

BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2015] NZREADT 17

READT 001/14

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

BETWEEN **RICHARD AND JILL BURROWS**

Appellants

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

First respondent

AND **RAEWYN PATERSON and DENNIS CORBETT**

Second respondents

MEMBERS OF TRIBUNAL

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

HEARD at WHANGAREI on 6 November 2014

DATE OF THIS DECISION 5 March 2015

REPRESENTATION

The appellants on their own behalf
Ms K H Lawson-Bradshaw, counsel for the Authority
The licensees on their own behalf

DECISION OF THE TRIBUNAL

Introduction

[1] This case has arisen because a licensee who did not achieve a sale for the complainant vendors has been refused a share of commission by the second respondent licensees who did achieve the sale.

[2] Richard and Jill Burrows (“the complainant vendors”) appeal against the 28 November 2013 decision of Complaints Assessment Committee 20002 to take no further action on their complaint against Ms Raewyn Paterson and Mr Dennis Corbett (the licensees).

Background

[3] The complainants were the vendors of a property at 168 Marsden Road, Paihia, which they initially listed with Mr Ross Robertson of Ray White, Paihia. After some months, they listed their property jointly with Ross Robertson and with Ms Paterson and Mr Corbett from the local office of Harcourts (at Kerikeri). That listing agreement is dated 15 February 2012 on a standard Harcourts form and, inter alia, covers that the listing is for a *“Joint Sole Agency with Ross Robertson from Ray White Paihia”*. Later in the agreement, the listing is referred to as a *“Joint Exclusive & Sole Agency Authority”* reading as follows:

“JOINT EXCLUSIVE & SOLE AGENCY AUTHORITY

This shall constitute an exclusive and irrevocable agency from the commencement dated noted below until midnight on the expiry dated noted below. If during the period hereof the property or part of it is sold by you or me or any other person or if at any time the property or any part of it is sold to anyone introduced during the period hereof, I agree to pay you (or if the property is sold or the or the introduction is made by any franchisee of Harcourts Group Ltd other than you, then to that franchisee) the fees set out below whether such sale is on the terms set out herein or any other terms acceptable to me if any exchange of the property or part of it is made by you or me or any other person during the period hereof or if such exchange is made at any time for the property of a person introduced during the period hereof, I agree to pay you (or if the exchange or introduction is made by any franchisee of Harcourts Group Ltd other than you, then to that franchisee), a fee as upon a sale notwithstanding that you may be entitled to a fee from the other party to the exchange. At the expiry of this Exclusive & Sole Agency Authority, this agency appointment shall continue on General Authority terms noted below.

Delete one of the following:

- 1. I have not appointed any other real estate agent to sell this property.*
- 2. I have appointed the following _____*

as agents prior to this Authority and I acknowledge that I have been advised of the need to cancel such appointments for the reason that if a sale is effected by or through the instrumentality of any other real estate agent, I may be liable for more than one free or damages.”

[4] The agency appointment in the listing agreement is to *“Bay of Islands Realty Limited ... and all other franchisees of Harcourts Group Limited”*.

[5] Prior to signing the listing agreement with Ms Paterson and Mr Corbett on 15 February 2012, the complainants sought an assurance that the other licensee, Ross Robertson of Ray White, would be entitled to a commission split in the event of a sale which took place late in March 2012 as covered below. However, the commission was not split with Ross Robertson after the sale. Ms Paterson and Mr Corbett have stated that the reason there was no commission split was that such an arrangement had been agreed upon if the sale went to auction but, if it was sale by negotiation, the licensee who secured the sale would get all the usual commission.

[6] On 19 March 2012 Ms Paterson and Mr Corbett presented the complainants with an offer from a Ms Beverly Dickie. The offer was accepted by the complainant vendors. The sale and purchase agreement was conditional on due diligence satisfactory to the

purchaser, approval of the vendors' financiers, and a clause (explained below) allowing pre-settlement access to the purchaser.

[7] The complainants allege that, without their permission, Ms Paterson authorised a 24 hour extension to the date by which the purchaser needed to fulfil due diligence. It seems that the solicitor for the complainants confirmed the extension on their behalf.

[8] The contract was confirmed by the purchaser and, subsequently, she conducted a pre-settlement inspection of the property in terms of a special clause in the contract set out below, and was accompanied by builders, plumbers, and carpet layers. The complainants also allege that Ms Paterson knew these tradespeople were coming but had not disclosed this to them. Ms Paterson has stated that the sale and purchase agreement entitled the purchasers to view the property for two hours and this was signed/agreed to by the complainants. The contract clause in question reads: "*Access to Windermere weekend of 28/29 April time to suit both vendor & purchaser for about a two hour period*".

The Committee's Decision of 28 November 2013

[9] The Committee carefully reviewed the evidence and issues 'on the papers', in terms of the Real Estate Agents Act 2008, and held that no further action be taken against the licensees with regard to their three complaints.

Complaint One: Allegation that the licensees misled the complainants with regards to the commission split

[10] The Committee received evidence from the licensees that the initial agreement was for the property to be sold at auction and for Mr Robertson to be involved in the auction as a shared listing. However (it was put), the complainants had then changed their mind and decided to sell by negotiation. It was also put that when they made this decision, Ms Paterson explained to them that the agencies would operate independently and that only the selling agent would therefore receive any commission.

[11] When Mr Robertson was interviewed he had said that because there was only ever a "*hand shake*" agreement between him and the two licensees at Harcourts to share the commission in the event of a sale, he had chosen not to pursue the issue.

[12] The Committee considered that there was insufficient evidence to establish that there was an agreement for a 50/50 split of commission outside of the auction process, and consequently dismissed this complaint.

Complaint Two: Allegation of the licensees granting a 24 hour extension beyond the unconditional date without the complainants' knowledge

[13] The Committee dismissed this complaint due to emails showing that the request for an extension had been made by the purchaser's solicitor to the complainants' solicitor, who then confirmed the extension.

Complaint three: Allegation that the licensees allowed tradesmen to attend an inspection after the confirmation date, without notifying the complainants

[14] The Committee dismissed this complaint as the sale and purchase agreement included the said clause which provided the purchasers with a two hour period to inspect the property at a time and date suitable to them (the purchasers). The Committee

considered that this also meant that trades people were able to attend the viewing with the purchaser.

The Committee's Reasoning

[15] We set out the reasoning of the Committee which reads as follows:

"5. Decision

- 5.1 *After conducting an inquiry into the complaint, pursuant to section 89(1) of the Real Estate Agents Act 2008 (the Act), the Committee held a hearing with regard to that complaint. In accordance with section 90(1) of the Act, the Committee conducted the hearing on the papers, and pursuant to section 90(2) the Committee's determination was made on the basis of the written material before it.*
- 5.2 *Best practice in the industry in regard to joint listings would suggest that arrangements between real estate agencies to jointly market a vendor's property should in all cases be recorded in writing. In this case however, there was no written documentation to support the contention that there was any conjunctional agreement in place. All parties have a version of events that indicate there was to be some arrangement for the sharing of commission if the property went to auction. The property was not sold by auction. There is insufficient evidence to establish that there was an agreement that a 50/50 split of commission would be payable in the event that the property sold outside of the auction process. To date, Harcourts have not paid any commission to Ross Robertson and in the absence of a written agreement legally they are not obliged to. The Committee noted that Ross Robertson has not pursued any payment from Harcourts.*
- 5.3 *In regard to the complaint that Licensee 1 agreed to an extension without the complainants' approval, there is no evidence available to the Committee that this in fact occurred. Emails between the two solicitors involved confirm that the request came from the purchaser through her solicitor to the complainants' solicitor who agreed to such an extension. Whilst it seems that Licensee 1 was in agreement with this there is no indication that she authorised an extension on behalf of the complainants.*
- 5.4 *The sale and purchase agreement does contain a clause allowing an inspection for a period of 2 hours. In the view of the Committee the insertion of this special clause would support the contention that the inspection was more than merely a viewing.*
- 5.1 *Accordingly after full consideration the Committee has determined under section 80(2) of the Act to take no further action with regard to the complaint or any issue involved in the complaint."*

Salient Evidence from the Appellant Complainants

[16] The complainants state that they gave the listing to Harcourts on the proviso that Mr Ross Robertson was involved in some manner of commission division.

[17] They stated that the words “*sale by auction*” were deleted on the listing agreement of the licensees which was signed before Mr Robertson was invited to the Harcourts’ office for a discussion with the licensees where they claim that the property was only to be sold by auction. It is correct that “*Auction*” is deleted from a “*Method of Sale*” heading in the listing agreement.

[18] The complainants also emphasise that the obtaining by the licensees (of Harcourts) of a flyer about their property from Ray White Paihia’s office shows that all three agents were working together as the complainants had requested.

[19] They also claim that there has been negligence on the part of the licensees in dealing with them (the complainants) when completing the sale, first, by changing the unconditional date in the contract without the complainants’ knowledge and, second, by not giving the complainants the true facts of the viewing visit arranged for the purchasers in terms of the sale and purchase agreement. They assert that, contrary to what Mr Corbett says in his evidence, they did not agree that prospective contractors may visit under that clause in the agreement, but only that the purchasers may return to view prior to settlement.

[20] The complainants also put it that there was a lack of effort put into this sale by the licensees and, so much so, that the licensees needed to use Mr Robertson’s flyer because they did not have time “*to prepare even the basic information for themselves*” – as they put it.

[21] In her initial typed brief to us, the complainant Mrs Burrows emphasised that the property in Paihia had been on the market for some time with Mr Robertson (from Ray White Ltd, Paihia) undertaking much marketing and, mostly, at no charge. They then involved Ms Paterson of Harcourts at Kerikeri who tried very hard to convince them to market for auction but the complainants did not want that.

[22] Mrs Burrows states that it was never explained to the complainants that not selling by auction would negate a commission sharing arrangement by the licensees with Mr Robertson. She expressed her concern that the licensees kept pushing the complainants to go to auction.

[23] Mrs Burrows also covered that, once the purchaser had signed their initial offer, the complainants were asked by Ms Paterson if the purchasers could add a clause that they come through the house for a two hour period on an agreed date to get the feel of the house layout again. The complainants agreed to that and an appropriate clause was inserted in the agreement. The complaint of Mrs Burrows is that at no stage did she add anything about bringing people to “*do quotes etc*”, as she puts it. Mrs Burrows also put it that Ms Paterson’s builder husband was to be in charge of the alterations to the residence required by the purchasers.

[24] It also concerns Mrs Burrows that, on the date upon which the conditions in the contract were to be fulfilled, Ms Paterson gave the purchasers a 24 hour extension without seeking the consent of the complainants; although Ms Paterson has subsequently denied that to the complainants.

[25] Mrs Burrows states that she found the events we have covered above to be “*a very disturbing experience ... when we were already under huge financial pressures*”. She emphasised that the complainants regard Mr Robertson as a “*decent and helpful real estate agent*” and are very embarrassed that, in their view, he was so badly treated the licensees and by Mr Corbett in particular.

The Evidence of Mr R J Burrows

[26] The evidence of the other complainant, Mr Burrows, is consistent with that of Mrs Burrows but considerably more detailed. We set out extracts of it as follows:

“Raewyn and Dennis [the licensees] were trying to push the auction option to us, but right from the start I expressed my concerns about this as other auctions in Paihia had provided very little to no result. I had also had a previous bad experience with an auction some years earlier and my comment to Raewyn and Dennis was that I had no confidence in auctions and so we did not want to go down that track. The other problem with auctions was we did not have the funds to pay for the advertising. This was conveyed to Raewyn and Dennis and I said that if the bank did get involved then they would do the auction thing.

At this first meeting we explained how we had a sole agency with Ross Robertson of Ray White, Paihia and because he personally had spent considerable amounts on advertising we would not under any circumstances cut Ross out of any sale. This was my personal commitment to Ross because of his loyalty to us over a period of many years and both Jill and I emphasised that we would only sign a listing agreement if it was on a shared joint sale agency and any commission if sold by either real estate office would be shared.

Both Raewyn and Dennis agreed to this and they said that Ross would have to meet at their office to work out the details. I assumed that this would be about the percentage of how the commission would be split and how advertising would be handled. Dennis had said they wouldn't be putting in additional signage on our driveway as Ross's signs were more than enough. It was Dennis who said that Ross would have to share commission if HE made the sale – we assumed this was discussed with Ross when they had the meeting with him.

The question of it only applying to an auction did not come up as Jill and I made it very clear that the share commission would apply to any sale and after all we were not going ahead with an auction anyway. ...

At the end of this general discussion, Raewyn completed a listing agreement and you will note that before it was signed, we made sure the method of sale specifically deleted the word auction and it was shown as joint. Section 3. This also included a note that it was a joint sole agency with Ross Robertson. The words JOINT SOLE AGENCY instead of joint was put in as we were told that this would cover the shared commission.

Again before we signed the agreement I asked that they both did understand that we were only signing the agreement subject to shared commission and as they both agreed, we signed the listing.

The main points are that the agreement was not a general or just a joint agreement, nor an auction. It was a joint sole agreement so that commission would be shared no matter which office made the sale. ...

We know that Dennis and Raewyn both knew we were not going ahead with an auction so we only assume that from the day we signed the listing agreement that the verbal acceptance by Dennis was a total sham. Raewyn's actions however suggest otherwise, as I am sure that she would not have approached Ross in his office for a sales flyer on our property, if she didn't have the same understanding as us. ...

Jill and I have no personal gain from this and it is because of our personal integrity that we have tried to ensure that Ross would be acknowledged. We discussed all this thoroughly and it was agreed to by Dennis and Raewyn, and by Raewyn's actions alone we know she is aware of this. We believe there should be some commitment by them to honour this agreement. ...

When we were originally given the Sale & Purchase agreement, it did not have any reference to access to the property on the 28/29 April. The main problem at that stage was that whatever we accepted had to be agreed to by the ASB Bank. Dennis agreed to follow this up with the bank and in between adjustments we had a phone call from Raewyn saying that the purchasers would appreciate the opportunity to have access to have house to refresh their memories of the layout etc. It seemed a reasonable request due to them living in Christchurch and the length of time from signing until settlement, so we agreed to it.

It was Raewyn who spoke to us about it and added it to the S & P Agreement, but at no stage did she or Dennis mention trades people and yet on the day the purchasers turned up with builders, plumbers, carpet layers and others all under supervision from Raewyn's husband.

[27] Under cross-examination, Mr Burrows stated that, at their very first meeting with the licensees on 15 February 2012, the complainants made it clear they required the commission to be split by the licensees with Mr Robertson, and that they were adamantly opposed to marketing for auction and did not authorise that.

[28] They pointed out that Mr Robertson had done his best, worked hard as their agent to sell the property, and had spent a lot of his own money on advertising on their behalf; so that he was not to be dismissed without a commission share. Mr Burrows said that he and Mrs Burrows made it absolutely clear to the licensees that there was to be some type of dual sole agency between the three agents on a shared commission basis, and that the licensees clearly and readily accepted that. Matters were left on the basis the licensees would meet with Mr Ross Robertson and sort out a commission split, which the complainants did not require to be 50/50 but to be fair in all the circumstances.

[29] Mr Burrows emphasised that the commission split being limited to a sale of the property by auction was never in issue, because the complainants were not prepared to go ahead by auction, although they kept getting a recommendation to do that from the licensees. They were against that auction course because they had had a previous bad experience with an auction, they felt that auctions were not succeeding in Paihia at that time, and they did not have the money to cover advertising for an auction; so that they were totally opposed against the auction course of marketing.

[30] Mr Burrows made it clear that: *"the main thing that I was pushing was no auction and Ross Robertson was going to be involved"*.

[31] The other two issues (i.e. of the purchaser being given a 24 hour extension to fulfil conditions in the contract and of the purchaser's bringing of tradespeople to view the property) were also covered carefully in cross-examination of Mr Burrows but without adding to what we have covered above in those respects. However, it did become clear that the extension of time for fulfilment of conditions was agreed to by the complainants' lawyer but without the complainants' instructions and, apparently, they would have been opposed to granting an extension.

[32] The background to the two hour access clause is that the purchasers lived in Christchurch and wished to refresh their memories of the layout of the property prior to settlement and, it transpires, to assist them obtain quotes from various tradesmen with regard to improvements from their point of view. The complainants do not regard that clause as covering the bringing of builders, plumbers, and carpet layers to view the property; – apparently six or seven tradespeople came with the purchaser for the two hour period arranged.

Evidence of the Licensees

Evidence from Ms R Paterson

[33] Ms Paterson says that the proposed commission split was discussed by the licensees with both complainants and with Mr Robertson on the basis that the property would be taken to auction because the licensees felt that the complainants' bank "*would look more favourably on an auction timeline*". However, Ms Paterson emphasises that, once the complainants decided against an auction process, it was explained very clearly to them that the commission would be on the basis of "*winner takes all*" and Mr Robertson knew of this.

[34] Ms Paterson explained that she had collected the Ray White flyer from Mr Robertson to ensure that she was passing on to her prospective buyer information which was correct and she did not give a flyer to that purchaser.

[35] Ms Paterson asserts that she did not extend the contract period of time for fulfilment of conditions and that the extension was approved by the solicitor for the complainant vendors; and she produced emails which seemed to confirm that.

[36] Ms Paterson adds that the clause in the contract for a two hour visit by the purchasers was added by the purchaser and presented by Mr Corbett for approval and acceptance of the complainant vendors.

[37] Under cross-examination, Ms Paterson stated that, as far as she could recall, the complainants did not make it clear that they would not sell by auction but, merely, that they were uncomfortable with the idea of selling by auction.

[38] However, Ms Paterson understood that the complainants required Mr Robertson to remain involved in the sale process because he had been marketing the property for some time on their behalf and had invested his own money in advertising costs. When it was put to Ms Paterson by Ms Lawson-Bradshaw as to whether the complainants also made it clear to the licensees that they wanted Mr Robertson to receive a commission, Ms Paterson replied "*At that point in time we were talking about auction and yes, yes that was the understanding*".

[39] Ms Paterson stated that she simply did not consider what would happen over commission splitting if the property did not sell by auction, yet she accepts that certainly at her second meeting with the complainants they made it clear that they were adamant the property was not to be marketed for auction. That seemed to mean to Ms Paterson that the two real estate firms would be "*now operating as two individual agencies*" (as she put it) and she continued: "*which is why I put the line through where it said that Ross Robertson had to report back through me with the details of his buyers because clearly he didn't as he was operating as a Ray White agent*". Later, she added that "*Therefore, it's winner takes all*" because they were "*going back to operating as joint sole*

agencies". A little later she stated, inter alia, *"I think it was an understanding that if Ross was involved in the auction that he would be paid 50% of the listing but when that was no longer proceeding forward and the companies were operating as two individual agencies, then the normal rules would apply"*. She accepted that she did not tell the complainants what the normal rules were or precisely what *"joint sole agency"* meant.

[40] A consistent pattern from Ms Paterson was that Mr Burrows had not so much made it clear to the licensees that Mr Robertson was to receive a cut of the commission but that, as she put it, *"No, I understood that you wanted Mr Robertson involved ... which is why we were including him in an auction process"*.

[41] Towards the end of cross-examining Ms Paterson, Mr Burrows put it to her: *"Does it not seem strange to you then that back, when I was adamant about unlimited and the way I thought about auctions, that then I wouldn't say anything more about the fact that if we ...[inaudible] it would still be a shared arrangement, it doesn't make sense with pure logic from where you are coming from that because if you already said that I wanted him to be involved in a commission that there was a sale?"* Ms Paterson replied *"I understood it as that at that particular meeting that we were looking at a mode of sale being an auction which is why we were talking about Ross being a part of it"*.

[42] Mr Burrows then put it to Ms Paterson that he had not been happy about an auction process but was very, very, adamant that Mr Robertson was to be involved in the commission sale. Ms Paterson responded *"If you're telling me that's where you were coming from that's not what I understood at the time"*; and she seemed influenced by her view that the complainants were under bank pressure to sell the property by auction.

[43] Inter alia to Mr Denley, Ms Paterson stated: *"I think having gone through this experience we need to make it very, very clear to a seller that if we have a joint sole agency agreement that the agency, that the agencies operate completely independently and that the commission is paid to the successful, to the successful agency"*. Certainly, Ms Paterson was adamant throughout her evidence that, under a joint agency agreement, the agencies are operating independently and commission is not split. She also insisted to Mr Denley that she had carried out her vendors' instructions regarding Mr Robertson.

Evidence from Mr D Corbett

[44] Mr Corbett states that in February 2012 he met with Mr Robertson in his office and decided that, in the event that the complainants agreed to proceed with an auction campaign, which was the strong recommendation of the licensees, any commission would be split between the two agency companies; but (he asserts) it was clear that this arrangement would only apply to an auction campaign.

[45] He said that he explained to the complainants that auction was their best option if their bank was threatening a mortgagee sale and that they originally agreed to the auction course but changed their mind after speaking with Mr Robertson. Mr Corbett then states *"when the instruction to sell reverted from the proposed auction to a joint sole agency selling by private treaty, it was a clear understanding between the agencies and the Burrows that the standard best practice whereby the selling agent was paid the commission was confirmed."*

[46] He also stated that, as the contract for sale and purchase was being completed, he was told that the purchasers wanted to obtain quotes for improvements to the property as soon as possible. Accordingly, the purchaser wrote the said viewing clause into the

contract document and the vendors were happy to sign it, says Mr Corbett, and was not put under any pressure to do so, and indeed, was at all times advised to take legal advice.

[47] Mr Corbett added that the agreement was also conditional on due diligence to the satisfaction of the purchaser and that, for the benefit of the vendors, the agreement was conditional upon their bank approving the sale.

[48] Mr Corbett made it clear to us that, had the property been sold by auction, the licensees would have had no hesitation in paying Mr Robertson half of the commission. The licensees could not see that was a curious proposition when the vendors were adamantly opposed at all stages to selling the property by auction, but required the licensees to split commission with Mr Robertson in a fair way. Mr Corbett asserted that the industry practice is that if a property is sold by negotiation under a joint agency agreement "*the winner takes all*".

[49] Overall, there was quite some vagueness between the three licensees as to what extent they discussed commission split and when, but their main meeting seems to have been on 15 February 2012. Mr Corbett is adamant that it was his understanding that, if the property was not sold by auction, the licensees would not be required to share any commission with Mr Robertson. He accepted that the listing authority was to the effect that the three agents had a sole joint exclusive agency.

[50] Later, Mr Corbett seemed to be saying that they had not discussed with Mr Robertson what would happen if the property did not sell at auction because, at the time of their discussions with Mr Robertson, they thought the property would be going to auction only. They also believed that if the property was not sold by auction there would not need to be a commission split and it did not cross their mind to clear up that aspect.

[51] The fact that Mr Burrows would not contemplate an auction did not seem to have been absorbed by the two licensees or that Mr Burrows required that commission be shared with Mr Robertson. However, Mr Corbett did seem to understand that if the property was sold outside the auction process by Mr Robertson, then Mr Robertson would receive all the commission.

Evidence of Mr Ross Robertson

[52] Mr Robertson said that he knew that the complainants were most reluctant to market the property by auction but he understood that, even if that happened, he would help the licensees with open homes very much in a secondary role, but still at a 50/50 commission split. With hindsight, he feels he was casual in not recording arrangements with the licensees over splitting commission.

[53] In terms of the property not being sold at auction, he was conscious that if an agent introduced someone to a property pre-auction there would be a finding fee of 10%; that, if a buyer is referred to an agency, a 20% fee is not uncommon, and when an agent worked together with another agency the split would be 50/50 or 60/40. He accepted that, by negotiation, the commission split might be 70/30, 60/40 or 50/50. He felt that in Paihia, at material times, it was common for there to be a 50/50 split or a 60/40 split.

[54] However Mr Robertson accepted that he expected to be working with the licensees on a shared commission basis but with no set rate of the commission split. He felt that because the licensees could not have obtained the listing of Mr and Mrs Burrows without his involvement, he would at least receive a 20% split which he felt was "*hardly reflective of what I've done*". Although his discussions with the licensees over the commission split

seem to have been rather vague, he believed: *“we had a general understanding”*. It had not bothered him that matters were a little vague because Mr Corbett had been well known to him over about 35 years and Mr Robertson was confident of fair treatment over splitting the commission.

[55] As it happens Mr Robertson did not find out that the property had been sold through the licensees by negotiation for some weeks; and he found out from a third party and not from the licensees. Nevertheless, he expected them to contact him and propose a commission proportion split but, eventually, realised he had been foolish not to have covered that issue in writing with the licensees. He did not pursue matters himself because he felt a fool not to have put the matter in writing and was conscious that and he did not have a formal written agency agreement to produce to the Authority.

[56] It was firmly put to Mr Robertson by Mr Corbett that, when the three agents met, it was made clear that there would be a joint listing to sell by auction, that Harcourts would *“control and run everything”*, and that Mr Robertson would assist with open homes for auction and, in that event, there would be a 50/50 commission split. Mr Robertson disagreed. Mr Robertson seemed to accept that, in all the circumstances, he would *“not have necessarily expected a 50/50 split”*; but expected to receive something like \$8,000 or \$9,000.

[57] Among the documents adduced to us, by consent, is a memorandum from Mr Robertson referred to by both parties which reads as follows:

“FILE NOTE

Date: 11 September 2013

Start Time: 2.15 pm

Location: (telephone call)

Parties: Ross Robertson (licensee)
Tony Quayle (Real Estate Agents Authority investigator)

Subject: Burrows v Paterson and Corbett

States:

I have not initiated this complaint or driven it.

The circumstances around the commission are that I had a Sole Agency agreement to sell the Burrow’s property. I was well aware that the owners were facing a lot of pressure.

I received a call from Richard to say that he had been approached by a friend and been recommended to Raewyn Paterson from Harcourts and would I work for her.

I advised Richard that I would as I did not want to hold them back from selling their property.

I then received a call from Dennis Corbett whom I have known for 35 years as a business man and latterly a real estate agent.

We had a meeting where we discussed doing a joint listing to sell by way of auction and that Harcourts would control and run everything and I would be available to assist with open homes. There was an agreement for a 50/50 split of the commission.

Dennis did have an excluded buyer and I agreed that this person would be excluded from our deal. The buyer had an unusual name but I do not recall the name specifically.

We had a handshake agreement.

Richard contacted me to say that he had entered into a joint agency agreement on the understanding that I was involved.”

[58] We observe that it could be inferred from the above memorandum that the 50/50 commission split applied to an auction process and that the matter of splitting commission for sale by private treaty had not been addressed, but that is inconsistent with Mr Robertson’s evidence to us.

The Stance of the Authority

[59] Counsel for the Authority notes that the complainants appeal against all three of the Committee’s key findings, as identified above, and asserts that the Committee came to the wrong conclusion on the facts.

Commission split

[60] Counsel for the Authority also notes that the complainants state that they were never interested in proceeding to auction and that they were concerned to make sure Ross Robertson received a share of the commission. The complainants’ evidence is that they told the licensees that they would only sign the listing agreement if it was on a shared joint sale agency and any commission, if sold by either real estate office, would be shared. A further meeting was to take place with the licensees and Ross Robertson to “*sort out the detail*” which the complainants thought would be about the percentage, rather than whether the commission would or would not be split.

[61] In the case of *Murphy v Real Estate Agents Authority* [2012] NZREADT 11, we determined that best practice is for all arrangements to jointly market a property between agencies to be recorded in writing to avoid any misunderstanding during the marketing period or completion of the sale. Further, we noted that the purpose of recording these agreements is to ensure that the marketing and commission sharing arrangements are transparent and to avoid the vendor/client being placed at risk of paying two commissions. A copy should also be sent to the vendors.

[62] In *Murphy*, we found that the licensee’s actions in that case did not warrant any disciplinary action. On the facts in the present case there appears to be no issue of the complainants being exposed to a risk of double commission. Mr Robertson has not made a complaint himself.

[63] While best practice dictates that the arrangement should have been recorded in writing, counsel for the Authority notes that it will be a matter for us whether the licensees’

conduct misled the complainants, or otherwise fell below acceptable standards in all the circumstances of the case.

24 Hour Extension of Unconditional Date

[64] The purchaser's solicitor emailed the complainant's solicitor stating that Ms Paterson agrees to the extension but that "*we require your confirmation of this please*". Ms Paterson denies that she agreed to the extension on the complainants behalf.

[65] The purchaser's solicitor clearly required the complainants' consent to that extension before proceeding. Whatever the licensee said about the extension, the evidence appears clear that the complainants' solicitor consented to the extension in any event.

Tradespeople through the Property

[66] As covered above the sale and purchase agreement had a further term that allowed the vendors access of a two hour window during the weekend of 28-29 April 2012. The Committee found that the fact that tradesmen were there during this two hour window was of little consequence given that this term had been agreed to.

[67] The complainants have stated that they were unaware tradesmen were to be brought to the property and that Ms Paterson had advised them that the purchaser just wanted to have a look to refresh her memory. Mr Corbett has stated that he was the one who presented the agreement with the additional clause (about such access) to the complainants, not Ms Paterson. He further states that he advised the complainants that he thought the purchaser wanted to get quotes for improvements to the property.

[68] Ms Lawson-Bradshaw puts it that if a licensee is aware that there are additional people being brought to view a property, best practice would be that their vendor client is informed; but that the Committee found the two hour window had been consented to by all parties. She submits that it is for us to determine whether this amounts to unsatisfactory conduct.

Discussion

[69] According to the Listing Agreement, it seems to us that the commission received by the licensees must have been \$25,875.

[70] As covered above, there are three issues, namely, the commission split, who authorised a 24 hour extension for the purchaser to fulfil the conditions in her offer, and whether the number of tradespeople who attended a final viewing by the purchasers was authorised.

[71] With regard to the latter two issues, we agree with the Committee that there is no merit in the complaints based on them. It seems that the complainants' solicitor granted the 24 hour time extension as their agent and did that in the ordinary and sensible course of such legal work.

[72] We also agree with the Committee that the attendance of tradespeople with the purchaser (under the said access clause in the contract), to consider the state of the property and take measurements, was a permitted procedure.

[73] Frankly, it seems to us that those two issues are really only raised by the complainants as add-ons to their main concern that, as the vendors of the property, they required and considered that there was agreement that Mr Robertson receive a share of the commission which should have amounted at least to \$8,625 or one third of the total commission.

[74] We agree with Ms Lawson-Bradshaw that the best practice for all marketing arrangements relating to property is that agencies set out clearly in writing whatever the arrangement is to avoid misunderstanding and confusion as has arisen in this case. As Ms Lawson-Bradshaw also put it, *“the purpose of the clarity is to provide protection to consumers so that they are not placed in a position where they are at risk of paying two commissions. However, here the agreement was to split the commission, if there was such an agreement, and so there wasn’t any risk to the vendors that they would be exposed to paying double commission”*.

[75] Ms Lawson-Bradshaw also put it that we need to decide whether the complainants were actually misled by the licensees in any way so that disciplinary sanction is required. However, the situation seems to have arisen through confusion on the part of the licensees.

[76] The licensees seem to think that commission was not to be split unless the property was to be sold at auction. As covered above, they opine that it is industry practice that under a joint agency the selling agency takes all the commission. That may well be so; but in the present case the vendors’ firm instruction was that commission be shared fairly between the agencies and the vendors believe that the licensees agreed to that. The complainants made it very clear at all times that they required Mr Robertson to be involved and receive a fair part of any sale commission. His evidence is that he expected some share of commission but there had been no explicit discussion about the precise sharing, except that if the property was sold by auction the split would be 50/50.

[77] Ms Lawson-Bradshaw emphasised that, in her cross-examination of Ms Paterson, the latter accepted that the licensees had not spelt out to the complainants that Mr Robertson would no longer be receiving any share of commission if the property was sold through the Harcourts agency and not by auction.

[78] The essence of Mr Corbett’s approach is that there was no arrangement between Mr Robertson and the two second respondent licensees about splitting commission if the property was not sold by auction. He asserts that if the property had been sold by auction *“there would have been no hesitation in paying Mr Robertson commission”*. He also asserts that he does not recall Mr and Mrs Burrows stating that, regardless of the mode of sale, Mr Robertson is to be paid a share of commission. That recollection, or lack of it, is surprising in terms of the evidence of the complainants as we have covered it above.

[79] Section 72 of the Act defines *“unsatisfactory conduct”* as follows:

“72 Unsatisfactory conduct

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or*
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or*
- (c) is incompetent or negligent; or*
- (d) would reasonably be regarded by agents of good standing as being*

unacceptable.”

[80] Frankly, the said listing agreement is rather untidy and imprecise. However, it broadly complies with s.128 of the Act, although it does not specify the manner of splitting commission between the two agencies, but it does cover the liability of the vendors to commission. We consider that the listing agreement does not comply with Rule 9.10 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2009 which reads:

“9.10 A licensee must not submit an agency agreement or a sale and purchase agreement or other contractual document to any person for signature unless all material particulars have been inserted into or attached to the document.”

[81] A material particular in the listing in this case was the manner in which commission be split. That has not been covered, so that these proceedings have eventuated. The licensees prepared and managed the listing agreement. Having said that, Mr Robertson knew about the joint listing and should have been more pro-active to protect himself in terms of the complainant vendors’ directions to the licensees about splitting of commission.

[82] We record that Rules 5.1, 9.1, and 9.2 read:

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

...

9.1 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. [Our emphasis]

...

9.2 A licensee must not engage in any conduct that would put a client, prospective client or customer under undue or unfair pressure.”

[83] The relevant complaint is against the licensees and they failed to act in accordance with the instructions of the vendors to fairly involve Mr Robertson in sharing commission.

[84] We record that, in terms of the Act, the Committee carefully decided these issues “*on the papers*”, whereas we have heard very full evidence and are able to assess credibility of witnesses. We accept the evidence of the complainants and of Mr Robertson. The licensees seem honest people but rather confused as to what they agreed with the complainants about sharing commission with Mr Robertson.

[85] There seems to us to have been a clear understanding that a commission share be received by Mr Robertson, and on the basis that the property would not be sold by auction. It seems illogical that the licensees thought that there was only to be a commission share if the property was sold by auction when their firm instructions from the outset were to sell the property but not by auction.

[86] When we absorb all the evidence and argument, it seems to us that the licensees, probably through mental confusion, have not followed the instructions from the complainant vendors, with which they had appeared to agree at the outset, that a fair share of commission be paid to Mr Robertson if they sold the property and that he would pay them a fair share of commission if he achieved the sale.

[87] We consider that the licensees did not observe the clear vendor instructions that Mr Robertson share in commission one way or another. That seems to us to be unsatisfactory conduct but, in the particular context we have covered above, rather at the lower end of the scale.

[88] In terms of s.72(a) of the Act, we consider that a reasonable member of the public is entitled to expect licensees to observe the lawful instructions of vendors. Indeed, Rule 9.1 requires that and has been breached so that both (a) and (b) of s.72 apply. We consider that it was unsatisfactory conduct by the licensees to not comply with a clear, understandable, and basic stipulation of the complainant vendors as we have covered above. In our view Rules 9.1 and 5.1 in particular have not been complied with. However, as we have already stated, that unsatisfactory conduct was at the lower end of the scale in context except that Mr Robertson has been deprived of a useful sum of money.

[89] In terms of the way our Chairman cast this decision, as set out above, we record that one of our members has some misgivings as to whether the conduct of the licensees reaches the threshold of "*unsatisfactory conduct*" as defined in s.72 of the Act.

[90] That member notes that Mr Robertson marketed the property as a sole agent for many months without success; does not seem to have contributed to the sale effected by the licensees; seemed rather casual over the marketing of the property when it was put in the hands of him and the two licensees; and did not even have the energy to ensure he receive a commission as the vendors had directed. That member also emphasises that the licensees sold the property through their own efforts and contacts and that Mr Robertson appeared to have so little interest in the marketing that he did not even know when it had been sold nor made contact with the licensees as to their endeavours.

[91] That member puts it that, in the industry, it is "*winner take all*" commission unless something different is spelt out clearly and that the licensees did achieve a sale for the vendors which Mr Robertson had been unable to do. Our colleague's point is to query whether a disinterested party should be rewarded by successful and active agents.

[92] Having said all that, our member accepts, as we have explained above, that the licensees did not follow the complainant vendors' instructions with which they seem to have agreed at the outset. The views of that member seem very relevant to penalty.

[93] We think it best that penalty be dealt with separately in the usual way with the parties being able to focus submissions on that aspect. We direct the Registrar to arrange a telephone conference of the parties with our Chairman to arrange a timetable for submissions on penalty. We are conscious that we seem to have powers under s.93 of the Act to order a refund from commission and/or rectification of an error, and there is the issue of costs.

[94] 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 N Dangen
Member