[75] The Authority submits that the licensee's conduct prior to 19 March 2013 is relevant to the determination of unsatisfactory conduct and that the definition of real estate agency work under the Act allows for conduct prior to engagement to be considered so long as it meets the definition. It would be contrary to the purposes of the Act if conduct by a real estate agent performed for the purpose of obtaining an agency agreement was not caught by this definition.

[76] The leading decision for the definition of "*real estate agency work*" is the High Court decision of *House v Real Estate Agents Authority* [2013] NZHC 161 where the High Court held at paragraph [45]: "*That given that statutory purpose and the regulatory apparatus contained in the Act, a narrow and literal approach to the definition of "real estate agency work" would be inappropriate.*"

[77] Also of relevance is our decision *Murphy v Real Estate Agents Authority* (CAC 10060) [2012] NZREADT 52 (at [15]) which held:

*"We consider that every case must be determined on its own facts and that the Tribunal will determine whether any particular conduct falls within the definition of real estate agency work by having regard to other cases of the Tribunal, the words of the Act, and the conduct complained of."*

[78] It is put that whether the licensee's conduct at issue meets the definition of real estate agency work is a matter of fact for us to determine. However, we have no concerns with the conduct of the licensee at any stage of the saga we have set out above.

*Relevant Rules*

[79] When considering the conduct of the licensee the relevant rules are:

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

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

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

[80] In terms of the detailed oral evidence adduced to us, we find all witnesses to be credible and truthful.

*Mandate to sell and alterations under 2012 rules*

[81] We agree with counsel for the licensee that:

- [a] Mrs Buchanan made a sufficient level of enquiry as to who could execute the agreement for sale and purchase and had no reason to believe that she may have had improper authority to effect a sale;
- [b] Although there was a technical defect in that the Club's 2012 rules were not properly lodged with the Registrar of Incorporated Societies, it was reasonable for Mrs Buchanan to rely on her understanding that the rules had been changed and that she was entitled to operate in terms of those 2012 Rules; and
- [c] the Club as a whole was responsible for compliance with its statutory obligations as an incorporated society, not Ms Buchanan individually. We add that, in fact, that responsibility must have rested with the Committee and/or the Governing Body.

[82] Mrs Buchanan acknowledges that Mrs O'Reilly first raised concerns in early May 2013 about the validity of the proposed sale, the application of the 2012 Rules, and whether the Club had a proper mandate to sell and appoint Mrs Buchanan as agent. Mrs Buchanan was aware of those concerns but genuinely considered that the 2012 Rules were effective when she was appointed agent and effected the sale. She therefore believed that she had the appropriate mandate to sell because she was aware that the 2012 Rules had been passed unanimously at the Club's 27 September 2012 AGM.

[83] On the advice of the committee she understood that, after the 27 September 2012 unanimous resolution, the 2012 rules came into effect immediately based on clause 34 of the 2012 rules which stated:

*“Revision of Rules: These rules may be revised and amended by resolution passed by a majority of the members for the time being entitled to be present and to vote at any General Meeting, of which notice specifying the intention to propose the resolution has been duly given*

*according to the Rules. Once ratified at the Annual General Meeting, these rules become the authorised rules of the Club and effective immediately.”*

[84] Clause 20(b) of the 2012 rules coves: “*The quorum for ... a General Meeting of the club shall be 30% of the current financial membership to a maximum of (40) members excluding proxy votes.*” In terms of that provision, Mrs Buchanan understood that the Club had the required mandate to sell the property by tender due to the unanimous supporting vote of 38 Club members at the 14 April 2013 meeting.

[85] We also find that, contrary to Mrs O’Reilly’s contentions:

- [a] Mrs Buchanan did not fail to check that the 2012 rules applied after Mrs O’Reilly raised concerns;
- [b] Checking the validity of the rules was not simply a matter of clarification with the Incorporated Societies Office by a telephone call or a website check;
- [c] Mrs Buchanan did not make continual assurances to the committee, governing body, and membership that the 2012 rules had been actioned by her and were binding.

[86] We find Mrs Buchanan to be a credible witness who believed that the 2012 rules were in place when she was appointed as real estate salesperson and for completeness, as a Club official, actively oversaw attempts to have them registered in the Incorporated Societies Office.

[87] We record and accept that:

- [a] A former Club secretary had difficulties in keeping up with her workload and had not sent the 2012 rules to the Incorporated Societies Office, as she had been required to;
- [b] Accordingly, in May 2013 Mrs Buchanan sent the minutes of the 2012 AGM, which recorded the changes in 2012 rules to the Incorporated Societies Office for attempted registration;
- [c] The Incorporated Societies Office subsequently acknowledged and apologised to Mrs Buchanan for the fact that it should have made clear to the club what the requirements for registration were at that time and inadvertently failed to do so;
- [d] The Incorporated Societies Office also acknowledged that:
  - [i] Further attempts at registration of the 2012 Rules in July 2013 had been hampered by failures in email transmissions and by the 2012 rules and coversheet, which Mrs Buchanan had sent, being lost in the post.
  - [ii] While it considered that the alterations originally recorded in the AGM minutes would not have legal effect for registration in that form (and instead required a full copy of the 2012 rules), the High Court, which has ultimate jurisdiction over Societies, might take a different view.

- [e] As soon as Mrs Buchanan became aware of the July 2013 administrative mistakes, she arranged for the 2012 rules to be sent again to the Incorporated Societies Office in September 2013. The Office then received and immediately registered them on 23 September 2013.

[88] We accept that, overall, Mrs Buchanan acted diligently and in good faith at all times in understanding that she had the required mandate to sell the property under the 2012 rules and in her attempts to have the 2012 Rules registered at the Incorporated Societies Office; and delays in that registration arose from the actions of the Club's former secretarial staff and the Incorporated Societies Office.

*Representations about Value of Property and Equity in Club*

[89] We consider that Complaints Assessment Committee was correct to find that:

- [a] Mrs Buchanan acted properly in respect of the valuations and appraisal of the property, in keeping with her professional duties as salesperson.
- [b] There is insufficient evidence to support the allegation that Mrs Buchanan provided inconsistent information about the Club's financial position. In fact, she seems to have ensured that accurate accounting information was in front of the committee so that the need to sell became clear.

[90] It seems to us that, at all material times, Mrs Buchanan dealt with the Club's financial information accurately and in good faith. The Club had external accountants who prepared annual and six monthly reports. Mrs Buchanan did not prepare these and did not deal with them as salesperson.

[91] The Club membership had voted in Mrs Buchanan as treasurer of the committee due to her commercial experience. However, she was not exclusively responsible for the Club's finances. The Governing Body and, after the Committee was established in 2012, the Governing Body and the Committee combined, were collectively responsible for the financial affairs of the Club and the Club's business.

[92] Mrs Buchanan and other governing body members carried out a substantial amount of voluntary work between 2011 and 2013 in attempts to improve the Club's finances. That was unrelated to her work as a salesperson. However, in February 2013 the committee unanimously agreed to attempt to sell the property by tender after review of the draft accounts to 31 December 2012 which were prepared by the Club's external accountants that confirmed that the Club continued to operate at a loss.

[93] There were no misrepresentations or breach of Mrs Buchanan's duties as salesperson arising from the property's valuations, her appraisal of the property, or comments on available Club equity. Mrs Buchanan's treasurer's and administrator's report, presented to the 19 March 2013 general meeting of the Club, stated with reasons and a breakdown of figures that she considered the Club would require \$200,000 from a sale to be fully clear of all current and forthcoming debts, Mrs Buchanan did not present the report in any context relating to the property's value and did so before she was asked to act as licensed salesperson on sale of the property.

[94] The fact that in April 2014, after the property sale and sale of the remaining Club assets, there was approximately \$110,000 remaining for distribution to charities, has no bearing on Mrs Buchanan's reasonably held view regarding debt levels in March 2013. The remaining asset sales and distribution were properly effected and documented by the Club and were unrelated to Mrs Buchanan's role as salesperson for the property.

[95] Mrs Buchanan's 20 March 2013 appraisal as salesperson for the property at \$290,000 to \$340,000 contained full and sensible reasons for her view.

[96] The CAC correctly observed that:

- [a] The vice president of the Club, not Mrs Buchanan disclosed to the Club a 30 May 2011 independent valuation of the property at \$220,000.
- [b] Mrs Buchanan had sound reasons for keeping the Club's private valuation information figures confidential during the tender process as disclosure could have affected the sale price if a Club member wished to tender.

[97] Mrs Buchanan challenged the QV capital valuation on the committee's instructions. The revised 16 May 2013 QV was posted on the members' information board at the Club and in any event was publicly available.

*Misuse of position to convince members to sell*

[98] The CAC was correct to find that there was insufficient evidence to support the allegation that Mrs Buchanan used her position to influence the decision to sell. Mrs Buchanan was entitled to vote regarding the proposed sale as a Club member, and as a governing body and committee member, at the meetings 12 February 2013 and 19 March 2013 respectively, and made both votes before she was appointed as salesperson.

[99] When Mrs Buchanan was appointed as salesperson during the Club's general meeting 19 March 2013, she had no advance knowledge that she would be nominated as salesperson and she had not had any discussions with Club members or officials before this time about being appointed as salesperson.

[100] We also find that Mrs Buchanan was not a guarantor of the Westpac mortgage as Westpac did not require a guarantee of the loan to the club. She was a signatory to the mortgage on behalf of the Club, together with the other four Governing Body members. Any references in Club minutes to a guarantee to Westpac are used in the more informal sense that the Governing Body had assured Westpac that it would provide information and documentation if the Club's finances deteriorated further.

[101] It seems to us that, once appointed as licensed salesperson, Mrs Buchanan acted as salesperson with full disclosure of her other roles and financial interests within the Club; took diligent steps to avoid any conflict of interests; and carried out the sales process in keeping with her professional duties.



[102] We accepted that, in terms of her professional obligations as a licensed salesperson, Mrs Buchanan:

- [a] Reminded the Committee and the governing body on a number of occasions that they were in control of the sales process and that her role was limited to being a salesperson. This illustrates that she was acting at the Club's request and not the other way round.
- [b] Removed herself from any decision making role over the sales process or price and made clear that those were the roles of the other Committee and Governing Body members.
- [c] Removed herself from any decisions about Mrs O'Reilly's or any other individuals' applications for membership and from any direct involvement with Mrs O'Reilly's complaints.
- [d] Made full written disclosure of other benefits under s.136 of the Act which she ensured all recipients of tender documentation signed and returned to her before they received the balance of documentation and/or viewed the property. This stated:

*I [name] acknowledge that Rosalie Buchanan, Licensed Salesperson REAA 2008, is one of the 105 current vendors and has an interest in, by way of being a Debenture Holder, Committee Treasurer, Governing Body Administrator, the property at 2 Dutton Street, Bunnythorpe and may benefit financially from this transaction.*

*I acknowledge that I have been advised to seek legal advice concerning this disclosure prior to signing any sale and purchase agreement."*

- [e] Marketed the property by a number of appropriate means.
- [f] On the Committee's and governing body's instructions, achieved the best possible sales price through arm's length negotiations.

### **Outcome**

[103] We agree with the submissions for the licensee and we find her evidence to us to be honest and credible.

[104] We find that, when acting as licensed salesperson on sale of the property, Mrs Buchanan at all times complied with her professional obligations under ss.72 and 73 of the Act and Rules 6.2-6.4 of the Rules. Certainly the allegations of the complainant have not been proved on the balance of probabilities.

[105] Accordingly, this appeal is dismissed.

[106] 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 J Gaukrodger  
Member

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Ms C Sandelin  
Member